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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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To: Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure

From: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: December 1, 2000

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on October 16 and 17, 2000, in Tucson, Arizona. It voted to recommend approval of one change in the Supplemental Admiralty Rules for adoption as a technical amendment without publication, and to recommend approval for publication in August, 2001, of closely related technical changes in other Admiralty Rules provisions. These are the sole action items recommended for consideration at the January 2001 meeting of the Standing Committee. Part I of this report explains the recommendations.

Part II summarizes ongoing Advisory Committee work in three areas. The Advisory Committee hopes to present recommendations to the Standing Committee in June as to at least some — and perhaps all — of these areas. They are summarized now in the belief that the June discussion will be advanced if time permits initial discussion for familiarization with these topics in January.

I. Action Items: Technical Amendments — Admiralty Rules

Four technical changes are recommended to adapt the Admiralty Rules to provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff. One change is so narrowly technical that it is recommended for adoption without publication. Although the other three proposed amendments also are recommended with a similar technical and conforming purpose, the changes may not be as narrow as intended; publication is recommended as to them.

The provisions of the Admiralty Rules to be amended are themselves new. The Supreme Court transmitted them to Congress on April 17, 2000, to take effect on December 1. These rules grew out of a years-long project that stemmed from joint study by the Department of Justice and the Maritime Law Association. The purpose of the changes was to separate some procedural aspects of civil forfeiture proceedings from the procedures long used for true in rem admiralty proceedings.

Attention was paid to forfeiture reform bills pending in Congress during the drafting stages, but it was not possible to anticipate the precise form of the law that came to be enacted, also in April 2000.

Because the new Admiralty Rules took effect on December 1, it would be possible to resolve inconsistencies with the new statute by invoking the supersession provision of the Rules Enabling Act, 28 U.S.C. § 2072(b). There was no purpose to supersede yet-to-be-enacted legislation, however, and no reason has appeared to resist the specific provisions of the new statute. The legislation is more recently drafted, even if earlier effective, and the nature of the specific inconsistencies will demonstrate the reasons for choosing to conform the Rules to the statute.

The proposed changes were worked out in close consultation with representatives of the Department of Justice. The details are intricate, and may seem obscure to those who are not versed in admiralty or forfeiture practice. The full memorandum presenting the proposals to the Advisory Committee is set out in an appendix as a more extensive discussion of the details than seems necessary to present the four proposals recommended by the Advisory Committee.

(1) Time To Claim. Amended Admiralty Rule C(6)(a)(i)(A) provides that a statement of interest in an in rem civil forfeiture action must be filed "within 20 days" after specified events. New 18 U.S.C. § 983(a)(4)(A) provides that a person claiming an interest in property seized for forfeiture must file a claim "not later than 30 days" after somewhat differently specified events (see Item (2) below). The 20-day period in the new Rule was chosen under the impression that a 20-day period was specified in some versions of the long-pending forfeiture reform legislation. If it had been known that Congress favored a 30-day period, as adopted in the new statute, a 30-day period would have been provided in Rule C(6). It is recommended that the 20-day period in Rule C(6) be changed to a 30-day period. This change will avoid an inadvertent supersession of the statute. The change is so narrowly technical that it is recommended for adoption as a technical conforming change, without publication for comment.

Because Rule C(6)(a)(i)(A) also would be amended under the proposal described as Item (2), but only after publication, the present change should be set out separately:

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows * * *

Committee Note

Rule C(6)(a)(i)(A) is amended to adopt the 30-day period for filing a claim provided by 18 U.S.C. § 983(a)(4)(A), which was enacted shortly before Rule C(6)(a)(i)(A) took effect.

(2) "[S]ervice of Government's Complaint". The 30-day period that new § 983(a)(4)(A) sets for filing a claim runs "after the date of service of the Government's complaint, or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." New Rule C(6)(a)(i)(A) sets the period to run "after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." The provisions that relate to publication of notice seem consistent, and no change is recommended in Rule C(6) on this account. It seems likely that the publication-of-notice provision will control the claim time in many proceedings. But there is a difference between the "date of service of the Government's complaint" and "actual notice of execution of process." The most likely difference in practice will occur when the claim is filed by a person who was not served but who claims an interest in the forfeiture property. An actual notice requirement offers greater protection, although the protection will be cut off 30 days after completed publication of notice. It might be urged that the government should be content to rely on the 30-day period that runs from completed publication, invoking a shorter period only as to a claimant who had actual notice. But that is not the choice made in the statute, and on balance it has seemed better to conform the Rule to the statute. This recommendation seems sufficiently important to require publication for comment. To avoid confusion, the text published for comment should incorporate the 30-day period recommended as Item (1), perhaps with a footnote to indicate that the 30-day change is impending on a faster track:

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within 30[1] days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows * * *.

Committee Note

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the first alternative time for filing a verified statement as 30 days after the date of service of the Government's complaint.

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[1] The change from the 20-day period provided in present Rule C(6)(a)(i)(A) to a 30-day period is pending, but is expected to take effect before the present proposal can take effect.

(3) "Serve" or "File" an Answer. This proposed change not only conforms to the new statute, but also catches up a drafting oversight in new Rule C(6)(b)(iv). The starting point is new Rule C(6)(a)(iii), which provides that a party who files a statement of interest in a forfeiture proceeding "must serve an answer within 20 days after filing the statement." New § 983(a)(4)(B) provides that the party "shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim." These provisions need not be inconsistent; both service and filing can be accomplished within 20 days. The statute does constrain the operation of Civil Rule 5(d), which allows a reasonable time after service for filing, but it has not seemed wise to amend Civil Rule 5(d) to supersede the new statute. The relationship between statute and Rule 5(d) may create a trap for the unwary, however, so it is recommended that Rule C(6)(a)(iii) be amended to require both service and filing within 20 days.

Review of this question showed that new Rule C(6)(b)(iv) calls for the answer in a true admiralty proceeding to be "filed" within 20 days after the statement of interest. That provision was a drafting oversight; the ordinary requirement is that an answer be served within the time set by rule, and it seems wise to conform this practice with the practice adopted in Rule C(6)(a) as well as other rules. It is recommended that the filing requirement in Rule C(6)(b)(iv) be changed to a service requirement.

Both recommendations seem simple enough, but it is recommended that they be published for comment, in part because of the recommendation that the change in Rule C(6)(a) proposed as Item (2) be published:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

Committee Note

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

(4) "Arrest" of Real Property. New Rule C(3)(a)(i), carrying forward the practice established by former Rule C(3), requires the clerk to issue a summons and warrant for the arrest of forfeiture property. New 18 U.S.C. § 985 provides that real property that is the subject of a civil forfeiture action "shall not be seized before entry of an order of forfeiture." In lieu of seizure, the government initiates an action to forfeit real property by filing a complaint, posting notice on the property, and serving notice on the property owner along with a copy of the complaint. Provision is made for arrest in certain circumstances.

The arrest provision in Rule C(3) is too broad. An exception to the warrant requirement is recommended to reflect the new statute. Although this change is a narrow and conforming one, it is recommended that it be published for comment, in part because of the recommendation that the change proposed as Item (2) be published:

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

II. Pending Projects

The Advisory Committee is considering three topics that may come to this Committee with recommendations for action at the June 2001 meeting. They are described below in the expectation that June deliberations will be advanced by any opportunity that can be made for advance familiarization.

In addition to these three topics, the Discovery Subcommittee is pursuing a long-range study of the ever-changing issues that are gradually growing up around discovery of computer-based information. The most easily understood reason for caution is that technology continues to evolve at a dizzying pace; two meetings held seven months apart, in March and October, provided graphic demonstrations of the changes that can outstrip any possible speed of the rulemaking process. It is difficult to predict when — or even whether — there may be reasons to recommend rules changes so compelling as to overcome the risks of limited present information and immediate obsolescence.

Another long-range project is considering the question whether it is possible to develop simplified rules that will provide better justice in some forms of actions. The concern is that the full sweep of the present Civil Rules may be more elaborate than some cases can bear. A draft set of simplified rules has been prepared to illustrate some of the approaches that might be taken to provide speedier and lower-cost procedures. At the same time, it is recognized that the present rules offer many flexible opportunities to expedite procedure in cases that would benefit from expedition. A panel of judges addressed the October meeting on such topics as a voluntary "small claims" procedure, differentiated case management programs that assign some cases to tracks that provide reduced discovery over shortened periods and speedy trials, and the "Rocket Docket" practices in the Eastern District of Virginia. No determinate direction has yet been set for this project, which has been confided to a subcommittee for further consideration.

CLASS ACTIONS

Beginning in 1991, the Advisory Committee has devoted unremitting attention to professional and popular laments that class-action practice should be improved. Many observers believe that the 1966 Rule 23 amendments transformed and eventually entrenched this area of procedure, and many believe that the procedure has had profound substantive consequences in many areas of the law. A decade of struggle with these observations has confirmed a conclusion that was anticipated on all sides — "improvement" means vastly different things to different proponents of change.

Earlier Rule 23 studies aimed at the substantive criteria for class certification and, in conjunction with the Ad Hoc Working Group on Mass Torts, at the possible adaptation of Rule 23 for mass-tort litigation. The work was carried on with the aid of empirical studies by the Federal Judicial Center and, more recently, the RAND Institute for Civil Justice. Many conferences were held, and hundreds of witnesses and comments greeted proposals that were published in 1996.

Several topics considered during this process remain open for further study, but new Rule 23(f) is the only amendment adopted so far. Several circuits already have elaborated the standards that will guide decisions whether to permit interlocutory appeals under Rule 23(f) from class certification decisions. Rule 23(f) seems well on the way toward accomplishing its twin goals: establishing appellate control of occasional ill-advised decisions to grant or deny certification, and generating a body of appellate law to guide future certification decisions.

The Rule 23 Subcommittee is now turning its attention away from the criteria for certification and toward the processes of class actions. The final scope of its agenda has not been set, but a number of topics are being developed into working drafts. None of these drafts had evolved to a point that would support detailed review and recommendation for publication at the October meeting. It is not clear whether all can reach that point by the time of the April 2001 Advisory Committee meeting, nor whether it would be wise to publish some Rule 23 revisions for comment before a complete package has been made ready. For the moment, what can be offered is a review of the major areas of inquiry.

It must be emphasized that this review is only a picture of deliberations up to the time of the December Subcommittee meeting. New problems will have emerged, and old ones will have come to be seen in different perspectives. The references to draft rules describe only Reporters' drafts, not any text approved — or in many cases even reviewed — by the Subcommittee.

Settlement Review. One prominent settlement issue — certification of settlement-only classes — has been set aside. The Supreme Court has recently addressed this issue, lower courts are responding, and it has seemed wise to defer any consideration of possible rule amendments as this developing process matures.

Many participants in the continuing Rule 23 study process have expressed concern that judicial review of proposed class action settlements under Rule 23(e) is limited by the lack of effective adversary challenge. Courts are accustomed to being informed by parties who vigorously contest with each other. Once class representatives and class adversaries have agreed on a settlement, however, all present the court with a common front. The settlement is presented as a matter of great advantage to the class, providing assured and immediate relief in place of a long and costly struggle with an uncertain outcome. Various revised and much lengthened versions of Rule 23(e) have been studied. Some of the changes are relatively simple, such as one that would explicitly require the common practice of providing a hearing. Others are more complex and continue to shift.

The standard for approving a settlement is commonly described by demanding that the settlement be "fair, reasonable, and adequate." That standard can be stated in the rule, leaving the review process as open-ended as it is now. No suggestion has yet been made that the process should not remain open-ended — it has been accepted that the factors that affect the fairness, reasonableness, and adequacy of a settlement cannot be captured in a closed list. But there is great uncertainty whether it would provide helpful guidance to district courts to provide in Rule 23(e) a

list of factors that often have been considered. The evident advantages of such a list may be offset by the risks that any list will encourage many courts to exclude consideration of factors not on the list, and that the review process may become a check-list that simply moves through factors that are manifestly not relevant to a particular settlement at the expense of focusing on the factors that are relevant. There also is a nearly aesthetic objection that it ill becomes the Federal Rules to include a "laundry list." A further concern is that a list might be used to encourage consideration of factors that have not yet come to prominence in the case law. An obvious compromise is to state a general standard in the rule, leaving helpful suggestions either to Committee Note or to the Manual for Complex Litigation. A recent draft Rule listing 14 factors has been followed by another draft that relegates all 14 to (rather dense) discussion in a draft Note.

The process of settlement review has presented a number of problems more difficult than the criteria for approval. Perhaps the most significant issue is whether class members should be afforded an opportunity to request exclusion from the class after settlement terms are made known. An opportunity to request exclusion provides a strong measure of adequacy, but also may make it more difficult to hold together a truly desirable settlement. Early drafts presented the issue in expansive form, providing an opportunity to opt out of the settlement even in a "mandatory" (b)(1) or (b)(2) class action. An alternative draft scales back to an opportunity to opt out of a (b)(3) class settlement that ripens into exclusion from the class if the settlement is approved. A further reduction has been considered, simply advising — either in a rule list of approval factors or in the Note — that an opportunity to request exclusion is one factor that bears on approval.

The role of objectors in the settlement process has generated a clear set of problems with no ready solutions. The perception that class representatives and class adversaries may join forces in a way that deprives the court of adequate information to review a proposed settlement suggests that objectors can add a highly desirable element of adversariness to the review. Much experience supports this conclusion. At the same time, experienced practitioners support the view that objectors often appear for self-serving reasons, seeking to benefit themselves (often by claiming attorney fees) rather than to benefit the class. "Professional objectors" are said to trade on the opportunity to augment delay, confusion, and expense, provoking separate settlements or cosmetic changes in the class settlement in return for abandoning the objections. The challenge is to find rule provisions that will encourage and support "good" objectors while deterring "bad" objectors.

The successive draft provisions that would support objectors have progressed from strong support to considerably reduced support in at least two dimensions. One dimension involves compensation for the costs of objecting. An early draft would have required compensation — including attorney fees — for making successful objections, and would have allowed compensation for making objections that, although unsuccessful, enhanced the review process. This provision has been reduced to one that allows compensation, in the court's discretion, only for successful objections. The changes were due in part to concern about encouraging the activities of objectors who are motivated by wrong purposes or who are simply ill-informed. But there also was concern about designating a source of payment: who, among the class, class representatives, or class

adversary should be forced to pay for unsuccessful objections? And who should be forced to pay for a "successful" objection that, by defeating the settlement, may lead to expensive and unsuccessful further litigation or even to abandonment of the class action without resolution?

Another form of support for objectors is provided in the form of discovery to support well-informed objections. An early draft required that an objector be afforded discovery "reasonably calculated to aid the court in appraising the merits of the class claims, issues, or defenses." This provision met the objection that the very purpose of settlement may be to avoid the costs of extensive discovery on the merits. A somewhat different objection was that if settlement is reached after extensive discovery, an objector's discovery may involve expensive review of the completed discovery and invasive inquiry into the work-product decisions that shaped the discovery program. More generally, it was again urged that allowing a right of discovery would unduly encourage bad-faith objectors. This discovery provision has been reduced, for the moment at least, to a provision that requires an objector to show reason to doubt the reasonableness, fairness, or adequacy of the settlement before having access to discovery on the merits of the class claims.

Yet another discovery question involves an objector's desire to learn about any "side agreements" or the course of settlement negotiations. No explicit provision is made for discovery of the negotiation process itself. Alternative provisions have been suggested for discovery of side agreements: one would require that "all agreements or understandings made in connection with the proposed settlement" be disclosed and summarized in the notice of proposed settlement. The other would permit discovery of such agreements. It has proved difficult to define in rule language the kinds of side agreements that may be subject to inquiry.

A different problem posed by objectors arises when an objector seeks to settle the objection. There is a fear that the great power arising from the delay and cost of litigating objections may be wielded to extract settlement terms that unjustifiably favor the objector. A draft provision would require court approval of an agreement settling objections, based on the view that an objector who takes on the role of objecting on behalf of a class assumes duties to the class similar to the duties assumed by a class representative. A settlement affording the objector terms more favorable than the objector would win under the proposed settlement would be proper under the draft only if the terms "are reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members." It will prove difficult to draft language that gives much more guidance than this. And there are doubts about asking the trial court to deal with objections after an appeal is taken, but offsetting doubts about asking an appellate court to review a proposed settlement.

Other questions have been raised about objectors. The most fundamental question is whether it is useful and possible to draft provisions specifically framed to deter bad-faith objections. It is possible to make a cross-reference to Rule 11, a redundant tack that has been taken in some other rules provisions. Anything more effective is likely to prove difficult. The particular suggestion that an unsuccessful objector should be made to pay the costs incurred to respond to the objections would

entail a great risk of deterring good-faith objectors, and has not yet been reduced to even tentative draft form.

Beyond supporting objectors, another method to overcome the possible lack of adversary testing of a proposed settlement has been proposed. This approach would authorize the court to appoint a magistrate judge or another person to undertake an independent investigation of the proposed settlement; in effect, the court's agent would operate in the ways that would be followed by a well-supported and well-intentioned objector. There are obvious concerns about injecting the court into the roles usually undertaken by adversaries, even through an agent, but this provision has found substantial support.

Attorney Appointment and Fees. Much popular, and some professional, dissatisfaction with class-action practice arises from the perception that courts frequently award excessive attorney fees. There is a well-developed body of case law dealing with fee awards, both under fee-shifting statutes and under common-fund theories, but it may be useful to draft a rule that captures this law in a way that guides and eases the court's task. There also may be room to suggest consideration of factors not now frequently mentioned in the cases. One example, urged by the RAND study and reflected in many pending bills to regulate class-action practice, is the suggestion that fee awards should be based not on the theoretical maximum amount that might be distributed to class members but should be based instead on amounts actually claimed or distributed.

The Subcommittee has not yet discussed any detailed fee draft. At least in the beginning, the Subcommittee has put aside the question whether to adopt a choice between the "lodestar" and "percentage-of-recovery" approaches to calculating fees. There is a difficult question whether any attempt should be made, within Enabling Act constraints, to affect the underlying grounds for imposing liability for fees — for example, could members of a defendant class be made liable to share the responsibility for the class attorney's fees? There is a question whether it is wise to enumerate a list of factors to be considered in determining the amount of an award, just as there has been a question whether a settlement-review rule should contain a list of review factors. Questions arise as to hearings, the need for findings, the role of objectors, and the like. These and other issues remain to be worked through.

The Subcommittee also has yet to discuss a detailed draft rule on appointing counsel for a class. The basic question is whether the rules should emphasize the responsibility of the court to ensure that the class has the best available counsel, moving beyond the common threshold of considering the competence of counsel as part of the determination whether class representatives will adequately represent the class. A related question is whether the rules should explicitly state — in keeping with drafts that have been before the Advisory Committee since 1991 — that class counsel is a fiduciary responsible to represent the best interests of the class. Although this statement might seem to trench on state regulation of professional responsibility, it would be an integral element in defining the nature of a federal class action. The class, in this view, would be the primary client, speaking primarily through the named class representatives but commanding the central professional

obligations of class counsel.

Many subsidiary questions surround consideration of a rule on appointing class counsel. One difficulty arises from appointing counsel for a defendant class; the problems may be quite different from those that attend appointment of counsel for a plaintiff class, and may arise so infrequently that the rule should be confined to plaintiff class counsel. Another difficulty is presented by the question whether an attempt should be made to restrict activities by would-be counsel before appointment to represent the class. Some pre-appointment activities are inevitable — seeking class certification, conducting discovery on class certification issues, resisting pre-certification dispositive motions, and the like. Other pre-appointment activities may be desirable at times, even if fraught with risk; preliminary or even final settlement negotiations are an example.

More detailed issues also arise. A rule on appointing class counsel can specify a list of factors to consider in selecting between competing applicants when competing applicants appear. The rule could encourage, or discourage, competitions with respect to fees and related arrangements. It may be desirable to attempt to reduce or eliminate any reward for the simple act of filing the first class action. Still other issues will emerge.

A final issue cuts across at least the fee and settlement issues, and might relate in some ways to appointment of class counsel. The Third Circuit established a rule that prohibited simultaneous negotiations on the merits of class relief and on the amount of a fee award for class counsel. Simultaneous negotiations were seen to create unacceptable conflicts of interest. More recently, however, in *Evans v. Jeff D.*, 475 U.S. 717 (1986), the Supreme Court seemed to bless simultaneous negotiations. During the course of earlier Rule 23 hearings, several witnesses lamented that the Third Circuit rule had been a good one and urged that it be restored. The underlying issues are complex, and may be affected by the distinction between fee awards based on statute and fee awards based on common-fund analysis. The Subcommittee may conclude that the issues are too complex to yield to present rulemaking proposals.

Appeal Standing. Some participants in earlier Rule 23 hearings urged reconsideration of the rule, common in many circuits, that an objector can appeal a class-action judgment only by winning intervention in the trial court. The rule has been supported by the need to maintain control of the action in class representatives, class counsel, and the trial court. These expressions may be polite ways of noting concern that a more open opportunity to appeal would cause lengthy disruptions of the proceedings, with concomitant delays in distributing class relief, at the behest of wishful, ill-informed, or selfishly motivated objectors. On the other hand, the class judgment binds all class members. Our system of constituting trial courts, establishing procedural rules, and constituting appellate courts, makes appellate review an integral part of the process. Class representatives may litigate ineptly despite the court's responsibility to ensure adequate representation, or may accept ill-considered settlements in circumstances beyond the reach of effective review. So long as an issue tendered for appeal has been properly presented in the trial court, there is an argument that a power to defeat any appeal cannot be entrusted to class representatives, class counsel, or even the trial court.

This question remains under study.

Notice. The difficulty of framing adequate class-action notices is notorious. Many of the class-action bills that have been introduced in Congress include "plain English" notice requirements. At the request of the Advisory Committee, the Federal Judicial Center has undertaken to study a large set of good sample notices and to develop a model set. There may be some value in emphasizing a "plain English" requirement in the provisions of Rule 23. It also may be desirable to make explicit a requirement that some notice be provided to class members in "mandatory" class actions certified under Rule 23(b)(1) or (b)(2). Actions on behalf of mammoth classes whose members have claims only for small amounts of money may deserve something less than individual notice to each class member that can be identified. And the benefits that defendants realize from final disposition by class judgment may support reconsideration of the rule that representatives of a plaintiff class pay the full costs of effecting notice. These questions have been discussed intermittently over the years, and remain on the agenda for further consideration.

Overlapping Classes. One source of class-action problems has arisen when claims on behalf of similar or overlapping classes are filed in different courts. The problems commonly include competing, conflicting, and overlapping actions in both state and federal courts. Legislative solutions can draw from a full array of jurisdictional opportunities, and may achieve a delicate balance of state and federal interests. A variety of approaches have been sketched by bills in Congress, and legislative action may yet occur. It may be possible, however, to achieve some partial solutions in the rulemaking process. This topic remains open to further consideration.

SPECIAL MASTERS: RULE 53

The Rule 53 project has been deferred for several years because it will require substantial effort that could not be mustered in competition with the needs of the discovery and class-action projects. As work on the new discovery amendments wound down, room was made on the agenda to revive this project. A Rule 53 Subcommittee was appointed to develop the initial Rule 53 redraft. The Federal Judicial Center agreed to undertake empirical research on contemporary uses of special masters. The final report is published as Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). Discussion of the Subcommittee's report to the Advisory Committee has helped set the framework for further work on the draft rule.

The major reason for considering Rule 53 is that the use of special masters has developed in directions that simply are not addressed by Rule 53. Rule 53 is framed around the use of trial masters who hear evidence and report the evidence or make recommended findings of fact, or who perform accountings. The Supreme Court has sharply curtailed the use of trial masters. See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). Nonetheless, the FJC study shows that trial masters still are appointed with some frequency. Rule 53 does not speak in any meaningful way to two broad categories of special-master practice that have come to prominence since 1938. Masters now are frequently used for pretrial purposes;

discovery masters and settlement masters are perhaps the most common examples. Masters also are frequently used for post-trial purposes, at times in helping to enforce complex decrees and often as "monitors" to supervise and perhaps investigate compliance with complex decrees. The FJC study not only documents the frequent use of masters in these roles, but also reports that orders appointing masters are as likely to cite no authority for the appointment as to cite Rule 53. The failure to reflect critically or often about the source of authority to appoint a master may be in part due to the frequent apparent consent of the parties; orders appointing masters were entered without opposition in some 70% of the cases studied. The failure to contest, however, need not reflect enthusiastic consent: some of the lawyers interviewed reported that they had not wanted a master, but had refrained from objecting for fear of offending the judge.

One reform to be accomplished by an amended Rule 53 would be to address directly the pretrial and post-trial special-master practices that have emerged. As with other rules, it is possible to draft a rule that sets out detailed lists of duties that can be assigned to pretrial, trial, and post-trial masters. It may be better to speak in general categories. An alternative approach is to list a number of possible duties or powers and to direct that an order appointing a master specify the duties and powers to be assumed by the master. Various approaches can be found within this spectrum and will be explored.

Consideration of more specific issues has led to some doubts about the use of trial masters in jury trials. Rule 53(e)(3) now provides that in a jury action the master is not to report the evidence, but the master's findings "are admissible as evidence of the matters found and may be read to the jury." Even if the evidence submitted to the master were by some unusual circumstance indistinguishable from the evidence submitted to the jury, it is difficult to understand how a jury is supposed to cope with the findings as "evidence." There even is some question whether trial masters should be available in bench trials, apart from the traditional role in "accountings."

The trial-master questions relate to another and perhaps still broader set of questions. Special master practice grew up long before the institution of magistrate judges. Magistrate judges can and do perform many of the functions assigned to special masters, and do so without requiring the parties to pay master fees. The draft rule would provide that absent consent of the parties, a master may be appointed for purposes other than trial purposes only for duties that "cannot be performed adequately by an available district judge or magistrate judge of the district." The magistrate-judge statute, however, provides that a judge may designate a magistrate judge to serve as a special master in any civil case, on consent of the parties, without regard to the "exceptional condition" limit of Civil Rule 53(b). 28 U.S.C. § 636(b)(2). More work needs to be done to consider the relationship between Rule 53 and magistrate judges, and particularly the possible justifications for assigning master duties to a magistrate judge, whether the duties embrace matters that could not be assigned to the magistrate judge acting as magistrate judge or embrace matters that could be assigned in the magistrate judge role.

The FJC study reported frequent uncertainties about the propriety of ex parte communications, at the level of communications either between parties and master or between master and court. The draft proceeds on the premise that ex parte communications may be desirable or even necessary in some situations; a settlement master, for example, almost invariably must be able to engage in ex parte communications with the parties. It would provide only that the order appointing a master must specify the circumstances, if any, in which ex parte communications are authorized.

Of course there are many other details that may be addressed. Present Rule 53 is highly detailed in some directions that may deserve simplification. It may be open to adding details not now there — one example is a provision that would speak to conflicts of interest. These questions, however, generally involve the familiar drafting choices between detailed direction and more open-ended authority. Satisfactory resolutions seem within reach.

JURY INSTRUCTIONS: RULE 51

Consideration of Rule 51 began with a suggestion from the Ninth Circuit Council that something be done to legitimate local district rules that require submission of jury instruction requests before trial begins. Rule 51 now provides that a party may file requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs." The Criminal Rules Committee has taken the lead in removing this limitation, and similar revision of Rule 51 is easily accomplished.

Revision of Rule 51, however, has raised the question whether other changes should be made. The text of Rule 51 does not address the relationship between requests and objections as clearly as might be wished. Rule 51 does not refer at all to the "plain error" doctrine that has been accepted by most of the courts of appeals, despite the literal rejection of any plain error exception by Rule 51's language. All of this case law doctrine can be expressed clearly in Rule 51, and the first discussion draft sought to do so.

If Rule 51 is to be restated, the occasion might be seized to move beyond clear expression of current Rule 51 doctrine. The revised draft to be considered at the April meeting would require the court to inform counsel of all proposed instructions, not merely action on instruction requests. It also would speak to supplemental instructions. Other draft provisions would reflect growing practices, such as the use of preliminary and interim instructions.

Consideration of Rule 51 is reasonably advanced. The April Advisory Committee meeting may produce a draft that can be recommended for publication.

APPENDIX: ADMIRALTY RULES MEMORANDUM

NOTE: Civil Asset Forfeiture Reform Act of 2000: Technical Conforming Changes to Admiralty Rules

Four suggestions have been made to conform the Admiralty Rules to the provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff.

All of these suggestions share a common twist. The Admiralty Rules involved, C(3) and C(6), have been amended and will take effect, absent action by Congress, on December 1, 2000. The Civil Asset Forfeiture Reform Act of 2000 was enacted on April 25, 2000. Under the supersession provision of 28 U.S.C. § 2072(b), the newer Rule C provisions will prevail unless they are amended to conform to the statute. The first of the changes easily qualifies for adoption, and almost as easily qualifies for adoption as a technical conforming amendment without publication. It is so simple that if there is a sense of real urgency, it could be recommended to the January 2001 Standing Committee meeting for forwarding to the March 2001 Judicial Conference, aiming for adoption by the Supreme Court and transmission to Congress to take effect on December 1, 2001. A more ordinary pace would lead to action by the Judicial Conference in September 2001, leading to an effective date of December 1, 2002. The other changes described as (3) and (4) are not as easy; one or both may deserve adoption without publication, but fast-track treatment seems doubtful. The final change — item (2) below — presents genuinely difficult problems.

(1) Time To Claim

Rule C(6)(a)(i)(A) provides that a statement of interest in the property involved in an in rem forfeiture action must be filed "within **20** days after the earlier of (a) **receiving actual notice of execution of process**, or (2) completed publication of notice under Rule C(4) * * *." New 18 U.S.C. § 983(a)(4)(A) provides:

> In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than **30** days **after the date of service of the Government's complaint** or, as applicable, not later than **30** days after the date of final publication of notice of the filing of the complaint.

Despite the many minor variations between the text of the statute and the text of Rule C(6), the statutory incorporation of the "manner set forth in" the Admiralty Rules seems to iron out several possible problems apart from two that arise from the "except" clause. The first of these two problems arises from the difference between the 20-day period provided by Rule C(6) and the 30-day period provided by the statute. The second, discussed separately below, arises from the "date of

service" provision.

The 20-day period in Rule C(6) was adopted at a time when at least some versions of the legislation that ultimately became § 983 adopted a 20-day period. It was believed that the 10-day period retained for admiralty proceedings in Rule C(6)(b)(i)(A) was important, but the 20-day period was recommended for forfeiture proceedings in deference to the apparent preferences of Congress. Had the pending legislation then provided a 30-day period, the 30-day period would have been adopted in Rule C(6)(a)(i)(A). The Department of Justice would welcome amendment of Rule C(6)(a)(i)(A) to conform to the new statute.

There is no reason to stick to the supersession provision to set aside a statute that was not even known when Rule C(6)(a)(i)(A) was drafted.

It is recommended that Admiralty Rule C(6)(a)(1)(A) be amended to conform to § 983(a)(4)(A):

(a) Civil Forfeiture. In an rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows; * * *

(2) "[S]ervice of the Government's Complaint"

The most difficult question presented by § 983(a)(4)(A) arises from designation of one of the alternative events that start the 30-day period for filing a claim[2] to property seized for forfeiture. Under the statute, the period starts to run on "the date of service of the Government's complaint." Under Rule C(6)(a)(i)(A) the period starts on "receiving actual notice of execution of process." The differences between these provisions are greater — and certainly more complicated — than may appear.

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[2] The statute refers to a "claim." The term is used here to reflect the statute. "Claim" has a narrower meaning in maritime practice than it has in the new forfeiture statute. For that reason it was avoided in drafting new Rule C(6), where both for forfeiture and in rem admiralty proceedings the procedure is to file a statement of interest. For forfeiture it is "an interest in or right against the property"; for admiralty it is "an interest in the property." The admiralty provision is limited to a right of possession or ownership; other interests are advanced by intervention. There is no thought to amend Rule C(6) to reflect the statutory usage.

The difference between "service of the * * * complaint" and "execution of process" is a starting point. Civil forfeiture continues to be an in rem proceeding. The initial pleading is a complaint, see Rule C(2). The initial process under Rule C(3)(a) is a summons and warrant for arrest unless forfeiture is demanded of real property. The complaint should be served with the warrant; if that is done, "service of the complaint" is the same as "execution of process." There is a difference only if for some reason the complaint is not served with the summons and warrant. For real property, there is no arrest; under new 18 U.S.C. § 985(c), described in item (4) below, the complaint is filed with the court and served on the owner. Here "execution of process" even more clearly seems to mean the same thing as "service of the complaint." The prospect that some litigants will contend that a distinction exists may, however, suggest the usefulness of bringing the rule into line with the statute. The more important reason for adapting Rule C(6) to the statutory language, however, is the "actual notice" requirement that appears only in Rule C(6).

Rule C(6) provides a person making a claim greater protection than the statute whenever the actual notice required by Rule C(6) does not occur or occurs later than the "service" described in the statute. When the person claiming an interest is a person served, the difference is likely to be minor — by far the most obvious circumstance will be that service by mail is complete on mailing, while actual notice is likely to occur later. In rare cases service will go astray and the "actual notice" requirement of Rule C(6) will make a more significant difference. The "actual notice" requirement also makes a difference when service of the complaint is not made on the person claiming an interest. Since forfeiture is an in rem proceeding, initial process often is not served on the person claiming an interest. Some persons claiming an interest will actually learn of the execution of process, although not personally served, but the fact often will be disputed and difficult to resolve. Some persons claiming an interest will learn of published notice before publication is completed, but this fact too will be difficult to establish. And because different persons are likely to have actual notice at different times, the deadline for filing claims will be different for different persons.

Assuming that there is a significant difference between Rule C(6) and new § 983(a)(4)(A), it remains to ask which is better. Both Rule and statute provide an alternative deadline by requiring that a statement of interest be filed within 30 days of "completed" (or, in the statute, "final") publication of notice. This provision avoids the problem of proving actual notice and the prospect that different persons asserting an interest will have actual notice (if at all) at different times. It seems likely that most of the difficulties will be cured by the publication provision so long as notice is published in all civil forfeiture proceedings.[3] More importantly, reliance on published notice to

[3] The Department of Justice believes that the requirement of publication is firmly established by new § 983(a)(3)(A). This statute provides that if a claim is filed for property seized in a nonjudicial forfeiture proceeding, the government "shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules * * * or return the property pending the filing of a complaint * * *." Supplemental Rule C(4) requires notice by publication in an in rem action unless the property is released under Rule E(5). The release provision does not seem to interfere with the publication

begin the period for filing a statement of interest reflects a long tradition that in rem proceedings can cut off rights without providing actual notice. The function of setting an earlier deadline when service is accomplished before publication is completed is to shorten the effective limitations period. There is much to be said for the view that the shorter period is desirable only when there is actual notice, but that is not the choice made in the statute.

The Department of Justice believes that the Rule should be brought into line with the statute. This task is easily accomplished. The change will leave the Rule subject to whatever ambiguities inhere in the statute, but it will avoid the still greater ambiguities that arise from seemingly inconsistent statute and rule provisions. On balance, the change seems desirable:

The statement of interest must be filed:

(A) within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), * * *

The change would be "technical" in the sense that it is designed to avoid conflict with a statute enacted after the Rule was proposed but before the Rule is to take effect. The difference between requiring actual notice and not requiring actual notice, however, is significant. And there is a risk that unknown complications lurk in the shadows. Publication for comment seems important, particularly to provide an opportunity to hear from those whose practice involves defending against forfeitures.

If Rule C(6) is amended, the Committee Note might well be limited to a simple statement

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of notice in forfeiture proceedings. Rule E(5)(a) provides for release of property on filing a "special bond," but forfeiture seizures are excepted. Rule E(5)(c) provides for release of property by stipulation and does not expressly except forfeiture property. It appears that the Department of Justice has at times agreed to release of forfeiture property, on posting bond. Seizure of foreign fishing vessels has at times been followed by such agreed release. And release may be allowed as to real property because the new scheme provided by § 985 relies on seizure only in special circumstances — release would be in keeping with the spirit of the statute that less drastic security measures are preferred. If Rule E(5)(c) does allow release by stipulation without publication, release probably does no harm to the interests of persons who might have stated an interest in the forfeiture property.

New § 983(e) sets out notice provisions that, when unraveled, appear to apply only to nonjudicial forfeitures. The Department of Justice view is that no other statute supersedes the invocation of Rule C(4) by § 983(a)(3)(A), and that publication is required even when real property is forfeited despite the provision of new § 985, discussed in item (4) below, dispensing with seizure.

that the changes are made to bring the rule into agreement with the new statute.

(3) "Serve" or "File" an Answer

Another inconsistency is created by § 983(a)(4)(B). Admiralty Rule C(6)(a)(iii) provides that a person who files a statement of interest in a forfeiture proceeding "must **serve** an answer within 20 days after filing the statement." New § 983(a)(4)(B) provides that a person asserting an interest in seized property "shall **file** an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim."

The Department of Justice is concerned that this discrepancy will lead to litigation, and thinks it important to adapt the forfeiture portion of Rule C(6) to the statute.

The simplest adaptation would be to amend Rule C(6)(a)(iii) to require that the answer be filed within 20 days. This approach would be bolstered by the fact that the parallel time-to-answer provision for in rem admiralty proceedings, Rule C(6)(b)(iv), calls for an answer to be **filed** within 20 days after the statement of interest.

This question may not yield to such simple adaptation to the statute. Ordinarily an answer is served. See, e.g., Civil Rule 12(a). Before the current amendments, Admiralty Rule C(6), which applied interchangeably to civil forfeiture proceedings and to in rem admiralty actions without distinction, called for the answer to be served. Civil Rule 5(a), which applies in admiralty proceedings unless inconsistent with the Admiralty Rules, requires service of every pleading subsequent to the original complaint. Service of an answer seems important; simply filing the answer, relying on the opposing party to find it in the court files, is a strange way to proceed. (Nothing on the face of Civil Rule 5 appears to require service of every document that must be filed; Rule 5(d) does require filing of every document that must be served "within a reasonable time after service.")

The better position may be that there is no inconsistency between § 983(a)(4)(B) and the forfeiture provision in Rule C(6)(a)(iii). Rule C(6)(a) requires that the answer be served; Rule 5(d) requires that it be filed. Section 983(a)(4)(B) does not speak directly to service, but tightens the filing requirement of Civil Rule 5(d). The only difference is that the statute requires filing within the 20-day time set by Rule C(6) for service, while Rule 5(d) requires filing within a reasonable time after service. This minor difference is regrettable, but it may be better to live with it than to dispense with any express requirement that the answer be served.

Whether or not there is an inconsistency between Rule C(6) and the statute, it is wise to require service of an answer. The provision for simply filing the answer in the admiralty portion of new Rule C(6) is an inadvertent oversight. Of the several possible approaches to the situation, the best is to conform the forfeiture provision to the statute and to amend the admiralty provision to require service — but only service — within 20 days. The result is that a 20-day filing requirement

applies only to civil forfeiture proceedings, but that requirement derives from the new statute. The following amendments to Rule C(6) are recommended, with the support of the Department of Justice:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

If any of these changes is to be made in Rule C(6), there is a separate question whether the change should be accomplished on an expedited basis without publication and comment. The distinction between filing and service seems more important than the difference between a 20-day and 30-day time to file the initial statement of interest. Publication of a proposal for comment would at least begin the process of drawing attention to the question. On the other hand, the changes are intended primarily to bring Rule and statute together, reducing as far as possible the awkward consequences of unforeseen and unintended supersession. The decision whether to request adoption without publication deserves serious discussion.

(4) "Arrest" of Real Property

New Rule C(3)(a)(i), drawn from the final sentence of present Rule C(3), provides that "[w]hen the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances."

New 18 U.S.C. § 985, 114 Stat. 214, provides that real property that is the subject of a civil forfeiture action "shall not be seized before entry of an order of forfeiture." In lieu of seizure, the government is to initiate a civil forfeiture action against real property by filing a complaint, posting notice on the property, and serving notice on the property owner along with a copy of the complaint.

The arrest provision in Rule C(3)(a)(i) now seems too broad. Actions to forfeit real property must somehow be excluded; there is no reason to resist the statute and insist on arrest. A variety of approaches could be taken. The simplest might be:

When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under {applicable statutory procedures}[Title 18, U.S.C., § 985].[4]

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

Again, it is important to consider whether this change can properly be adopted as a conforming amendment without publication and comment. It is difficult to imagine much need for comment, apart from drafting issues; the purpose of § 985 is to improve life for real property owners and occupants, the Department of Justice has no desire to quarrel with § 985, and it is desirable to bring the Rule into conformity with the statute.

[4] The alternatives are included to permit discussion. The Department of Justice prefers "applicable statutory procedures." Reference to a specific statute today incurs the risk that the statute may be renumbered tomorrow, and that other statutes may be adopted. The Committee Note can provide adequate guidance to the provisions of 18 U.S.C. § 985.