COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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December 13, 1995

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TO: Members of the Standing
Committee on Rules

Dear Colleagues:

The Advisory Committee on Civil Rules has no items requiring action by the Standing Committee. A detailed account of our past meeting is set out in the Minutes. As you know, the Advisory Committee has spent a great deal of time struggling with class actions and Rule 23. Approximately four years ago, a proposal to collapse the (b)(1), (2), and (3) classes into one was sent forward by the Advisory Committee. With the new large settlement classes coming on the horizon, and the expanding use of Rule 23(b)(3) in mass tort disasters, the committee decided that it was unwise to continue with that proposal. We then began a process which has taken the past two and a half years. That process included a request to the Federal Judicial Center to conduct an empirical study of class actions in operation in the district courts across the country. We spent considerable time working with the research group of the Federal Judicial Center in developing the required protocol. Unfortunately, the project suffered mightily from an extraordinarily weak data base. The good work of the Judicial Center quickly spotted serious gaps in the furnished data, which, in combination with reporting errors, cast doubt on the accuracy of much of the data that was available. That study was then refocused. The new study was more modest, reflecting the actual available data. The Judicial Center will furnish a copy of the study on request.

Our process also included extensive discussion with academics and practitioners. These discussions continued in 1994 with an in-house tutorial conducted by Herb Wachtell of the New York Bar, Professor Francis McGovern of the University of Alabama School of Law, and John Frank of the Phoenix Bar. Wachtell and McGovern have considerable experience in the current use of class actions in large cases, including the creation of complex alternative dispute systems to administer disbursements of billions of dollars. John Frank was a member of the committee when (b)(3) was added to the rule in 1966.

On February 16 & 17, 1995, the committee met at the University of Pennsylvania School of Law in a meeting hosted by Professors Steve Burbank and Geoff Hazard. Approximately 16 academics and practitioners joined the committee. I attach a copy of that agenda. On March 29-30, the committee participated in a conference in Dallas, Texas, convened by The Southwestern Legal Foundation and Southern Methodist University. Arthur Miller was the discussion leader for the conference, and Geoff Hazard was its reporter. The first day of the conference was confined to discussions by leading academics across the country. Approximately 100 lawyers joined the 20 academics on the second day in a plenary session. The conference included free-ranging discussions as well as scholarly presentations from Professors David Shapiro, Paul Carrington, Steve Burbank, Ed Cooper, Deborah Hensler (RAND), and others. Much of the discussion focused on group litigation. The committee next met on April 20 at New York University School of Law. There, we participated in a 2-day national symposium on class actions.

By this point, the committee had listened to hundreds of ideas. We began a winnowing process. On May 8, Professor Cooper and I submitted a questionnaire to members of the committee. The questionnaire disclosed a sense of the committee's views and assisted in organizing our thinking. Each committee member responded to the questionnaire over the summer, with a copy to all other members. By August of 1995, several avenues of reform had become clear. I categorized the possible changes into two groups. Professor Cooper translated groups of ideas into rule language. These were the proposals before the committee when it met on November 9-11 at the University of Alabama School of Law. The material you have before you comes from that meeting. The committee elected not to proceed with any of the second group of possible changes which consisted largely of "clean-up." The four questions of the first group were: (1) Interlocutory appeal, draft 23(f); (2) Changing the 23(b)(3) requirement that a class action be superior to a requirement that it be "necessary for the fair and efficient disposition of the controversy"; (3) Limiting Rule 23(b)(3) by requiring consideration of the probability and importance of success on the merits--item (ii) in the first paragraph of (3), and subparagraphs (E) and (F); (4) Recognition of "settlement classes" in (b)(3), but not elsewhere.

As noted in the Minutes, the meeting at the University of Alabama was also attended by representatives of the American College of Trial Lawyers, the Litigation Section of the American Bar Association and several distinguished practitioners. All participated in the discussion.

It is not my purpose to explain here the actions taken by the committee. Professor Cooper and I will do that in person. The actions taken by the Advisory Committee are reflected in the attached draft rules and notes. My purpose is, rather, to outline for you the work devoted to this issue by the Advisory Committee. The large amount of time the Committee has spent has caused me to puzzle over how the Advisory Committee can best profit from the expertise of the Standing Committee and how to make this a meaningful collegial discussion. In reflecting on how to proceed, I was persuaded that we should put the matter on the January agenda of the Standing Committee as an information item without the pressure of decisionmaking. This will give the Standing Committee opportunity to explore these difficult issues and share its views. The Advisory Committee at its April meeting will then be able to benefit from the discussions at the January meeting of the Standing Committee. Our plan is to then bring the class issues to the summer meeting of the Standing Committee with a request for publication. This way you will not be greeting a stranger at the summer meeting. Ed and I look forward to being with you in January.

Sincerely yours,

Patrick E. Higginbotham

PRELIMINARY AGENDA
Advisory Committee on Civil Rules
University of Pennsylvania Law School
February 16-17, 1995

I. <u>First Session</u> - Thursday, February 16, 1995, 1:30 - 5:15 p.m.

A. Welcome - Dean Colin Diver

B. Plan for the Meetings - Professor Stephen Burbank

C. New Congress Update (2 - 3 p.m.) - Judge Patrick Higginbotham

D. Break (3 - 3:15 p.m.)

E. Presentation of Preliminary Results of FJC Empirical Study (3:15 - 4:15 p.m.) - Thomas Willging

F. Securities Class Actions (4:15 - 5:15 p.m.) - Judge Anthony Scirica

II. Reception at the Law School (5:30-6:30 p.m.)

III. Dinner, The Garden, 1617 Spruce Street (7:00 p.m.)

IV. <u>Second Session</u> - Friday, February 17, 1995, 9 a.m. - 12 noon

A. The 1992/93 Proposed Amendments (9 - 10:15 a.m.) - Professors Thomas Rowe & Edward Cooper

B. Break (10:15 - 10:30 a.m.)

C. Settlement Classes, Mandatory Classes and "Futures" Classes (10:30 - 12:30 p.m.) - Judge Edward Becker, Judge William Schwarzer, and Judge Lowell Reed

V. Lunch (12:30 - 1:30 p.m.)

VI. <u>Third Session</u> - 1:30 - 4 p.m.

A. Alternatives to the Class Action (1:30 - 2:45 p.m.) - Judge Patrick Higginbotham
art III & due process

B. Break (2:45 - 3:00 p.m.)

C. The Path Ahead (3:00 - 4 p.m.) - Professor Stephen Burbank

D. Adjournment (4 p.m.)

DRAFT CIVIL RULE 23

NOVEMBER 1995 EXCERPTS

The Civil Rules Advisory Committee discussed four major aspects of a draft class action rule at its meeting on November 9 and 10, 1995. It did not discuss any other aspect of the full draft of Civil Rule 23 that was before it. The attached materials are set out in a sequence designed to ease the way into the discussion.

The first attached page sets out all of the draft subdivision (b)(3) and subdivision (f). Several portions of (b)(3) reflect the matters discussed at the November meeting. (1) Item (ii) in the first paragraph is set out in two alternative versions at lines 8 through 13. This item embodies a preliminary review of the merits as part of the (b)(3) certification decision. The first alternative simply sets a "not insubstantial" threshold. The second alternative adopts a more complicated balancing test that weighs the prospect of success against the burdens of class litigation. Either alternative is supplemented by new factor (E), lines 33 to 34. The Committee has not chosen between these two alternatives. (2) Item (iii) retains the familiar requirement that a (b)(3) class be superior, but adds the new requirement that it also be "necessary" for the fair and efficient disposition of the controversy, see line 14. This requirement underscores the distinction between settings in which individual litigation is possible — perhaps with consolidation by some means other than Rule 23 — and settings in which the underlying claims will not support individual litigation. (3) Factor (F), lines 35 through 37, would allow a court to refuse certification, even though the class claim seems strong on the merits, on the ground that the public and private values served by class relief are outweighed by the burdens of class litigation. (4) Factor (G), lines 38 through 41, reflects a modest approach to certification of settlement classes; it is supplemented by the change from "adjudication" to "disposition" in lines 14 and 16 of the introductory paragraph. The Committee discussed settlement classes at length but reached no resolution.

Subdivision (f), lines 43 through 48, provides for permissive interlocutory appeals from certification decisions. It has not been controversial within the Committee.

The next attachment is a draft Committee Note dealing with the provisions noted above. It has not been reviewed by the Committee, but reflects the November discussion.

The final items are a full Rule 23 draft, and draft minutes of the November meeting. Except for the items noted above, the full draft has not been reviewed by the Committee. One of the major questions that remains for Committee consideration is whether it is wise to attempt at one time as many changes as this draft reflects.

RULE 23. CLASS ACTIONS

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(b) ~~Class actions Maintanable~~ When Class Actions may be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(3) the court finds (i) that the questions of law or fact common to the certified Class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that {the class claims, issues, or defenses are not insubstantial on the merits,} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}, and (iii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to ~~the~~ these findings include:

(A) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(B) the extent and nature of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(C) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(D) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(E) the probable success on the merits of the class claims, issues, or defenses;

(F) whether the public interest in – and the private benefits of – the probable relief to individual class members justify the burdens of the litigation; and

38 (G) the opportunity to settle on a class basis claims that
39 could not be litigated on a class basis or could not
40 be litigated by [or against?] a class as comprehensive
41 as the settlement class; or

42 * * * * *

43 (f) Appeals. A court of appeals may in its discretion permit an
44 appeal from an order of a district court granting or denying a
45 request for class action certification under this rule if
46 application is made to it within ten days after entry of the
47 order. An appeal does not stay proceedings in the district court
48 unless the district judge or the court of appeals so orders.

PARTIAL DRAFT ADVISORY COMMITTEE NOTE

December 12, 1995

Subdivision (b). Subdivision (b) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. When Rule 23 was substantially revised in 1966, the Advisory Committee Note stated: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liabilitiy and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits seprately tried." Although it is clear that developing experience has superseded that suggestion, the lessons of experience are not yet so clear as to support detailed mass tort provisions either in Rule 23 or a new but related rule.

The probability that a claim would support individual litigation depends both on the probability of any recovery and the probable size of such recovery as might be won. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median recovery figures reported by the Federal Judicial Center study all were far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases frequently sweep into a class many members whose individual claims would easily support individual litigation, controlled by the class member. Individual class members may be seriously harmed by the loss of control. Class certification may be desired by defendants more than most plaintiff class members in such cases, and denial of certification or careful definition of the class may be essential to protect many plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims.

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing on the merits.

certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force — a substantial settlement value — when the small probability of defeat is multiplied by the amount of liability to the entire class.

Individual litigation may play quite a different role with respect to class certification. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that at least involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

Item (ii) has been added to the findings required for class certification, and is supplemented by the addition of new factor (E) to the list of factors considered in making the findings required for certification. It addresses the concern that class certification may create an artificial and coercive settlement value by aggregating weak claims. It also recognizes the prospect that certification is likely to increase the stakes substantially, and thereby increase the costs of the litigation.

{**Version 1**} Taken to its full extent, this concern might lead to a requirement that the court balance the probable outcome on the merits against the cost and burdens of class litigation, including the prospect that settlement may be forced by the small risk of a large class recovery. A balancing test was rejected, however, because of its ancillary consequences. It would be difficult to resist demands for discovery to assist in demonstrating the probable outcome. The certification hearing and determination, already events of major significance, could easily become overpowering events in the course of the litigation. Findings as to probable outcome would affect settlement terms, and could easily affect the strategic posture of the case for purposes of summary judgment and even trial. Probable success findings could have collateral effects as well, affecting a party's standing in the financial community or inflicting other harms. And a probable

success balancing approach must inevitably add considerable delay to the certification process.

The "first look" approach adopted by item (ii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses "are not insubstantial on the merits." This phrase is chosen in the belief that there is a wide — although curious — gap between the higher possible requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims "on the merits," not to the dollar amount that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

{**Version 2**} These risks can be justified only by a preliminary finding that the prospect of class success is sufficient to justify them. The prospect of success need not be a probability greater than 0.50. What is required is that the probability be sufficient in relation to the predictable costs and burdens, including settlement pressures, entailed by certification. The finding is not an actual determination of the merits, and pains must be taken to control the procedures used to support the finding. Some measure of controlled discovery may be permitted, but the procedure should be as expeditious and inexpensive as possible. At times it may be wise to integrate the certification procedure with proceedings on precertification motions to dismiss or for summary judgment. A realistic view must be taken of the burdens of certification — bloated abstract assertions about the crippling costs of class litigation or the coercive settlement effects of certification deserve little weight. At the end of the process, a balance must be struck between the apparent strength of the class position on the merits and the adverse consequences of class certification. This balance will always be case-specific, and must depend in large measure on the discretion of the district judge.

The prospect-of-success finding is readily made if certification is sought only for purposes of pursuing settlement, not litigation. If certification of a settlement class is appropriate under the standards discussed [with factor (G) and subdivision (e)] below, the prospect of success relates to the likelihood of reaching a settlement that will be approved by the court, and the burdens of certification are merely the burdens of negotiations that all parties are willing to pursue.

Care must be taken to ensure that subsequent proceedings are

not distorted by the preliminary finding on the prospect of success. If a sufficient prospect is found to justify certification, subsequent pretrial and trial proceedings should be resolved without reference to the initial finding. The same caution must be observed in subsequent proceedings on individual claims if certification is denied.

One court's refusal to certify for want of a sufficient prospect of class success is not binding by way of res judicata if another would-be representative appears to seek class certification in the same court or some other court. The refusal to recognize a class defeats preclusion through the theories that bind class members. Even participation of the same lawyers ordinarily is not sufficient to extend preclusion to a new party. The first determination is nonetheless entitled to substantial respect, and a significantly stronger showing may properly be required to escape the precedential effect of the initial refusal to certify.

Item (iii) in the findings required for class certification has been amended by adding the requirement that a (b)(3) class be necessary for the fair and efficient [adjudication] of the controversy. The requirement that a class be superior to other available methods is retained, and the superiority finding — made under the familiar factors developed by current law, as well as the new factors (E), (F), and (G) — will be the first step in making the finding that a class action is necessary. It is no longer sufficient, however, to find that a class action is in some sense superior to other methods of [adjudicating] "the controversy." It also must be found that class certification is necessary. Necessity is meant to be a practical concept. In adding the necessity requirement, it also is intended to encourage careful reconsideration of the superiority finding without running the drafting risks entailed in finding some new word to substitute for "superior." Both necessity and superiority are together intended to force careful reappraisal of the fairness of class adjudication as well as efficiency concerns. Certification ordinarily should not be used to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not necessary for them, even if it would be superior in the sense that it consumes fewer litigating resources and more fair in the sense that it achieves more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, despite individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be "necessary" if there is to be any [adjudication] of the claims, but it is neither superior nor necessary to the fair and efficient [adjudication] of the claims. Class certification, on the other hand, is both superior and necessary for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount.

Superiority and necessity take on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

Yet another problem, presented by some recent class-action settlements, arises from efforts to resolve future claims that have not yet matured to the point that would permit present individual enforcement. A toxic agent, for example, may have touched a broad universe of persons. Some have developed present injuries, most never will develop any injury, and many will develop injuries at some indefinite time in the future. Class action settlements, much more than adjudications, can be structured in ways that provide for processing individual claims as actual injuries develop in the future. Class disposition may be the only possible means of resolving these "futures" claims. Although "necessary" in this sense, class certification — if it is ever appropriate — must be carefully guarded to protect the rights of class members who do not even have a realistic way to determine whether they may some day experience actual injury. The needs to effect meaningful notice and to protect the opportunity to opt out of the class require that any class be limited to terms that permit an individual claimant to opt out of the class and pursue individual litigation within a reasonable time after knowing both of the individual injury and the existence of the class litigation.

Factor (E) has been added to subdivision (b)(3) to complement the addition of new item (ii) and the addition of the necessity element to item (iii). The role of the probable success of the class claims, issues, or defenses is discussed with those items.

Factor (F) has been added to subdivision (b)(3) to effect a modest retrenchment in the use of class actions to aggregate trivial individual claims. It bears on the item (iii) requirement that a class action be superior to other available methods and necessary for the fair and efficient [adjudication] of the controversy. It permits the court to deny class certification if the public interest in — and the private benefits of — probable class relief do not justify the burdens of class litigation. This factor is distinct from the evaluation of the probable outcome on the merits called for by item (ii) and factor (E). At the extreme, it would permit denial of certification even on the assumption that the class position would certainly prevail on the merits.

Administration of factor (F) requires great sensitivity.

Subdivision (b)(3) class actions have become an important private means for supplementing public enforcement of the law. Legislation often provides explicit incentives for enforcement by private attorneys-general, including qui tam provisions, attorney-fee recovery, minimum statutory penalties, and treble damages. Class actions that aggregate many small individual claims and award "common-fund" attorney fees serve the same function. Class recoveries serve the important functions of depriving wrongdoers of the fruits of their wrongs and deterring other potential wrongdoers. There is little reason to believe that the Committee that proposed the 1966 amendments anticipated anything like the enforcement role that Rule 23 has assumed, but there is equally little reason to be concerned about that belief. What counts is the value of the enforcement device that courts, aided by active class-action lawyers, have forged out of Rule 23(b)(3). In most settings, the value of this device is clear.

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that

otherwise satisfy Rule 23 requirements. If probable individual relief is so slight as to be essentially trivial or meaningless, however, the core justification of class enforcement fails. Only public values can justify class certification. Public values do not always provide sufficient justification. An assessment of public values can properly include reconsideration of the probable outcome on the merits made for purposes of item (ii) and factor (E). If the prospect of success on the merits is slight and the value of any individual recovery is insignificant, certification can be denied with little difficulty. But even a strong prospect of success on the merits may not be sufficient to justify certification. It is no disrespect to the vital social policies embodied in much modern regulatory legislation to recognize that the effort to control highly complex private behavior can outlaw much behavior that involves merely trivial or technical violations. Some "wrongdoing" represents nothing worse than a wrong guess about the uncertain requirements of ambiguous law, yielding "gains" that could have been won by slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

Factor (G) is added to resolve some, but by no means all, of the questions that have grown up around the use of "settlement classes." Factor (G) bears only on (b)(3) classes. Among the many questions that it does not touch is the question whether it is appropriate to rely on subdivision (b)(1) to certify a mandatory non-opt-out class when present and prospective tort claims are likely to exceed the "limited fund" of a defendant's assets and insurance coverage. This possible use of subdivision (b)(1) presents difficult issues that cannot yet be resolved by a new rule provision. Subdivisions (c)(1)(A)(2) and (e) also bear on settlement classes.

A settlement class may be described as any class that is certified only for purposes of settling the claims of class members on a class-wide basis, not for litigation of their claims. The certification may be made before settlement efforts have even begun, as settlement efforts proceed, or after a proposed settlement has been reached.

Factor (G) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be

reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important and even vitally important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully-informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, particularly if the action appears to have been shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Subdivision (c)(1)(A)(ii) requires that if the class was certified only for settlement, class members be allowed to opt out of any settlement after the terms of the settlement are approved by the court. Parties who fear the impact of such opt-outs on a settlement intended to achieve total peace may respond by refusing to settle, or by crafting the settlement so that one or more parties may withdraw from the settlement after the opt-out period. The opportunity to opt out of the settlement creates special problems when the class includes "futures" claimants who do not yet know of the injuries that will one day bring them into the class. As to such claimants, the right to opt out created by subdivision (c)(1)(A)(ii) must be held open until the injury has matured and for a reasonable period after actual notice of the class settlement.

The right to opt out of a settlement class is meaningless unless there is actual notice. Actual notice in turn means more than exposure to some official pronouncement, even if it is directly addressed to an individual class member by name. The notice must be actually received and also must be cast in a form that conveys meaningful information to a person of ordinary understanding. A class member is bound by the judgment in a settlement-class action only after receiving actual notice and a reasonable opportunity to opt out of the judgment.

Although notice and the right to opt out provide the central

means of protecting settlement class members, the court must take particular care in applying some of Rule 23's requirements. Definition of the class must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

When a settlement class seems premature, the same goals may be served in part by forming an opt-in class under subdivision (b)(4). An opt-in class will bind only those whose actual participation guarantees actual notice and voluntary choice. The major difference, indeed, is that the opt-in class provides clear assurance of the same goals sought by requiring actual notice and a right to opt out of a settlement-class judgment. Other virtues of opt-in classes are discussed separately with subdivision (b)(4).

<u>Subdivision (f).</u> This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permsision to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is

by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be "one-way" intervention. That does not seem much of a concern to me — if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Rule 23. Class Actions (November, 1995 draft)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that {the class claims, issues, or defenses are not insubstantial on the merits,} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}, and (iii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to ~~the~~ these findings include:

(A) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(B) the extent and nature of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(C) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular

forum;

(D) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(E) the probable success on the merits of the class claims, issues, or defenses;

(F) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; and

(G) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

91 (5) the court finds that a class certified under subdivision
92 (b)(2) should be joined with claims for individual
93 damages that are certified as a class action under
94 subdivision (b)(3) or (b)(4).

95 **(c) Determination by Order Whether Class Action to Be ~~Maintained~~**
96 **Certified; Notice and Membership in Class; Judgment; ~~Actions~~**
97 **~~Conducted Partially as Class Actions~~ Multiple Classes and**
98 **Subclasses.**

99 **(1)** ~~As soon as practicable after the commencement of an action~~
100 ~~brought as a class action, the court shall determine by~~
101 ~~order whether it is to be so maintained. An order under~~
102 ~~this subdivision may be conditional, and may be altered~~
103 ~~or amended before the decision on the merits.~~ When
104 persons sue or are sued as representatives of a class,
105 the court shall determine by order whether and with
106 respect to what claims, defenses, or issues the action
107 should be certified as a class action.

108 **(A)** An order certifying a class action must describe the
109 class. When a class is certified under subdivision
110 (b)(3), the order must state when and how putative
111 members (i) may elect to be excluded from the
112 class, and (ii) if the class is certified only for
113 settlement, may elect to be excluded from any
114 settlement approved by the court under subdivision
115 (e). When a class is certified under subdivision
116 (b)(4), the order must state when, how, and under
117 what conditions putative members may elect to be
118 included in the class; the conditions of inclusion
119 may include a requirement that class members bear a
120 fair share of litigation expenses incurred by the
121 representative parties.

122 **(B)** An order under this subdivision may be [is]

conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) (A) When ordering that an action be certified as a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [A defendant may be ordered to advance the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the plaintiff class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual

156 notice is excessive in relation to the
157 generally small value of individual members'
158 claims.] The notice shall advise each member
159 that ~~(A) the court will exclude the member~~
160 ~~from the class if the member so requests by a~~
161 ~~specified date; (B) the judgment, whether~~
162 ~~favorable or not, will include all members who~~
163 ~~do not request exclusion; and (C)~~ any member
164 who does not request exclusion may, if the
165 member desires, enter an appearance through
166 counsel.

167 (iii) In any class action certified under
168 subdivision (b)(4), the court shall direct a
169 means of notice calculated to accomplish the
170 purposes of certification.

171 (3) Whether or not favorable to the class,

172 (A) The judgment in an action ~~maintained~~ certified as a
173 class action under subdivision (b)(1) or ~~(b)~~ (2)~~,~~
174 ~~whether or not favorable to the class,~~ shall
175 include and describe those whom the court finds to
176 be members of the class~~.~~;

177 (B) The judgment in an action ~~maintained~~ certified as a
178 class action under subdivision (b)(3)~~, whether or~~
179 ~~not favorable to the class,~~ shall include and
180 specify or describe those to whom the notice
181 provided in subdivision (c)(2)(A)(ii) was directed,
182 and who have not requested exclusion, and whom the
183 court finds to be members of the class~~.~~; and

184 (C) The judgment in an action certified as a class
185 action under subdivision (b)(4) shall include all
186 those who elected to be included in the class and
187 who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) **Orders in Conduct of Class Actions.** ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescrib~~ing~~e measures to prevent undue repetition or complication in ~~the~~ presenting~~ation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

(2) An ~~class~~ action certified as a class action shall not be dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

246 (3) A proposal to dismiss or compromise an action certified as
247 a class action may be referred to a magistrate judge or
248 a person specially appointed for an independent
249 investigation and report to the court on the fairness of
250 the proposed dismissal or compromise. The expenses of
251 the investigation and report and the fees of a person
252 specially appointed shall be paid by the parties as
253 directed by the court.

254 **(f) Appeals.** A court of appeals may in its discretion permit an
255 appeal from an order of a district court granting or denying
256 a request for class action certification under this rule if
257 application is made to it within ten days after entry of the
258 order. An appeal does not stay proceedings in the district
259 court unless the district judge or the court of appeals so
260 orders.