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

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To: **Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules**

Date: **May 21, 1997**

Re: **Report of the Advisory Committee on Civil Rules**

I Introduction

The Advisory Committee on Civil Rules met on March 20 and 21, 1997, in Tuscaloosa, Alabama. The Advisory Committee met again on May 1 and 2, 1997, in Naples, Florida. A brief summary of the topics considered at these meetings is provided in this Introduction. Part II recommends that this Committee transmit to the Judicial Conference, with a recommendation for adoption, two amendments of Civil Rule 23 dealing with class actions. Part III(A) describes the progress of the Advisory Committee's deliberations with respect to the other proposed Rule 23 amendments published for comment in August, 1996. Part III(B) describes a few additional Rule 23 proposals that have emerged from the public comment period and that have been placed on the Committee's Rule 23 agenda. Part III(C) briefly describes the continuing work of the Discovery Subcommittee, while Part III(D) notes a habeas corpus issue that calls for joint consideration by the Civil and Criminal Rules Committees.

The March meeting was held in conjunction with the American Bar Association CJRA Implementation Conference. Advisory Committee members attended the plenary sessions of the Conference, and met separately to conduct Committee and subcommittee business. The

major tasks for the Committee were devoted to shaping the class-action agenda for the May meeting and discussing the progress of the Discovery Subcommittee.

The May meeting was devoted almost entirely to the class-action proposals that were published in August, 1996, and to additional class-action proposals that emerged from public comments and testimony. These matters are reported in Parts II, III(A), and III(B).

The approved Minutes of the March meeting and the draft Minutes of the May meeting are appended.

II ACTION ITEMS

Rules Transmitted for Judicial Conference Approval

Rules 23(c)(1), 23(f)

The Committee has determined to break out two of the proposed amendments to Civil Rule 23 published in August, 1996, and to recommend now their transmission for adoption. The two amendments — a modification of Rule 23(c)(1) and the addition of new Rule 23(f) — are discrete and, in the Committee's unanimous judgment, will provide immediate benefits to the bench and bar. Moreover, Congress is interested in Rule 23(f). Two bills have been introduced that parrot proposed Rule 23(f).

Rule 23(c)(1)

Rule 23(c)(1) begins: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." The proposed amendment would substitute "when" for the first three words: "When practicable after the commencement * * *."

The proposed amendment would conform the language of Rule 23(c)(1) to present practice. The Federal Judicial Center study of class actions undertaken at the request of the Advisory Committee found that certification decisions often are made long after an action is filed. T. Willging, L. Hooper, & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 1996, pp. 26-29. Particularly in cases seeking certification under Rule 23(b)(3), it may not be practicable to determine before substantial development of the case whether common questions predominate and whether a class action is superior to other available methods for the fair

and efficient adjudication of the controversy. The amendment is desirable in part to remove any residual sense of urgency that may be imparted by the "as soon as" exhortation.

The amendment also would make it clear that subdivision (c)(1) does not prohibit ruling on motions to dismiss or for summary judgment before the court determines whether to certify a class. Some courts of appeals have concluded that the "as soon as practicable" requirement bars such precertification rulings. The Federal Judicial Center study found, however, that such precertification rulings are common, and indeed are quite common in a circuit that purports to forbid them. See *Empirical Study*, pp. 29-34. Disposition of part or all of the action by dismissal or summary judgment before a certification decision means that members of the putative class are not bound by the disposition. The importance of such resolutions is demonstrated by the frequent desire of defendants and courts alike to trade away the potential benefits of res judicata for prompt disposition.

There was little opposition to the proposal in the public comments. The most frequent basis for opposition was that it is unwise to encourage precertification rulings on motions to dismiss or for summary judgment.

Rule 23(f)

Proposed Rule 23(f) is new. It creates an opportunity for interlocutory appeal from an order granting or denying class action certification. The decision whether to permit appeal is confided to the sole discretion of the court of appeals. Application for appeal must be made within ten days after entry of the order. District court proceedings are stayed only if the district judge or the court of appeals orders a stay.

Authority to adopt an interlocutory appeal provision is created by 28 U.S.C. § 1292(e). Procedures governing such appeals are provided by proposed Appellate Rule 5, which is proceeding in tandem with proposed Rule 23(f). (It should be noted that Appellate Rule 5 serves purposes independent of proposed Rule 23(f). Appellate Rule 5 should proceed whether or not Rule 23(f) is submitted to the Judicial Conference at the same time.)

This interlocutory appeal provision has persisted virtually unchanged through the many alternative Rule 23 drafts that have been prepared by the Advisory Committee over the last six years. It responds to widespread observations that it is difficult to

secure effective appellate review of class certification decisions, and that increased appellate review would increase the uniformity of district-court practice. The need for appellate review is witnessed in some part by the recent increase in mandamus review. A permissive interlocutory appeal procedure will alleviate the strain on traditional mandamus doctrine.

Opposition to a new interlocutory appeal provision has persisted virtually unchanged through the life of the proposal. The main ground of opposition is that applications for permission to appeal will become a routine strategy for increasing cost and delay. Many of those who submitted comment and testimony repeated this refrain. In addition, there was concern that permission to appeal would be granted primarily in "pathological" cases, yielding a body of appellate law that provides a misleading picture of ordinary and sound certification process. Finally, conflicting views were offered on the stay provision. Those who decried the appeal provision argued further that stays of district court proceedings should be discouraged even more vehemently than the proposed rule would do. The need to pursue prompt discovery was urged to be particularly urgent.

The response to these objections also has remained constant. Circuit judges, relying on experience with discretionary interlocutory appeals under 28 U.S.C. § 1292(b), express confidence that applications for leave to appeal will be decided promptly. The risk of delay will be realized only when a certification determination presents questions of such difficulty and importance as to warrant immediate appeal. And even when leave is granted, the provision requiring an express order to stay district court proceedings will protect any real need to continue pretrial development of the case.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

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(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) ~~As soon as~~ When practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * * * *

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

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* New matter is underlined. Superseded material is struck out.

COMMITTEE NOTE

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is amended to provide for certification "when practicable."

A study by the Federal Judicial Center showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring that motions for certification be made within a specified period. See T. Willging, L. Hooper, & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 1996, pp. 26-29. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment simply conforms the language of the rule to predominant current practice. The inquiries needed to support a realistic application of the predominance and superiority requirements for certification of a (b)(3) class, for example, may be weakened by undue pressure for an early certification decision. The amendment makes this approach secure.

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision.

Subdivision (f). 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. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C, § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1292(b) model 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."

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. 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 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. 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.

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, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

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.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Summary of Comments

The comments, statements, and testimony on the Rule 23 proposals are set out in Volumes 2, 3, and 4 of the Working Papers on Rule 23. The Reporter's summaries of the responses to Rule 23(c)(1) appear at pages 399 to 402, and are attached here as Appendix A. The Reporter's summaries of the responses to Rule 23(f) appear at pages 407 to 420, and are attached here as Appendix B.

Gap Report

No change was made in the text of the Rule 23(c)(1) as published.

Two changes were made in the Committee Note to Rule 23(c)(1). The published Note observed that the change to "when practicable" would support wise administration of other proposed Rule 23 changes. These observations were revised in light of the Committee's decision to delay action on some of the changes, and to abandon others. The final sentence of the published Note commented that a few courts had thought it inconsistent with the "as soon as practicable" requirement to allow precertification action on motions to dismiss or for summary judgment. This sentence was deleted as unnecessary.

No changes were made in the text of Rule 23(f) as published.

Several changes were made in the published Committee Note. (1) References to 28 U.S.C. § 1292(b) interlocutory appeals were revised to dispel any implication that the restrictive elements of § 1292(b) should be read in to Rule 23(f). New emphasis was placed on court of appeals discretion by making explicit the analogy to certiorari discretion. (2) Suggestions that the new procedure is a "modest" expansion of appeal opportunities, to be applied with "restraint," and that permission "will almost will be denied when the certification decision turns on case-specific matters of fact and district court discretion," were deleted. It was thought better simply to observe that courts of appeals will develop standards "that reflect the changing areas of uncertainty in class litigation."

APPENDIX A: RULE 23(c)(1) COMMENTS

Rule 23 Comments: (c)(1) Certify when practicable

Robert J. Reinstein, 96CV043: The (c)(1) change is desirable, making it clear that the certification decision can be postponed while considering motions to dismiss or for summary judgment.

Public Citizen Litigation Group, 96CV044: (c)(1) is supported. It conforms to current practice. It could be drafted more simply: "The court shall determine by order whether an action brought as a class action is to be so maintained."

Stuart H. Savett, 96CV048: (c)(1) reflects "practice by the overwhelming majority of the circuits." It is desirable.

National Assn. of Securities & Commercial Attorneys, 96CV059: (c)(1) is desirable, making it clear that motions to dismiss or for summary judgment can be resolved before a certification decision.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): "This change is consistent with and complementary to the Advisory Committee's recognition that the class action ripens and evolves with time." Relaxing the pressure to certify quickly will reduce untoward pressure to settle.

Stanley M. Chesley, 96CV078: This proposal is counterproductive. "It is not common practice in most class actions to decide motions to dismiss and motions for summary judgment prior to certification." Early decision of such motions defeats closure. And certification commonly occurs before much discovery, making summary judgment premature.

FRCP Committee, American College of Trial Lawyers, 96CV095: Supports for the reasons given in the Note.

Richard B. Wentz, for Mortgage Bankers Assn., 96CV109: "This improvement will allow courts to dispose of many meritless cases before the parties have expended huge sums on class-related discovery."

Miles N. Ruthberg, 96CV112: Strongly approves. The current system forces premature class certification decision. "This forces a life or death decision to the very front of the case before adequate discovery or development of the claims and defenses to be tried." Although courts commonly make conditional certifications, this seeming qualification is no real comfort. Defendants are denied due process when the litigation focuses on individual

representative claims that do not share the fatal defects in the claims of other class members. Nonrepresentative class members are denied due process when their valid claims are defeated by defects in the claims of representative members.

Jeffrey J. Greenbaum, 96CV119: Supports the proposal because it "simply conforms the rule to current practice." Precertification decision of motions to dismiss or for summary judgment is efficient and should be clearly authorized by the rule.

Donn P. Pickett, 96CV128: The present "as soon as" requirement "often pressures the District Court into a premature consideration of the superiority factors. In addition, it tends to ease the burden on plaintiffs to authorize court reliance on assumptions regarding superiority rather than evidence." The change will allow certification decisions when the evidence is ripe. And it will make even more meaningful the opportunity to seek interlocutory appeal.

James J. Johnson (Procter & Gamble Co.), 96CV135: The proposed revision will support precertification summary judgment, a good thing.

William M. Audet, 96CV140: "As soon as practicable" now means delays of six months or a year to certification; this is too long. Class members hear of the case in the media and then hear nothing from the court, leaving them doubting and uncertain. If the rule is changed, it should be to force earlier, not later, certification.

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: Supports. This will make it clear that dispositive motions can be granted before the certification decision. Precertification rulings can spare the cost of class notification, and avoid undue pressure to settle.

Fed. Cts. Comm., Chicago Council of Lawyers, 96CV148: "This rule would, we expect, encourage defendants to trump class certification by filing preemptive summary judgments on the merits." This runs counter to the rule that the merits cannot be considered in making a certification determination. In some cases, such as pattern-or-practice employment cases, evidence on the merits can take years to develop, and it is unfair to place the burden of merits discovery on the plaintiff before a class has been certified. The dangers could be mitigated "if the new version of section (c) provides expressly that dispositive motions prior to class certification are

disfavored when there has been little or no merits discovery * * *."

Litigation Comm., American Corporate Counsel Assn., by Theodore J. Fischkin, 96CV161: Present practice is sound, and "serves the sensible purpose of eliminating some nonmeritorious cases before the parties must undergo the heavy burden and expense of conducting class litigation." The amendment is desirable because it confirms this practice.

American Bar Assn., 96CV162: Supports.

ABA Section on Litigation, 96CV162: (This Report is not ABA policy.) This change conforms to present practice, and validates the efficient present practice of passing on motions to dismiss or for summary judgment before ruling on certification.

ABA Tort & Ins. Practice §, 96CV162(Supp.): Unanimously endorses; this codifies current practice, and provides flexibility that supports precertification disposition of motions to dismiss or for summary judgment.

Stephen F. Gates, 96CV168: Reducing the pressure for immediate certification "should reduce the pressure to settle by allowing greater factual and legal development of the case before the certification decision must be made." This is an improvement.

Federal Bar Assn., 96CV170: "The practical effect of the present practice has already effectively translated the language of the rule into 'when.'" The proposal is endorsed.

California State Bar Fed. Cts. Comm., 96CV179: The proposal "reflects the reality of what is occurring at the trial level." It furthers the purposes of the settlement-class proposal, and confirms the practice of ruling on motions to dismiss or for summary judgment before the certification decision. It is endorsed.

California State Bar Comm. on Admin. of Justice, 96CV180: "This is the right approach. The determination of class certification is an important matter, and there is no particular reason that it should be made under pressure."

TESTIMONY

Philadelphia Hearing

Barbara Mather, Tr. 67-69: E.D.Pa. requires certification questions to be brought on within 90 days. This leads to theoretical arguments about what the issues will be at trial. Deferring decision until the record is better developed will give a much better idea of what the issues will be, and can be very helpful. And decertification is not the answer. "In the absence of discovery, our experience has been that class action decisions, once fixed, tend to be very difficult to reverse. * * * Plaintiff's counsel, the claimants who have been notified, and the Judge, are all reluctant to upset expectations that are created when the notice goes out."

Roger C. Cramton, Tr 94: Opposes because of the association with settlement classes.

Dallas Hearing

Henry B. Alsobrook, Tr. 73-77: The horrendous amount of discovery that is allowed before class certification is a burden. The Committee should do something about it; judicial education efforts are not likely to be enough. There should be only some kind of limited discovery on class certification issues. But if the proposal to allow certification "when" practicable, not "as soon as" practicable will encourage more nonclass-certification discovery, then it should be opposed.

Stanley M. Chesley, Tr. 140-141: The proposal is counterproductive. It is not common to decide motions to dismiss or for summary judgment before certification; there is no benefit to courts or parties, because only the individual litigation is resolved. And little discovery is done before certification. Nor will the change encourage precertification negotiations, which are rare.

Bartlett H. McGuire, Tr. 161-162: This change gives a degree of flexibility that some courts have thought they did not have and would be very useful.

San Francisco Hearing

Donn P. Pickett, Tr. 219-221: This proposal does more good than the Committee may realize. The present "as soon as" language is used by plaintiffs "to advance the critical certification determination to a premature level." It is not true in my experience that

plaintiffs prefer that the certification decision be delayed until there is a settlement, so the settlement can bear the costs of notice. The plaintiff attorneys I have dealt with are well financed. "The cost of notice is not a deterrent to them. The advantage in certification is enormous." The Note should not hint that this is a minor change.

APPENDIX B: RULE 23(F) COMMENTS

Rule 23 Comments: (f) Appeal

Stephen Gardner, 96CV034: Defendants almost always will seek to appeal. Plaintiffs almost never will. "[T]he rule as written does little to advance a plaintiff's situation, but does provide significant dilatory opportunities for defendants." Appeal should be permitted only on denial of certification. An order granting certification "is only harmful to the defendant if the plaintiff prevails at trial and on appeal, both on certification issues and on the merits."

Allen D. Black, 96CV036 & Supp.: The interlocutory appeal provision of proposed (f) will lead to development of certification law based on the "most extreme cases" that are accepted for review. There also is a risk that defendants will attempt to appeal virtually every certification. "There simply is no explosion of frivolous or trivial litigation, as some have claimed. This is confirmed by the empirical study commissioned by this Committee." "My friend, Bill Coleman, disagrees vehemently with that conclusion; but his testimony is supported by no facts or even any anecdotal examples."

Robert N. Kaplan, 96CV038: The (f) appeal proposal is not needed in securities or antitrust litigation. It will only increase class discovery and the costs of litigation.

Patricia Sturdevant, 96CV039: Personally and as General Counsel, National Association of Consumer Advocates. Defendants will always appeal. Plaintiffs almost never will appeal. This proposal "would favor defendants over plaintiffs, encourage dilatory appeal by the party of greater economic power and unnecessarily delay proceedings." California follows a more balanced approach – plaintiffs can appeal denial of certification, which is a "death knell," but defendants cannot appeal grant of certification.

Robert J. Reinstein, 96CV043: The interlocutory appeal provision of (f) runs counter to the federal policy against piecemeal appeals. No persuasive case has been made for it. Even if existing methods of interlocutory review are somehow inadequate, the amendment does not set out any helpful standards.

Public Citizen Litigation Group, 96CV044: The subdivision (f) appeal proposal is desirable, but it should be expanded by providing that the district court may, in granting or denying certification, state whether interlocutory appeal is appropriate.

H. Laddie Montague, Jr., 96CV046: Interlocutory appeals under proposed (f) are undesirable. The proposal has no guidelines, and ignores the views of the trial judge. A defendant has nothing to lose in seeking appeal. Will plaintiffs be given equal sympathy — is the "death knell" appeal to be revived? And the appeal may upset the trial court's power to revise its certification ruling pending appeal.

Stuart H. Savett, 96CV048: Interlocutory appeals should be rejected. Mandamus and § 1292(b) are used extensively now. Proposed subdivision (f) would encourage routine appeal attempts. Concern with mass tort cases should not extend to other areas.

Melvin I. Weiss, 96CV050: The interlocutory appeal provision in subdivision (f) is not necessary; mandamus and § 1292(b) are used when needed. Defendants will routinely make appeal applications after certification, driving up the litigation costs. And there are no guidelines to inform the decision whether to permit appeal or stay proceedings.

Richard A. Lockridge, 96CV051: Present opportunities for appellate review are sufficient. This proposal "will only increase litigation expenses." The focus of proposed 23(b)(3)(F) on "probable relief" to individual class members will bring the merits into the certification decision, and appeals will become complicated by reconsideration of the merits as well as other certification issues.

Gerald J. Rodos, 96CV052: The interlocutory appeal provision is not needed. Mandamus and § 1292(b) are adequate. There is no support for the Note suggestion that an order granting certification may force a defendant to settle — as see the FJC study, p. 90. The burdens of briefing the petition, and then the merits, will be substantial. And there may be significant additional consequences. Defendants who now oppose certification will make more and more arguments, hoping to preserve points for appeal and to provide grounds for encouraging permission to appeal. And both the FJC study and my experience suggest that about half of the classes that are certified result from agreement by defendants. This is because class-action law is well settled in securities and antitrust cases. But defendants who hope to change the settled law will be encouraged to seek reconsideration of appeals decisions that have gone largely untested for 10 or 15 years. To do that, the must resist certification.

Edwin C. Schallert, for Comm. on Fed. Cts., ABCNY, 96CV053: Interlocutory appeal opportunities should not be expanded in the manner proposed by new subdivision (f). Adequate means of review exist in § 1292(b) and mandamus. The proposal will"encourage routine motions for interlocutory appeals" by disappointed defendants and plaintiffs alike.

Irving R. Segal For the American College of Trial Lawyers Federal Rules of Civil Procedure Committee, 96CV054: (further testimony to be prepared for the January hearing): Strongly supports the interlocutory appeal proposal. "Given the complexity and dynamics of typical class action procedure, appellate review of class certification by a trial court is, as a matter of pragmatic fact, a genuine remedy only if the appeal is taken at or shortly after certification." This proposal may allow review in circumstances that do not fit comfortably into § 1292(b), even if the district court is inclined to certify an appeal. Proposed Appellate Rule 5 will govern the procedure.

Max W. Berger, 96CV055: A special interlocutory appeal provision is unnecessary, and "will lead to the routine petitioning of every class certification decision."

National Assn. of Securities & Commercial Attorneys, 96CV059: The (f) appeal provision is undesirable. The merits will be briefed twice, first in seeking permission to appeal and then on appeal. Any stay pending appeal is undesirable – discovery, for example, will be necessary whether or not a class is certified. Ample means of appellate review exist now.

Alfred W. Cortese, Jr. & Kathleen L. Blaner, 96CV063(Supp): Strongly support the amendment, suggesting that the reference to restraint be removed from the Note. "As a practical matter, erroneous class certification imposes irreparable injury unless remedied before the case proceed further."

Michael D. Donovan, for National Assn. of Consumer Advocates, 96CV064: Interlocutory appeals will be sought by all defendants, and ordinarily stays will be granted. Plaintiffs will almost never appeal in consumer actions. "Therefore, the rule as written does little to advance a claimant's situations, but does provide significant dilatory opportunities for defendants." California allows appeal from denial of certification on the ground that it effectively terminates the action.

William T. Coleman, Jr., Esq., 96CV068: (f) is desirable. The determination whether to certify a class "is the whole ballgame." It should be reviewable.

Leonard B. Simon, 96CV073: "[A]lthough the inability to appeal is often quite frustrating, allowing a substantial number of interlocutory appeals would be even worse." The proposal will encourage interlocutory appeals, and requests for stays, delaying still further the already slow pace of class actions.

Stanley M. Chesley, 96CV078: "The proposed rule is inherently unfair, unnecessary, and defeats the primary purposes of the class action, i.e., efficiency and expediency." The 10-day period is arbitrary. As a practical matter, appeal will ensure a delay of the action for 12 to 18 months. The parties and the court will not want to move forward with the action while the appeal remains pending.

Patrick E. Maloney, 96CV090 & Supp.: For Defense Research Institute. Now there is no effective means for interlocutory review of class certification rulings. "[T]he certification order often ends the litigation as a practical matter." All litigants "need a method to obtain timely and meaningful review of class certification orders." (f) "provides substantial relief." (The supplemental statement repeats these observations.)

G. Luke Ashley, 96CV091: Interlocutory appeals may "lead to a more rational and principled predominance and superiority analysis" than some courts have provided. It is a good thing.

Bartlett H. McGuire, 96CV092: Appeal provides a safety valve that "will be particularly important as the courts try to implement the chances to Rule 23" now proposed.

John W. Martin, Jr., 96CV093: Appearing as General Counsel of Ford Motor Company. "[W]hole-heartedly" endorses the present proposals, including particularly (f). The Note should be revised. The suggestion that interlocutory appeals should be granted "with restraint" should be removed. There will be little need for review in circuits where district courts generally observe the requirements of Rule 23, but more frequent review is appropriate when there are frequent departures. Nor should the Note suggest a bias against granting stays.

John L. Hill, Jr., 96CV094: The opportunity to appeal should encourage more rigorous district-court decisions, and deter the use

or threat of certification as a tool to leverage settlements. The Note should not discourage use of the appeal device.

FRCP Committee, American College of Trial Lawyers, 96CV095: Interlocutory review may be the only means of meaningful appellate review. This proposal provides comfort both to plaintiffs and defendants.

Lewis H. Goldfarb (Chrysler Corp), 96CV099: The certification decision "often determines the outcome of the case – very few defendants can afford the risk, however small, of trying a class action." "This reform is too important for the Committee to qualify by suggesting in the commentary that such appeals 'should be granted with restraint.'"

Sheila L. Birnbaum, 96CV107: "[A] defendant evaluates 1,000 individual cases very differently than it evaluates a class with 1,000 members." If there is a judgment for the class, the defendant cannot withstand the risk of appeal – particularly for public companies, whose stock is adversely affected by uncertainty. Defendants often are forced to settle after certification and before trial because they cannot support the risks of class litigation. Interlocutory review is now difficult or impossible in many circuits; mandamus cannot be relied upon. The restrictive statements in the Note are troubling; it should merely describe the change, and leave development of the standards for appeal to the courts. And it would be better to provide an automatic stay of district court proceedings pending appeal; "[t]he sheer expense of class action discovery is enormous; it is exponentially more costly than discovery in an individual case * * *."

Richard B. Wentz, for Mortgage Bankers Assn., 96CV109: "In much class action litigation, the case realistically will be won or lost at the class certification stage." Interlocutory appeal will help avoid the risk of loss at trial or of settlement coerced by the risk. It will help develop a body of precedent. But the Note suggestion that leave to appeal should be granted sparingly should be deleted.

Henry B. Alsobrook, Jr., 96CV103: This "is a step forward in judicial administration."

John W. Stamper, 96CV108: Permitting review of the certification ruling "may reduce the risk, which Judge Friendly identified long ago, of blackmail settlements."

Arthur R. Miller, 96CV111: The proposal "contains no guidelines, limitations, or restraints and completely ignores the views of the trial judge * * *." Requests for review will become automatic. Appellate review "may be appropriate in rare and unusual cases. When it is, currently available devices for obtaining review are adequate, and the courts of appeal have not ben reluctant to use them recently."

Miles N. Ruthberg, 96CV112: This "is an important and much-needed amendment for plaintiffs and defendants alike." Denial of certification can be the death knell for the plaintiff. Grant of certification "skyrockets the stakes for defendants. Most cannot endure the risk of an enormous adverse judgment * * * even where that risk is small * * *. In these cases, Rule 23 certification is nothing more than a vehicle for extracting money from defendants without regard to any appropriate liability exposure. I can personally confirm that some courts deliberately wield certification power precisely in order to pressure settlement — irrespective of whether the case could ever be fairly tried as a class action." (Adding see Valentino, 9th Cir.1996, 97 F.3d 1227, 1234.) The prospect of conditional certification, or later decertification, is scant comfort in the real world of inertia. Mandamus is not sufficient. Section 1292(b) review "requires the blessing of the very district court that issued the questionable ruling in the first place. If the ruling was designed to pressure settlement — as some clearly are — the district court is unlikely to relieve the pressure by putting the issue to the court of appeal." The courts of appeals can protect themselves against any threatened deluge. But the Note should not "undercut this otherwise elegant solution" by suggesting that review should be granted with restraint, or that this is a modest expansion of appeal opportunities.

Robert Dale Klein, 96CV113: Irreparable harm is done by the time final-judgment appeal can seek review of an improvident class certification. The defendant's position in the financial markets has been weakened, extraordinary litigation expense has been incurred, numerous marginal claims have appeared that must be resolved even if the class is decertified, and the class notification process has served as a lawyer advertising program. Or the appeal has been mooted by capitulation to settlement terms that would never have been won in individual actions.

John L. McGoldrick (Bristol-Meyers Squibb), 96CV116: Prefaces endorsement of the need for interlocutory appeal by describing the

abuses of Rule 23. Rule 23 often means "that companies that have committed no legally cognizable wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights in a class action is simply not a sensible business decision. Corporate decisionmakers are confronted with the implacable arithmetic of the class action." "American companies often feel forced to decide – after shaking their heads in disgust at the legal system – to pay what amounts to blackmail in order to settle meritless lawsuits." If they decide to fight, often it is not because it makes economic sense but because they need to defend other stakes – the hard-won gains from a strong affirmative action program are threatened if they settle an employment discrimination action, or a strong reputation for product quality is damaged by a settlement. Section 1292(b) appeals and mandamus in fact provide review in only a small fraction of cases; the numbers found by Anderson show 15 interlocutory appeals and 3 mandamus petitions that reached the merits in the last 10 years. Some district judges grant certification because they do not appreciate the enormous practical impact of certification. And, worse, some deliberately use unreviewable certifications to force settlements. Counsel often shop for favorable courts and judges. "[W]hether a company will deem it economically rational to defend its rights in court, or decide it economically necessary to pay an extortionate settlement, may well depend on the outcome of the class certification question." A realistic possibility of review also may spur district courts to take certification decisions more seriously. The opportunity for review is not a one-way street; plaintiffs too have sought review, and may benefit from it.

Jeffrey J. Greenbaum, 96CV119: This is a substantial improvement. Plaintiffs denied certification may face crippling costs of trial before winning a final judgment. Defendants confronted with certification may face potentially ruinous liability for weak claims. The pressures on defendants are increased in the increasing number of cases that certify mass torts. (f) "is an important step to achieve fundamental fairness." And it reduces the pressures that may distort mandamus review practice. But the Note is too restrictive in many respects. The references to restraint in granting review, and to a mere "modest expansion" should be deleted. The suggestion that review almost always will be denied when certification turns on case-specific factors also is unwise – substantial justice may require review even in such circumstances. The invitation to district judges to express their

views on the wisdom of appeal "appears to reintroduce unnecessarily the often insurmountable certification provision of * * * § 1292(b) * * *." Finally, 10 days is too short in the unusual circumstance that justifies a motion for reconsideration because the trial court has overlooked a controlling fact or point of law. The period should run from the order granting or denying certification or from an order denying reconsideration.

Guy Rounsaville, Jr., for Wells Fargo & Co., 96CV120: "The certifiability of the class is the whole ball game in any 'opt out' class action * * *. Because certification is, as a practical matter, the critical event in class actions, defendants should be given the option to appeal as specified in the proposed revised Rule."

William A. Montgomery (State Farm Ins. Cos.), 96CV122: This is an advance, but the rule should provide an automatic stay of proceedings pending appeal.

Brian C. Anderson, 96CV125: "[T]he most important proposed amendment is Rule 23(f)." Trial courts vary widely in their understanding of Rule 23; precedent can be found for almost any proposition. "This encourages the filing of ill-conceived 'long-shot' class actions * * *. The appellate process serves to both correct erroneous rulings in individual cases and promote clarity and uniformity in the handling of future cases. Currently, however, it is almost impossible to obtain appellate review on an interlocutory basis * * *." Few defendants or plaintiffs are able to persist to final judgment in order to win review of the certification or refusal to certify; this "is not a realistic option for most litigants." A LEXIS search shows only 15 decisions since January 1, 1987, granting § 1292(b) review (3 were plaintiff appeals), and only 11 petitions for mandamus (4 filed by plaintiffs) – but 3 of which were successful. These amount to fewer than 2% of all class certification rulings during this period. The Note should be revised to delete the discouraging references to review "with restraint," "modest" change, reluctance to review case-specific factors, and the like. "It is premature for this Committee to instruct the Courts of Appeal, at the outset of this proposed new era of enhanced appellate opportunity, as to when they should and should not entertain appeals."

Gerson H. Smoger, for ATLA, 96CV126: ATLA policy "opposes any court rule that would establish special appeal procedures for class actions, or which would confer special rights on parties with

respect to appeals from orders granting or denying certification of a class."

Donn P. Pickett, 96CV128: Interlocutory appeal will provide guidance to plaintiffs who fail to win certification, and protection to defendants faced with certification of a class with potential billion dollar damages. It will "creat[e] more law in a crucial area of jurisprudence. The current reliance on mandamus provides none of those benefits." The rule will work all the better in conjunction with the change to "when practical" in subdivision (c). But the Note should not assert that review will almost always be denied when decision turns on case-specific matters of fact and district court discretion. Interlocutory review can be helpful even in such cases.

Richard S. Paul, 96CV129: The need for (f) is demonstrated by Xerox' experience with certification of an antitrust class despite the manifest inability of the class members to establish injury on a classwide basis. The Fifth Circuit denied mandamus, observing however that it was not convinced that the class could prove classwide impact and that a § 1292(b) certification could have permitted efficient review. The district court thereafter repeated its earlier refusal to certify a § 1292(b) appeal. "Condemned to either proceed to trial or settle by the enormous leverage of class certification, Xerox, wholly apart from the merits of the case, was compelled to settle."

Richard A. Koffman, 96CV133: Overwhelmingly plaintiffs oppose and defendants support. This is clear proof that this proposal favors defendants. That is because it will occasion delay. Class actions take long enough now. Mandamus and § 1292(b) are protection enough.

James N. Roethe (Bank of America), 96CV134: The Note should not urge restraint, and should not discourage stays pending review. The courts of appeals are capable of determining whether to grant leave to appeal. Appeal may be the only way to avoid the unjust results arising from pressure to settle "even the most marginal class action."

James J. Johnson, 96CV135 & Supp.: "[T]he amendment permitting interlocutory appeal * * * will be very helpful in those cases where the class action device exerts its greatest pressure — where a class has been certified. * * * [S]uch decisions can often be outcome determinative for the case."

William M. Audet, 96CV140: This will invite delay of the individual case, and impose burdens on the courts of appeals. Section 1292(b) is opportunity enough for review; when it is a close call, district judges are ready to certify the ruling for appeal.

Joseph Goldberg, 96CV141: Review is difficult, but not impossible. This can frustrate plaintiffs denied certification as well as defendants faced with certification. But the change will increase the number of appeals sought and taken. The effect will be significantly increased costs and significant delay, clogging both trial and appellate courts. And increased appeals may distort class certification law; appellate courts will tend to see the most egregious cases, and depend on "judges with less immediate experience in administering classes." The proposal should not be adopted.

Paul D. Rheingold, 96CV145: "I am not addressing the right of appeal, which I feel to be a good idea."

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: Approves, with changes in the Note. Denial of certification can be dispositive of plaintiffs' claims; grant may be perceived to force settlement, regardless of the merits — "[w]hether or not this is ever true, * * * certification is clearly a significant factor for defendants in determining whether to settle an action." But the Note should say that the decision whether to grant review should be informed by the factors incorporated in § 1292(b) — ordinarily the court should require either a novel issue of law or a risk that the certification decision is dispositive. The Note should drop the suggestions that permission should be granted with restraint, and that permission ordinarily should not be granted to review decisions that rest on case-specific matters of fact and discretion. And the time for application should be changed to ten days after the certification decision or after the order denying reconsideration.

Fed.Cts.Comm., Chicago Council of Lawyers, 96V148: It is difficult to square a proposal for more frequent appeals with the deferential standard of review applied on appeal. There is no empirical support for the implicit view that district courts are prone to err in certification decisions. Indeed, district courts may become less responsible if the locus of responsibility is shifted to appellate courts. "[P]arties opposing class certification will face irresistible client pressure to pursue appeals whenever class certification is granted." When certification is denied, however,

there is little likely benefit from appeal because appellate courts are not likely to force certification on an unwilling district court. If the proposal is adopted, the "restraint" language from the Note should be incorporated in the text of the rule.

Charles F. Preuss (with Internat. Assn. Defense Counsel), 96CV152: Providing for immediate appellate review of the certification decision "will benefit plaintiffs, defendants and the court system alike."

James F. Mundy, for Pennsylvania Bar Assn., 96CV155: Supports the proposed amendments, except for (f). "[W]e wish to convey our opposition to the amendment in the absence of explicit guidance when such discretionary appeals should be entertained and our concern over the disruption such piecemeal appeals may cause to the proceedings in the district court. Perhaps these concerns could be alleviated with appropriate identified standards."

Nicholas J. Wittner (Nissan North America), 96CV158: "The current mechanisms of review are either too limited or too late, and are a big part of the 'blackmail settlements' problem." The Note references to "restraint," and to case-specific matters of fact and discretion, should be deleted. The proposal will generate better appellate guidelines for certification. Post-trial appeal is inadequate, because defendants faced with even a small risk of a ruinous defeat at trial are under immense pressure to settle.

Litigation Comm., American Corporate Counsel Assn., by Theodore J. Fischkin, 96CV161: There is a risk that this opportunity for appeal will be unduly restricted; the Note reference to restraint should be deleted. And to ensure that leave to appeal is granted when needed, standards should be added. Factors that support appeal include: (1) Certification of a nationwide class. (2) "The need to resolve a novel or unsettled question or an important conflict in district court decisions." (3) "A departure from the accepted and usual course of judicial proceedings of sufficient magnitude to warrant exercise of the supervisory powers of the Court of Appeals." If the certification decision is a mere recital of Rule 23 terms, without rigorous analysis and detailed findings, appeal is appropriate.

American Bar Assn., 96CV162: Supports.

ABA Section on Litigation, 96CV162: (This Report is not ABA policy.) The proposal "is a substantial improvement over current practice." Plaintiffs denied certification face litigation

expenses grossly disproportionate to their individual claims. Defendants confronted by certification may face ruinous liability, particularly with the growing tendency to certify mass-tort claims. The proposal properly balances the need for procedural protection against the danger of unreasonable delay. But the short time period for appeal may create difficulties when there is good reason for seeking reconsideration in the district court. The rule should be changed to make the 10 days "run from the order granting or denying class certification or denying reconsideration of such a determination."

ABA Torts & Ins. Practice §, 96CV162 (Supp.): Almost unanimously endorses this proposal "as a sound rulemaking solution to the burgeoning problem of using mandamus as a back-door method to obtain interlocutory review * * *." It also is sound to encourage district judges to express their views on the desirability of appeal. But appeal also should be available from orders "modifying or revoking or refusing to modify or revoke a certification previously granted." This language is borrowed from the injunction appeal statute, 28 U.S.C. § 1292(a)(1), because "certification orders have injunction-like potential for inflicting irreparable harm on parties before final orders permit review." (The dissenter believes that reconsideration by the district court, appeal under § 1292(b), and mandamus provide adequate safeguards.)

Federal Bar Assn., 96CV170: Opposes. "The Circuit Courts of Appeals are presently inundated with cases. * * * Adding an additional class of appeals (even permissive appeals) under these circumstances seems counterproductive in an environment where it is unlikely that additional judgeships will be created and vacancies go unfilled."

Washington Legal Found., 96CV171: "For all practical purposes, the decision on certification effectively determines the outcome of a class action lawsuit. Once a class is certified, very few defendants are willing or able to take the risk of allowing the case to go to trial, no matter how weak the merits of the claims or how strong the defenses to it." Interlocutory review is now difficult. The use of mandamus is criticized, and many courts are very reluctant to use it. But the Note should not urge restraint in granting review. And there should be an automatic stay once review is granted, to avoid the often high costs of potentially unnecessary discovery.

Bradford P. Simpson & B. Randall Dong, 96CV173: Strongly oppose. If it goes forward, it should be revised to allow pretrial discovery and other procedures to continue during the request for permission to appeal and during any appeal granted. "Without such a change this rule simply becomes a tool for delay in the repertoire of defense counsel."

Pharmaceutical Research & Mfrs. of America, 96CV174: Members have focused on the need to adopt interlocutory appeals. "In some types of cases involving class action claims, the decision to certify, or not to certify, a class is crucial to the rights of both parties to a fair hearing of the case. Defendants faced with certification of a plaintiff class sometimes face overwhelming pressure to settle, regardless of the perceived merits of the plaintiff's case. These 'potentially ruinous liability' cases place defendants in the untenable position of deciding to settle to avoid the risk, no matter how small, of an adverse judgment or to proceed to trial in the face of the threat of a judgment beyond the company's resources. The history of recent litigation involving more than one category of products demonstrates that such fears are not unfounded." The Note should not defeat the purpose of the proposal by urging that leave to appeal be granted with restraint. "[A]ppellate courts can distinguish between cases that do, and do not, justify the allocation of the resources of the appellate court."

California State Bar Comm. on Fed. Cts., 96CV179: Supports as a reasonable amendment. Plaintiffs may otherwise have to choose between trial and surrender if certification is denied, and defendants may be forced to surrender if certification is granted.

California State Bar Comm. on Admin. of Justice, 96CV180: Supports.

TESTIMONY

Philadelphia Hearing

Allen D. Black, Tr. 33-35: Certification decisions are made by district courts that are exposed to the full range of class actions. Discretionary appeal decisions will be made by courts of appeals in egregious cases at each end of the spectrum. The result will be a distorted body of class certification law, based on nonrepresentative cases. And every class certification decision, one way or the other, will result in an application for an appeal.

Melvin I. Weiss, Tr. 42-44: Agrees with Allen Black, just above. Courts manage to find ways to handle bad cases when they appear, even if that means stretching mandamus a bit.

Max W. Berger, Tr. 51-52: The rule should say that stays should be granted pending appeal only in extraordinary circumstances. Securities class actions are subject to long delays already under the Securities Litigation Reform Act. Additional delays in discovery pending appeal would make the litigation stale before it even gets under way.

Steven Glickstein, Tr. 53-62: Appeal is important to a plaintiff, who may abandon the litigation if certification is denied. It is important to a defendant, who may face ruinous exposure and settle — "so, once again, that class certification decision evades appellate review." In many situations there is little appellate guidance; this proposal will help generate a body of guiding decisions. Appeal is cleaner than mandamus, which has a "lot of baggage." The change will be of benefit to plaintiffs as well as defendants — if the court says the class is proper, that helps the plaintiff. The risk of a distorted body of law based on egregious cases is not real; the courts of appeals will take not only egregious cases, but also those that raise novel or important questions.

Barbara Mather, Tr. 65-67: This is the first real opportunity to appeal. Section 1292(b) does not do it, and mandamus is not the right way to go. Even when egregious cases come to the courts of appeals, the courts will write balanced, thoughtful opinions; there is no reason to fear development of a skewed body of precedent.

H. Laddie Montague, Tr. 162-164: A class certification can be conditional, and can be altered in any event. It is difficult to understand why there should be a special opportunity to appeal certification decisions that is not available for other important rulings on in limine motions, discovery, motions to dismiss, or motions for summary judgment.

Gerald Rodos, Tr. 174-176: The appeal provision is unnecessary. It will further prolong the pretrial phase in securities class actions, following reform legislation that already has lengthened the process. One problem is the Note statement that certification alone may force a defendant to settle; the FJC study found no evidence of that.

Edward Labaton, Tr. 189-193: If (f) is to be adopted, it should incorporate the standards of § 1292(b), requiring a debatable controlling issue and that immediate review would materially advance the litigation. If it is felt that a district judge may have a particular interest in not having an appeal, that problem can be addressed by dispensing with district-court certification. The problem with an open-ended rule of discretion is that in 70% to 90% of cases there will be an automatic attempt to appeal. This is an opportunity to delay the case and harass the other side.

David Weinstein, Tr. 196-201: The provision "is standardless." This is not an area for common-law development of standards. The final judgment rule is wise. Defendants often believe that denial of class certification is the only chance they have to avoid defeat on the merits; an interlocutory appeal opportunity will be viewed as one more chance. And often there will be a stay — experience with multidistrict litigation shows that the mere filing of a motion with the Judicial Panel commonly causes the trial judge to stay proceedings while the Panel decides whether the case is to be transferred. The "same kind of human dynamic" will operate when there is an application for leave to appeal a class certification decision.

William T. Coleman, Jr., Tr. 209-211: There should be an automatic right to appeal grant or denial of certification. Many of these cases are settled, because the amounts of money are so large.

Robert Reinstein, Tr. 250-255: It is likely that the courts of appeals will seldom grant review. But the theory that class certification coerces settlement has not been proved; the FJC study looked and could not find this effect. And (f) sets no standards; at the least, it should incorporate the § 1292(b) criteria that look for substantial ground for difference of opinion and materially advancing the ultimate disposition. And any erosion of the final judgment rule is a matter of concern.

Joel Gora, for ABCNY, Tr. 268-269: Section 1292(b) appeals generally deal with issues of law. These class-certification appeals are "an enormous mix, class question questions, a fact or law, of various subclasses, of prospects of recovery and the like. To make every one of those extremely individualized issues, the subject of potential appeal is going to add, we fear, yet another burden and obstacle to the class action mechanism."

Alfred Cortese, Tr. 288-289: More opportunity for appeals will help generate a body of law applying certification standards.

Charles Silver, Tr. 41, 48-50: Opposes the proposal. Texas has appeal as a matter of right from certification rulings. But most appeals are taken by defendants. Perhaps that is because a plaintiff can win reversal of a certification denial only by prevailing on all of the elements needed for certification, while a defendant can win reversal of a certification by prevailing on only one. Whatever the reason, the Committee should not act on the mistaken assumption that the appeal opportunity will actually prove "symmetrical" in its impact on plaintiffs and defendants.

John Martin, Tr. 55-56: Interlocutory review is one of the most significant of the proposed changes. It should not be qualified in the Note by suggesting that review should be granted with restraint. And the language discouraging stays pending appeal should be deleted.

Claudia Wilson Frost, Tr. 59-68: Texas has interlocutory appeal as a matter of right. A survey of 25 cases reported since the appeal procedure was adopted shows that 15 appeals were by defendants, the rest by plaintiffs. The plaintiffs sought review not only of certification denials, but also of issues as to the scope of the class, or the certification of an opt-out class. There is a floodgate concern, and the Note may seem to caution restraint, but it would be helpful to provide more guidance on the standards for granting review and the standard of review. But not prepared to give any suggestions for the standard of review other than abuse of discretion. With that, "an interlocutory appeal is a very desirable thing." The economics and risk involved deter many defendants from persisting through final judgment and appeal; they settle instead.

Henry B. Alsobrook, Jr., Tr. 77-80: It would be better to provide appeal as a matter of right, and to provide a stay pending appeal. Denial of certification, as a practical matter, operates as a stay. But if certification is granted, "we get into the horrendous expense of carrying on with the litigation for maybe years, hopefully not but could be years, before a decision is reached by the court of appeals * * *." Defendants want a binding determination of the certification issue by a court of appeals as early as possible.

John L. Hill, Jr., Tr. 113-116: Experience as former Chief Justice of Texas demonstrates the value of interlocutory appeal from class certification decisions. The right to a stay of trial-court

proceedings also is important. The proposal will "go a long way toward preventing the use of class actions as a tool to extort settlements."

Stanley M. Chesley, Tr. 142-144: Interlocutory appeals will defeat the primary class-action goal of efficiency and expediency. There may be a delay of 12 to 18 months. Even though jurisdiction remains in the district court and there is no formal stay, as a practical matter district judges are not anxious to waste time and money on litigation that may not proceed as a class.

Patrick E. Maloney, for Defense Research Institute, Tr. 152: "[T]here should be some meaningful way of appealing from a certification issue so that the parties don't waste all that time between the certification and either not appealing because there's so much expense involved and it forces a settlement, and I don't believe the delays are an issue that we should have to consider in terms of fairness."

Bartlett H. McGuire, Tr. 161: (f) is "a very helpful safety valve."

San Francisco Hearing

Elizabeth J. Cabraser, Tr. 52-56: Appellate review is available when needed now, through § 1292(b) and mandamus. A new procedure will be overused. It is difficult to believe that defense counsel will be able to persuade defendants not to seek review because a class certification presents only routine issues. "It will become used in every case, including securities, antitrust, civil rights, employment discrimination cases, in which the jurisprudence of class certification is well established." If there is to be any provision, it should be limited to cases in which new issues are most likely to arise, that is to say mass torts. New and startling developments in other substantive areas can be resolved through the existing means of review.

C.C. Torbert, Jr., Tr. 58-63: Although appeal as a matter of right might be better, the interlocutory appeal proposal will be a useful device. Class certification is the main event; once certification is granted, it is likely to turn simply into the question of who is the best negotiator.

Arthur R. Miller, Tr. 67-68: Although not arguing against the proposal, urges caution. It could become an attractive nuisance. As drafted, it applies not only to mass torts, but to civil rights, consumer actions, insurance actions. Perhaps it should be limited.

Charles F. Preuss (International Assn. of Defense Counsel), Tr. 86: "The appeal is a very valuable tool. And I think that that is a necessary tool at this stage, until we see how these proposed changes work out."

Samuel B. Witt, Tr. 96: The sooner the better, as Judge Hill testified in Dallas. The Note should not suggest restraint, and should not discourage stays pending appeal.

John L. McGoldrick, Tr. 106: "Quick, not terribly stingy review is very sensible, because many of these cases turn on whether it's certified or not. It is the issue * * *."

Sheila L. Birnbaum, Tr. 109-110: There should be appeal of right when a class is certified. But leave to appeal is better than the current situation. "Remember, the district court gets involved in this. They can't help it. I mean, it's natural. It's not a bad thing. * * * I would rather have three judges early on decide this issue rather than one district court judge." When review has been available by § 1292(b) or by mandamus, the courts of appeals have been decertifying mass tort classes.

Richard Wentz for Mortgage Bankers Assn., Tr. 137-138: The Note suggesting restraint should be rethought. Frequently we are sued by many lawyers on the same issue at the same time, and have to fight class certification in many forums. District court decisions denying certification are not much help in resisting the same certification request in another court. Appellate rulings would help.

James R. Sutterfield, for International Assn. of Ins. Defense Counsel, Tr. 146: Supports the whole package of proposals, but not sure whether it could be supported without (f) and the small-claims class. More needs to be done.

Jeffrey J. Greenbaum, Tr. 149-153: Class certification is outcome-determinative. It is the ball game. It creates insurmountable pressure to settle. Interlocutory appeal is important not only in mass torts, but also in securities and antitrust and other areas. But the comments should not take away what the rule gives. There is no need to speak of restraint; the appellate courts know which case they are going to hear. There may be a flood of applications during the first years after the rule is adopted, but lawyers will learn and will seek an appeal only when there is a good chance that it will be granted. The Note also should not disparage appeals based on case-specific matters; individual justice is important,

not merely resolving novel issues of law. And it is unwise to encourage district courts to express opinions on the advisability of appeal. That has been an insurmountable hurdle in § 1292(b) procedure. Most lawyers have problems in persuading a judge that an issue should go up on appeal now. "And I think a lot of judges may not see that clearly, and I think you should allow three objective people to make that decision." Finally, the time limit should include a period for reconsideration by the district court before appeal time expires.

Miles N. Ruthberg, Tr. 161-162: The appeal proposal is in many ways the most important part of the package. "Sometimes, very fine federal judges give in to the temptation to stretch and certify a class precisely because it has the effect of encouraging a defendant to settle." Twenty years ago, it was plaintiffs who wanted to appeal, who supported the death-knell theory. In the long run, all sides are better served by the opportunity for appeal. "I think the appellate courts will be able to exercise their discretion efficiently and quickly." But the comments suggesting restrained or modest use should be deleted; the appellate courts will take care of themselves.

Joseph Goldberg, Tr. 186-189: Is involved in a large pricefixing class action in which the defendant sought mandamus review of the order granting certification. There was full briefing; after ten months mandamus was denied on the ground that there was no abuse of discretion. The proceeding was very expensive. "Encouraging interlocutory appeals I think is only going to add to clogging the courts."

Brian C. Anderson, Tr. 201-205: Interlocutory appeal will help relieve the inconsistency of class certification practices reflected in district court decisions. As it is now, "skilled counsel can cite a case for pretty much any proposition." Present review opportunities are not adequate. A Lexis search of the last ten years revealed fifteen successful § 1292(b) reviews, eleven applications for mandamus, and three grants of mandamus. It is not only defendants who seek review. Of the § 1292(b) petitions, three were filed by plaintiffs and one by intervenors. Of the mandamus petitions, four were brought by plaintiffs. Six of these 18 reviews were in the last year; that does not mean that a nine-year problem has been solved.

Donn P. Pickett, Tr. 221-224: With certification decisions made "when" practicable there will be an even better record to support

interlocutory review, and (f) will work still better. The beauty of the proposal is that it is neutral, favoring neither plaintiffs nor defendants. It gives the appellate court "pure discretion," unencumbered by the technical requirements of § 1292(b). The Note seems to take away from the discretion by describing a modest provision to be used with restraint, and hardly ever in cases that turn on case-specific matters. It is better to leave it all to the appellate court, on the model of certiorari. These notes are, in practice, used to create side debates.

William M. Audet, Tr. 257: Section 1292(b) deals adequately with the problem if there is a bad certification order.

III(A) Other Rule 23 Published Proposals

Several proposals to amend Civil Rule 23 were published in August, 1996, in addition to the Rule 23(c)(1) and 23(f) proposals submitted above. The response of the bench and bar, by comments, statements, and testimony, was exemplary. Many centuries of accumulated individual experience were thoughtfully distilled and presented. The Advisory Committee and all those engaged in the Enabling Act process owe a debt of respect and gratitude to the individuals and organizations that participated in the process.

The Advisory Committee has studied the public response with care. The comments, statements, and transcripts fill three volumes in a four-volume set of Working Papers compiled to preserve the Advisory Committee's Rule 23 work. The results for the 1996 proposals are varied. Some of the proposals have been abandoned. Others remain on the Committee's agenda for continuing work. And a few new proposals for change have been added to the agenda. It seems likely that if the Committee decides to recommend adoption some of the remaining proposals, there will be sufficient changes as to require a new publication and comment period.

Rule 23(b)(3)(A). Two of the 1996 proposals have been removed from further consideration by the Advisory Committee. These first of these proposals would have added a new subparagraph (A) to Rule 23(b)(3), and amended present subparagraph (A) as redesignated subparagraph (B). The changes were designed to emphasize the importance of individual control of individual litigation, and to make it clear that alternative means of aggregation should be considered in determining whether a class action is superior to other available methods of adjudication. Nothing in the comments and testimony suggested significant grounds for doubting the value of these considerations. The need for amendment, however, was questioned on the ground that most courts already take full account of these matters in making certification decisions. More important, it became clear that any change will be seized in attempts to gain unintended partisan advantage. Subparagraph (A), for example, counseled consideration of the "practical ability of individual class members to pursue their claims without class certification." The litigating use that was predicted for these words — or any other words that might be used — was daunting. In addition, it was repeatedly observed that many class members who are able to maintain separate actions prefer to remain in a class, while those who prefer separate actions are able to opt out. The Committee concluded that even if these changes would in the end

accomplish their modest purposes, the long-term benefits would be outweighed by the costs of intervening struggle.

Rule 23(b)(3)(B). Rule 23(b)(3)(A) now lists, as a matter pertinent to the certification decision, the interest of class members "in individually controlling the prosecution or defense of separate actions." This provision was relettered as subparagraph (B), and was revised to focus on "maintaining or defending," rather than "controlling," separate actions. The reference to individual control was thought misleading because the superiority of a proposed class should be compared to all alternative available methods of adjudication. A differently defined class, consolidation of individually initiated actions through 28 U.S.C. § 1407, ad hoc joinder in aggregate group actions, intervention, and still other joinder devices should enter the comparison.

Proposed subparagraph (B) drew little comment. It was closely tied to new subparagraph (A) both in design and reaction. The Committee concluded that the possible modest benefits of the proposal would not justify the probable difficulties of assimilation, particularly once new (A) had been put aside.

Rule 23(b)(3)(C). The four remaining 1996 proposals that remain on the agenda were deferred for rather different sets of reasons. They can be summarized in order of their places in Rule 23.

Proposed Rule 23(b)(3)(C) would make the "maturity of any related litigation" pertinent to the decision whether to certify a (b)(3) class. The primary impetus for this proposal arose from recent dispersed mass tort cases that present grave problems of scientific uncertainty. The fear is that once-for-all class litigation may reach a seriously wrong answer that could be avoided by deferring any class adjudication until better information has accumulated. In other settings, the opportunity to learn the lessons of several individual actions may illuminate the wisdom of class treatment by showing what the controlling issues are and whether common issues predominate. Concerns about the proposal reflect concern for the impact on well-established areas of class-action practice. One common example was securities litigation. An asserted violation of federal securities laws may arise from unique and complex facts, and present novel issues of law. Yet there may be every advantage in resolving all claims in a single proceeding without the delay, cost, and potential disuniformity of individual actions. The Committee believes that the maturity proposal has merit, but that continued work is desirable to determine whether it

can be implemented in a way that will do more good than harm. Because current decisions in the courts of appeals have recognized and emphasized the importance of maturity in the dispersed mass tort setting, there is no urgent need for action.

Rule 23(b)(3)(F). Proposed Rule 23(b)(3)(F) would make pertinent to the determinations of predominance and superiority "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This proposal drew more comment than any other. The comments ranged from strong support to vehement opposition. In many ways, the proposal became the focal point for abiding disputes over the "private attorney-general" function of (b)(3) class actions. The most fundamental question is whether a procedural rule that emanated from the Enabling Act process should become the authority that supports private initiation and control of public law-enforcement values. Present Rule 23(b)(3) practice is urgently supported by advocates of private enforcement as an indispensable supplement to public enforcement. It is argued that Rule 23(b)(3) has taken on a substantive role, that Congress has relied on the enforcement mechanism of (b)(3) classes in many post-1966 statutes, and that any attempt to reduce the substantive role of (b)(3) classes would violate the limits of the Enabling Act. With equal fervor, it is responded that the authors of Rule 23(b)(3) never intended that it take on the role it has assumed. Creation of private attorney-general provisions, on this view, is a matter of substantive law that should be left to Congress. The time has come to roll back the substantive consequences that have evolved from a proposal designed to provide only an efficient means of aggregating the claims of those who knowingly choose to participate in the enforcement action.

The hot debate over the role of (b)(3) class actions was framed in still broader terms as well. Although there was broad agreement that many (b)(3) classes serve important social purposes, many witnesses painted a darker picture as well. Some actions are brought, they say, without any purpose to vindicate the public interest or win meaningful relief for class members. The driving motive is recovery of attorney fees by exploiting the leverage that class certification can lend to weak claims that barely survive motions to dismiss or for summary judgment. Defendants faced with high litigation costs, and a small risk of crippling losses, buy peace on terms that bring disrepute to the legal process and sustain the appetite for further filings.

As proposed, subparagraph (F) was an attempt to confirm – and perhaps expand – the discretion to deny class certification when the gains to individual class members seem insignificant. Early drafts directed that the public interest as well as private benefits be weighed in favor of certification, but this element was dropped in later drafts for fear that it might invite judges to evaluate the wisdom of statutory policies. In this form, the proposal implied a belief that judicial decision of private adversary litigation is legitimate only when justified by an award of meaningful relief to private individuals.

The emphasis on probable individual relief was challenged by several responses.

The most direct attack advanced the explicit belief that private benefits are not necessary to justify class-action enforcement in the public interest. Without class actions, lawbreakers are invited to inflict small injuries on vast numbers of victims, protected by the impuissance of public enforcement agencies and the comparatively prohibitive costs of private litigation. Class actions redress the balance, forcing wrongdoers to internalize the costs of their violations and deterring future violations.

The comparison between individual relief and the costs and burdens of class litigation was thought by many to defeat virtually all potential classes. With small variations in the numbers, a single illustration was offered repeatedly. A single defendant inflicts a $100 injury on each of 100,000 people. No victim could afford an action to recover $100. The costs and burdens of a class action are fairly estimated at $1,000,000. If each $100 individual recovery is compared, alone, to the $1,000,000 cost, certification must be denied. But comparison of the aggregate $10,000,000 relief to the $1,000,000 cost readily demonstrates the justification for class enforcement.

The focus on probable relief persuaded many that the substantive merits of the claims must be considered in ruling on certification. The Advisory Committee had earlier considered and rejected a proposal that would require a threshold prediction of the outcome on the merits. This abandoned proposal was found by many of the witnesses, in somewhat reduced form, to be an element of predicting whether any relief is probable. A variation on this argument was that in many cases the extent of recovery must depend on the nature of the violation proved, so that the merits must be

explored in such cases even if this factor were drafted to exclude any general justification for predicting the merits.

Apart from these matters of execution, proposed subparagraph (F) was found to raise a host of practical problems. Perhaps the most pervasive arises from the fact that many classes involve members whose individual injuries span a wide spectrum. What is to be done when some members' claims would easily justify certification, while other claims seem trivial? If a class is to be certified, should all claims be included unless the marginal costs of administering relief on very small claims exceed the amount of the claims? If there are relatively few larger claims and many quite small claims, can the benefits to all justify certification of a class that could not be sustained for either group alone?

Administrative difficulties also were foreseen. The importance of small dollar recoveries involves subjective evaluation, and different judges will reach inconsistent conclusions. Measurement of the "costs" of a class action can be affected by deliberately chosen litigation strategy, and it may prove difficult to disregard the artificially inflated elements of some projections. Prediction of judicial burdens will be equally uncertain. Preliminary litigation of the certification issue will be grievously protracted.

Collectively, the objections are formidable. They raise serious questions whether subparagraph (F) can be revised to accomplish its intended goals at reasonable cost. Yet is has proved difficult to find other means to respond to the strong evidence that some unknown number of exploitative class actions should be weeded out of the system. The Advisory Committee intends to continue to study subparagraph (F), as proposed and with modifications. One specific proposal for further study is that if (F) is used to defeat certification of a (b)(3) opt-out class, the court should have discretion to create a framework for permissive joinder by certifying an opt-in class. The opt-in class would provide a vehicle for measuring the enforcement interests of class members. If a sufficient number of class members actually request inclusion to justify proceeding in the class-action framework, one important element has been demonstrated with clarity.

Rules 23(b)(4), (e). Two other proposals remain. Proposed Rule (b)(4) would provide that a (b)(3) class can be certified for settlement purposes even though the same class would not be

certified for trial. The proposal was made to overrule a specific contrary ruling rendered by the Third Circuit in an opinion that also recognized the possibility that Rule 23 might be amended in this respect. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.1996). After the proposal was published, the Supreme Court granted certiorari in the *Amchem* case. Argument has been heard, but the case had not been decided by the time of the Advisory Committee meeting. The Committee concluded that further consideration of settlement-class issues should be deferred until the Supreme Court provides further guidance.

The comments and testimony of many practicing lawyers supported the view that settlement classes have grown to become a well-accepted and beneficial phenomenon. The Federal Judicial Center study supports the conclusion that settlement classes are common. The study, which covered all class actions terminated in four districts over a two-year period, found that 59 of 152 classes certified were certified for settlement purposes only. See *Empirical Study*, p. 26. At the same time, grave concerns were expressed by a number of witnesses — primarily academic lawyers — that settlement classes present grave dangers of conflicting interests and inadequate representation. There were strong arguments both for more careful structuring of the settlement process and for more searching review of actual settlement terms. These arguments could be addressed both in any proposal that may be developed to address settlement classes and also in the general Rule 23(e) provisions for reviewing and approving settlements. Because of this interdependence, the published proposal to amend Rule 23(e) also has been retained on the agenda for further study.

III(B) New Rule 23 Proposals

Two new Rule 23 proposals have been added to the Advisory Committee's agenda. Each responds to concerns raised by the comments addressed to the published proposals. Each presents difficulties that may defeat any actual proposal.

Repetitive Certification Requests. There are substantial concerns, although no hard empiric data, that overlapping, competing, and successive class-action filings may be increasing. Much of the concern has been directed to filings in state courts, a topic that is difficult to address through the Enabling Act process. A modest initial proposal is that one factor in determining whether to certify a (b)(3) class should be consideration of decisions granting or denying class certification in actions growing out of

the same conduct, transactions, or occurrences. This proposal has been added to the Committee agenda.

Common Evidence. Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Some comments suggested that administration of this requirement has become undesirably lax. Classes are certified without adequate consideration of the actual needs of trial, leading to unmanageable aggregations that require substantial individual proceedings to complete the disposition of each class member's claim. This concern is obviously connected to the usefulness of "issues" classes certified under Rule 23(c)(4). The Committee will consider whether subdivision (b)(3) should be amended to emphasize the importance of common evidence at trial.

III(C) Discovery Project

The Discovery Project described in earlier reports continues on track. The Discovery Subcommittee's planning for a September discovery conference is well advanced. The fruits of the September conference will provide a major focus for the Advisory Committee meeting in October. It is expected that the October meeting will result in selection of specific discovery proposals to be developed further by the Discovery Subcommittee and considered at the next following meeting. Even now, it is clear that one central question will be whether a uniform national disclosure practice should be adopted, superseding the divergent local practices that have grown up under the Civil Justice Reform Act and the local-option provisions of Civil Rule 26(a)(1).

III(D) Civil Rule 81(a)(2)

Civil Rule 81(a)(2) states that a writ of habeas corpus "shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days." As to § 2254 cases, this provision supersedes the time set by § 2243 for all habeas corpus proceedings.

This provision is manifestly misleading as to § 2254 cases. Rule 4 of the § 2254 Rules — adopted after Rule 81(a)(2) was last amended — provides that the time to answer is to be fixed by the judge.

This provision probably is misleading as to habeas corpus cases not governed by the § 2254 rules. Rule 1(b) of the § 2254 rules provides that the § 2254 rules may be applied at the court's discretion in cases not governed by § 2254. The court thus at least has discretion to supersede the Rule 81(a)(2) time period for any habeas corpus proceeding by invoking Rule 4.

Some action to correct Rule 81(a)(2) is required. The proper course, however, depends on consideration of the proper role of the § 2254 Rules with respect to habeas corpus proceedings not governed by § 2254. This topic should be addressed by the Criminal Rules Advisory Committee. The Civil Rules Advisory Committee will be pleased to coordinate its efforts with the Criminal Rules Committee.