(Rev. 03/05/03)
Agenda E-18 (Summary)
Rules
March 2003

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record, and includes the following items for the information of the Conference:

- Federal Rules of Appellate Procedure . . . . pp. 2-3
- Federal Rules of Bankruptcy Procedure . . . . pp. 3-4
- Federal Rules of Civil Procedure . . . . pp. 4-6
- Federal Rules of Criminal Procedure . . . . pp. 6-7
- Federal Rules of Evidence . . . . pp. 7-8
- Rules Governing Attorney Conduct . . . . pp. 8-9
- Model Local Rules Project . . . . p. 9
- Mass-Tort Litigation . . . . pp. 10-11
- Long-Range Planning . . . . p. 11
- Overlapping, Competing, and Duplicative Class Actions . . . . Addendum

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 16-17, 2003. All the members attended.

Representing the advisory rules committees were: Judge Samuel A. Alito, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge David F. Levi, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Edward E. Carnes, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James Ishida, attorney advisor in the Administrative Office; Joseph Cecil of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol and Professor Geoffrey C. Hazard, consultants to the Committee. In addition, certain judges and academics experienced in mass tort litigation

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

attended and participated in a comprehensive discussion on the status and future of class-action reform, including Judge Patrick E. Higginbotham, Judge Wm. Terrell Hodges, Judge Alfred M. Wolin, Judge Lee H. Rosenthal, Judge Jack B. Schmetterer, Professor Francis E. McGovern, Professor Elizabeth S. Gibson, and Professor Deborah R. Hensler.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action.

The advisory committee approved for committee consideration amendments to Rules 4 and 27 and a new Rule 28.1, and will submit them together with other proposed amendments currently under consideration in a single package at a later date with a request that they be published for public comment. The amendments to Rule 4(a)(6) would clarify one of the conditions to reopen the time to appeal by specifying that a party may move to reopen the time to appeal only if the party had not received notice under Federal Rule of Civil Procedure 77(d) of the entry of judgment or order within 21 days after entry. Rule 27(d)(1) would be amended to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with Rule 32 typeface and type-style requirements. A new Rule 28.1 would collect in one place all the rules provisions dealing with briefing in cases involving cross-appeals and would fill in the present gaps in the rules regarding cross-appeals.

The advisory committee has approved in principle a new Rule 32.1 that would require courts to permit the citation of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like. The proposed rule is limited and only addresses the citation of non-precedential opinions. The proposed rule takes no position on whether designating opinions as non-precedential is constitutional. Nor does it have any

impact on the effect a court must give to a non-precedential opinion. The advisory committee also approved in principle proposed amendments to Rule 35(a) that would resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. Under the proposal, disqualified judges would not be counted in the "base" in determining whether a "majority" of the circuit judges voted in favor of an en banc hearing. Both amendments are expected to be ready for adoption by the advisory committee at its May 2003 meeting and included in the package of proposals to be submitted to the Committee with a request that they be published for public comment.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules proposed amendments to Rules 3004, 3005, and 4008 with a recommendation that they be published for public comment. Under the proposed amendments to Rule 3004, which conform to § 501(c) of the Bankruptcy Code, the debtor and trustee may not file a proof of claim until the creditor's opportunity to file a proof of claim has expired. The proposed amendments to Rule 3005(a) delete the language in the existing rule that permits a creditor to file a superseding proof of claim. The existing provision was intended to protect a creditor from relying on a proof of claim filed by a codebtor on behalf of the creditor, but § 501 of the Code and the proposed amendments to Rule 3004 obviate the need for the existing language because a codebtor may no longer file a proof of claim until after the creditor's time to file has expired. Questions were raised regarding the need in some cases to permit a debtor to file a claim on behalf of a creditor to bring the issue properly before the court under the proposed amendments to Rule 3005. A committee member proposed that the rule amendment be changed to permit the court to allow the debtor to file a proof of claim prior to the expiration of the otherwise applicable filing period on a showing of cause. The advisory

committee withdrew the proposal and will reconsider the proposed amendments to Rule 3005 along with the proposed related amendments to Rule 3004 in light of these comments at its April 2003 meeting.

The proposed amendments to Rule 4008 clarify the deadlines for filing a reaffirmation agreement. The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rule 4008 to the bench and bar for comment.

Informational Item

Proposed amendments to Rule 9014, which exempt contested matters from certain disclosure requirements, were published for comment in August 2002. A public hearing on the proposed rules amendments was canceled because no one asked to testify. At its April 2003 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Admiralty Rules B and C with a recommendation that they be published for public comment. The proposed amendment to Rule B specifies the time for determining whether a defendant is "found" in the district, defeating use of attachment. The amendment eliminates the possibility that a defendant can defeat attachment by appointing an agent for service after the complaint praying for attachment is filed. The amendment is consistent with recent case law addressing the issue. The proposed amendment to Rule C corrects a minor oversight in the rule amendments made in 2000.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment.

Informational Items

The advisory committee has embarked on a multi-year, comprehensive "style" revision aimed at clarifying and simplifying the existing language of the Civil Rules. The project follows the successful completion of the style revisions of the Federal Rules of Appellate and Criminal Procedure.

An elaborate and exacting review process has been developed to ensure that no inadvertent substantive change is made to the rules, working from a draft prepared by a well-known legal writer and later refined by former committee chair Judge Sam C. Pointer. Under this review process, the rules have been subdivided by subject matter into manageable batches. The review of the first two rules batches, Rules 1 through 7.1 and Rules 8 through 15, is well underway. Each batch undergoes demanding scrutiny, first by noted academic scholars, then by a leading legal writing expert, and later by the Committee's Subcommittee on Style, composed of federal judges and an academic, before they are forwarded to the advisory committee's chair and reporter for their consideration.

The advisory committee has divided itself into two subcommittees, each with primary responsibility over a designated batch of rules. In turn, each subcommittee member is assigned specific rules for intensive review. The subcommittees meet in person to discuss each batch of rules, and revised drafts will be transmitted to the advisory committee for its consideration in plenary sessions. Before final action, representatives from major bar organizations, including the American Bar Association, the American College of Trial Lawyers, the American Trial Lawyers Association, and others, will be asked to comment on the draft revisions. Moreover, the Department of Justice, through its committee's representative, is reviewing the drafts.

Only after the rules undergo this demanding vetting will the Committee be requested to publish them for public comment, initiating the large-scale review under the formal rulemaking

process and providing an opportunity to the public to testify on them at public hearings. Every revised rule will have undergone this painstaking review process before a set of proposed amendments is submitted to the Committee for its approval.

The advisory committee continues its study of issues arising from discovery of computer-based documents, sealing of settlement orders, outstanding issues remaining from its work on class-action reform, and a new forfeiture rule that consolidates the forfeiture provisions now scattered throughout the Admiralty Rules and adds new provisions.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action.

Proposed amendments to Rule 41 setting out procedures governing the issuance of a tracking-device search warrant and a comprehensive style revision of the Rules for Proceeding under § 2254 and § 2255, including changes conforming to recent legislation, were published for comment in August 2002. A public hearing on the proposed rules amendments was canceled because no one asked to testify. At its April 2003 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The advisory committee considered a rule change that sets out specific review procedures governing magistrate judges' decision in non-dispositive and dispositive matters. Part of the proposal dealt with a magistrate judge accepting a guilty plea in a felony case. The proposal was intended to address a recent decision of the Ninth Circuit Court of Appeals, which the court has now voted to reconsider en banc. Its outcome may obviate the need for a rule change. In addition, the House Judiciary Committee leadership was advised that the provisions of the Homeland Security Act of 2002 (Pub. L. No. 107-296) amending Rule 6 were based on an

outdated version of the rule, which had been substantially revised before the Act took effect. New legislation is needed to correct the drafting error.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action.

Proposed amendments to Rule 804(b)(3), which would require "particularized guarantees of trustworthiness" indicating the reliability of an unavailable witness's statement *incriminating* an accused, were published for comment in August 2002. The amendments would maintain the "corroborating circumstances" requirement for statements *exculpating* an accused and also extend the requirement to declarations against penal interest offered in civil cases. Two persons requested to testify on the proposed amendments at the scheduled public hearing. At its April 2003 meeting, the advisory committee will consider the testimony and other written comments submitted on the proposed amendments.

As part of its ongoing responsibility to monitor the rules, the advisory committee must consider all suggestions transmitted to it to amend the rules. At its October 2002 meeting, the advisory committee considered the following suggestions to amend:

(1) Rule 106 to permit a party — as a matter of fairness under the "completeness" doctrine — to introduce the remainder of an *oral statement* that had been initially introduced by the adverse party;

(2) Rule 412 to clarify whether "false claims" of rape are covered by the rule's exclusionary provisions;

(3) Rule 803(4) to prohibit the admission of statements pertaining to medical treatment or diagnosis made for purposes of litigation;

(4) Rule 804(a)(5) to address the anomalous results that sometimes arise under the rule's "deposition preference" for a hearsay exception premised on unavailability in circumstances when the hearsay is admissible under another hearsay exception;

(5) Rule 804(b)(1) to clarify whether the rule's hearsay exception applies to testimony given in prior litigation by a "predecessor in interest" who had no legal relationship to the party against whom the testimony is now being offered;

(6) Rule 807 to clarify the breadth of the residual hearsay exception and liberalize its notice requirements consistent with actual practices of the courts;

(7) Rule 902(1) to delete an outdated reference to the Canal Zone;

(8) Rule 902(2) to expand the self-authentication provisions to apply to state officials who have no seal;

(9) Rule 902(6) to expand the self-authentication provisions to apply to Internet materials; and

(10) Rule 1006 to clarify the distinction between summaries of evidence to be formally admitted at trial and summaries of evidence already admitted at trial, often called "pedagogical summaries."

Although the proposed amendments have substantial merit, the advisory committee declined to proceed with any of them in accordance with the committee's established policy to recommend rules amendments only if absolutely necessary. The advisory committee abstained from action on the suggestions as proposed because they applied only in a limited number of situations or the existing jurisprudence has developed ways to handle the problems raised by them. A few suggested proposals merited additional investigation and were accepted for further study by the advisory committee.

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct continues to monitor legislative developments and discussions on the topic among the Department of Justice, state court representatives, and the American Bar Association. The Committee was advised that proposed rules governing conduct of in-house corporate counsel and "outside" attorneys advising public companies in securities-related cases had been circulated by the Securities and Exchange Commission for comment in accordance with § 307 of the Sarbanes-Oxley Act of 2002. (Pub. L. No. 107-204.) The proposed rules require an attorney to report instances of a "material violation of securities law or breach of fiduciary duty" up the "ladder" of company officials until the problems are corrected. If no corrective action is taken and the violation may cause "substantial

injury to the financial interests" of investors, the attorney must disaffirm in writing to the Commission any document filed with the SEC that the attorney has prepared and that the attorney reasonably believes is misleading. Outside counsel must also withdraw from further representation. The SEC is expected to issue final rules on January 26, 2003. The Committee will monitor the impact of the rules.

MODEL LOCAL RULES PROJECT

The Committee was presented with a report on the local rules project prepared by Professor Mary P. Squiers. The report summarizes the results of a comprehensive review of all local rules of court governing civil cases. It notes a rising trend in the number of local rules, which now approaches 6,000 rules, excluding thousands more subparts. The report noted, however, that the number of individual rules that were potentially inconsistent or duplicative of national rules or federal law was fewer than the number identified in the first local rules project. The comprehensive restructuring of local rules that courts undertook to comply with uniform numbering required by the federal rules likely resulted in eliminating many of the outdated and inconsistent local rules.. The Committee received the report and thanked Professor Squiers for her outstanding work on the project.

The advisory committee reporters will review the report and forward any comments or suggestions to Professor Squiers for her consideration. After providing the reporters with this additional review opportunity, the report will be resubmitted to the Committee at its June 2003 meeting with a recommendation on how best to distribute the report's recommendations to individual district courts and circuit judicial councils for their consideration.

MASS-TORT LITIGATION

The Committee's guest participants engaged in a comprehensive discussion of mass-tort litigation. Despite the growing number of mass torts, empirical studies have provided limited illumination, primarily because data on state court filings remains elusive. Understanding the full dimensions of the mass-tort phenomenon is made more difficult because the bench and bar are constantly changing the practices used in handling mass torts. Recourse to bankruptcy procedures in mass torts has become more common, but its efficacy is still uncertain and may raise due process concerns. Two aspects of mass torts have not changed. Increased state class-action filing to avoid federal Rule 23 requirements and duplicative and competing class-action filings in state and federal court remain serious problems. The group's consensus reinforced the convictions of the Advisory Committee on Civil Rules and Standing Committee that such abuses continue and need reform.

Whether to adopt a settlement-only class was discussed. The Committee recognized the recurring dilemma confronting policy makers, who face the daunting task of promoting payment of serious claims without encouraging large numbers of meritless claims, whose filing is injurious to the system as a whole.

The Committee expressed growing concern with the adverse effects of mass-tort litigation on the judiciary, economy, and society as a whole. Although acknowledging the intractable nature of mass torts, the Committee encouraged the Advisory Committee on Civil Rules to continue its broad-based effort addressing the many problems caused by mass-tort litigation. The Committee also suggested consideration of convening a conference of leading practitioners and judges experienced in mass torts, including experts in bankruptcy, especially if recent legislative bills governing asbestos filings and minimal-diversity jurisdiction in class actions are not enacted.

LONG-RANGE PLANNING

The Committee was provided a report of the September 23, 2002, meeting of the Judicial Conference's Committee chairs involved in long-range planning. The Committee was encouraged to continue to focus on the long-range trends in litigation and their impact on the federal rules of procedure.

Respectfully Submitted,

Anthony J. Scirica

David M. Bernick
Charles J. Cooper
Sidney A. Fitzwater
Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
J. Garvan Murtha
Larry D. Thompson
A. Wallace Tashima
Thomas W. Thrash
Charles Talley Wells

ADDENDUM TO THE REPORT OF THE

JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

OVERLAPPING, COMPETING, AND DUPLICATIVE CLASS ACTIONS

The most vexing issue in modern civil litigation is the problem of mass claims—the accumulation of thousands (even millions) of claims through class actions or through aggregation of individual lawsuits. Especially problematic are mass claims implicating primarily state law that are national in scope and that result in multiple class-action filings in state and federal courts.

Overlapping, competing, and duplicative damages class actions generate unnecessary litigation and threaten to undermine the fairness of class resolutions. Unreasonable delay, unequal distribution of limited funds, and disparate verdicts on liability and damages raise serious questions of fairness. Under the current system, multiple class actions too often prevent the equitable resolution of mass claims and bring the judicial system into disrepute.

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

This year, in a report adopted by the American Bar Association, the ABA Task Force on Class Action Legislation stated:

> [T]he filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts [is] one of the most serious concerns with class action practice. Such overlapping class actions consume unnecessary litigation resources, encourage "gaming" of court filings, and risk inconsistent treatment of like cases. The Judicial Panel on Multi-District Litigation (MDL) permits consolidation of federal cases for pre-trial proceedings, and although a few states have similar devices for cases within their state, no such device exists for consolidating suits in different states. Thus, removal to a federal court would permit the invocation of MDL treatment that is not available when overlapping cases are pending in state courts.[1]

The problems that arise from overlapping, duplicative, and competing class actions have been studied for more than ten years by the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, and a Judicial Conference Ad Hoc Mass Torts Working Group. The RAND Institute for Civil Justice, the American Law Institute, the American Bar Association, and the American College of Trial Lawyers have complemented this work.[2] All these efforts have established convincing support for two propositions. First, the problems of multiple damages class actions in state and federal courts are serious and must be addressed. Second, these problems cannot be resolved by amending Federal Rule of Civil Procedure 23. Current jurisdictional statutes stand in the way, and this issue can only be addressed by Congress.

For these reasons, the Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure unanimously adopted a resolution recognizing that overlapping and duplicative class actions in federal and state courts threaten the resolution and settlement of such actions on terms that are fair to class members, defeat appropriate judicial

---

[1]Report to the House of Delegates, § I. The ABA adopted the recommendations of the Task Force (Feb. 10, 2003).

[2]The Federal Judicial Center studied class action dispositions in four metropolitan district courts over a period of two years and found illustrations of unresolved duplicative filings.

supervision, waste judicial resources, lead to forum shopping, burden litigants with the expenses and burdens of multiple litigation of the same issues, and place conscientious class counsel at a potential disadvantage.[3] The Committees further resolved that "[l]arge nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court," and that appropriate legislation could be crafted that would not unduly burden the federal courts or invade state control of in-state class actions. Accordingly, the Committees expressed their support for "the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed."[4]

The Judicial Conference Committee on Federal-State Jurisdiction has recognized the significance of these issues, and has given them careful and thoughtful consideration. While we believe its recommendations deserve careful scrutiny, we think the problems of multiple class action litigation require a legislative response.

1. Problems.

Cases filed in, or removed to, federal courts are subject to the coordination and consolidation procedures managed by the Judicial Panel on Multidistrict Litigation. These procedures have provided effective remedies for the problems inherent in duplicative and overlapping class actions. Centralization avoids the costs associated with multiple litigation and

---

[3]Judge Wm. Terrell Hodges, chair, Judicial Panel on Multidistrict Litigation, supports the views and the conclusions contained in this Standing Rules Committee addendum report. Judge Hodges expresses his views on his own behalf and not on behalf of the panel. There was insufficient time to canvass the entire Multidistrict Litigation Panel.

[4]"Report of the Advisory Committee on Civil Rules" to Committee on Rules of Practice and Procedure (May 7, 2002) (attached as Appendix A).

permits a coordinated approach to the litigation. But there are no similar means to deal with parallel and competing actions in state courts. Those cases often are not removable because of the requirement of complete diversity. Consequently, actions covering the same or similar subject matter, with many of the same class members, may proceed in several states and the federal courts simultaneously.

Multiple and duplicative class actions undermine many of the purposes of the class action device: to eliminate repetitive litigation, promote judicial efficiency, and achieve uniform results in similar cases. Furthermore, the ability of a federal court to assert effective control over its own litigation can be easily thwarted by the competing actions. A federal court, except in bankruptcy, is ordinarily powerless to guard against these risks due to existing limits on jurisdiction and the rules of deference imposed by statutory and decisional law.

Because class-action defendants often have finite resources from which to pay judgments, multiple actions may result in inequitable distribution of recoveries, especially when successful suits or settlements drain the pot. In these situations, plaintiffs in subsequent actions may be denied rightful recovery by a defendant's lack of resources. In many cases, the defendant may seek protection under the bankruptcy code.

The ability to file nationwide or multistate class actions in state courts without the possibility of centralization leads to predictable imbalances. Competing groups of class counsel may vie to seize control of class litigation, bringing their version of the action to resolution ahead of cases pending in other courts, with the connected rewards for counsel. Or the same counsel or group of cooperating counsel may file suits in several courts, pressing ahead in one court or another as the course of apparent advantage indicates. Litigation in one forum may be used to gain leverage in another court by threatening to derail settlement negotiations.

Experienced judges, lawyers, and observers all agree that close judicial supervision is critical to the ultimate fairness of the class-action process. But such supervision may be defeated by multiple filings. That a court may deny class certification or disapprove a settlement does not prevent parties from shopping their actions elsewhere. The refusal of one court to certify a class or approve a settlement may lead not to attempts to achieve a more coherent class or a fairer settlement, but to refiling in other courts in the relentless quest for a different result. Multiple class actions have come to resemble the multi-headed Hydra: after a denial of class certification or settlement, the battle is fought in other venues. Because nationwide class actions can be filed anywhere, litigants have been able to steer their cases to a handful of courts that are perceived to be lax in applying class-action standards. This may be exploited by some plaintiffs' counsel to seek a settlement on terms especially favorable for themselves even where other counsel in parallel cases have declined to settle on such terms. Or a defendant confronting many actions in several courts may negotiate with different class counsel to find the settlement terms that least protect the class. "Coupon settlements" are well-known examples where the interests of the plaintiff class may have been subordinated as a result of these forces. Thus, the filing of multiple, overlapping class actions opens the way to the "reverse auction" or "race to the bottom," in which the interests of the class and appropriate judicial supervision are bartered away.

Furthermore, shopping of class actions encourages nationwide or multistate cases being decided by courts representing the policies of a single state, which may have little or no special interest in the litigation, when a national perspective may be more appropriate. These policies affect important interests, both as to the substance of claims and defenses, and also as to the appropriate use of class-action procedure. Under the current regime, certain counties draw high

numbers of class action filings, and certain state courts are being asked to set national policy on issues that affect interstate commerce, nationwide practices, and the national economy.

Competition among actions and courts too often thwarts the ability of most courts to achieve the desirable goals of class litigation: efficient litigation that fairly and adequately compensates plaintiffs, is consistent among class members, and grants defendants res judicata. Voluntary cooperation among courts has not been able to ensure fulfillment of these goals. Experience over many years suggests that these goals can be achieved only by establishing authority to manage mass litigation through some form of consolidation.

In sum, there are manifold inefficiencies and inequities that result from the filing of duplicative, overlapping class actions in multiple jurisdictions. Where the actions are filed in multiple federal courts, the Judicial Panel on Multidistrict Litigation routinely acts to coordinate the litigation and to control the excesses. When the actions are pending in multiple state and federal jurisdictions, however, there is no such panel or coordination. And this lack of coordination creates the opportunity for destructive forum shopping in which unfair advantage may be taken of class members, of other class counsel, of defendants, and of the judicial system—a system that can ill afford to expend resources on duplicative, complex litigation.

2. Rules Committees' Response.

For several years, the Advisory Committee on Civil Rules has deliberated over possible rules changes to address these problems. After ten years of studying and discussing the problems, the Advisory Committee circulated for comment three sets of proposed amendments designed to limit the problems of overlapping class actions. After extended comments and discussion, including a class-action conference sponsored by the Advisory Committee at the University of Chicago Law School in October 2001, the Committee determined that any attempt to address

these problems through rulemaking faced substantial obstacles to workable, effective solutions—most importantly, the limits of the Rules Enabling Act and the Anti-Injunction Act. As a result, the Committee determined that changes to Rule 23 could not significantly address the problems of state-court actions that compete with federal class actions.[5]

The problems of multiple and competing class actions cannot be addressed without considering the allocation of jurisdiction of the state and federal courts. This inquiry necessarily implicates principles of federalism and judicial workload. Only Congress can effectively address these issues.

3. The Concept of Minimal Diversity.

For several years, Congress has considered bills that would establish a "minimal diversity" basis for federal class action jurisdiction, permitting federal courts to consider large class actions whenever any single plaintiff is a citizen of a state different from any defendant. Minimal diversity would permit eligible class actions to be filed in, or removed to, federal court, where they could be subject to the procedures of the Multidistrict Litigation Panel, reducing the number of overlapping and competing class actions and increasing the effectiveness of judicial supervision of class actions.

Legislation adopting minimal diversity for large class actions must strike the proper balance between legitimate state-court interests and federal-court jurisdictional benefits, while avoiding undue increase in the federal court workload.[6] This determination should take into consideration such factors as the aggregate amount in controversy, the size of the class, the percentage of the class who are citizens or residents of the forum state, the relationship of the

---

[5] See Appendix A, "Report of the Advisory Committee on Civil Rules," at 13.

[6] In 2002, there were 2,916 class actions commenced in federal court, 600 of which were based on diversity jurisdiction. Annual Report of the Director of the Administrative Office of the United States Courts.

defendants to the forum state, standards for removal, and the existence of duplicative or overlapping cases.[7]

Congress has the constitutional authority to enact a minimal diversity provision. The complete diversity requirement, first recognized by the Supreme Court in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), "is based on the diversity statute, not Article III of the Constitution." *Newman-Greene, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 829 n.1 (1989); *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 n.3 (1996); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) ("[I]n a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."). In the past, Congress has enacted laws recognizing expanded diversity jurisdiction. The Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369 (enacted November 2, 2002), The Y2K Act, 15 U.S.C. § 6614 (enacted July 20, 1999); and the much earlier interpleader statute, 28 U.S.C. § 1335 (enacted June 1948), are all examples.

Congress's authority to adopt minimal diversity jurisdiction under Article III provides ample authority to address class-action problems. Additionally, the American Bar Association Task Force on Class Action Legislation has noted that, "given the legislative finding of impact on interstate commerce, the commerce clause of Article I may provide constitutional authority for expanding federal-court jurisdiction regarding overlapping and multistate class actions." The Task Force also recognized the importance of "appropriate limitations to leave within the jurisdiction of state courts those class actions in which a state's interests are stronger than federal interests."

---

[7] Similar factors were included in the ABA's Task Force on Class Action Litigation and the ALI recommended proposal on complex litigation.

In the past, the Judicial Conference has endorsed the concept of extending minimal diversity jurisdiction to multistate complex litigation. In March 1988, it approved in principle the creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property arising out of a "single event" (JCUS-MAR 88, pp. 21-22). This position was reiterated in March 2001 when the Judicial Conference supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." In 1990, The Federal Courts Study Committee recommended the adoption of minimal diversity jurisdiction for "major multi-party, multi-forum litigation." Minimal diversity for mass litigation has also been endorsed by the Department of Justice in earlier legislation.[8] The ALI in its complex litigation project also proposed extending minimal diversity to allow a centralized judicial panel to remove class action cases to federal court. And as mentioned, the ABA recently adopted recommendations noting that "concerns over class action practices could be addressed with federal legislation providing for expanded federal court jurisdiction."

4. The Class Action Fairness Act of 2003.

One attempt to balance these concerns is reflected in the "Class Action Fairness Act of 2003," S. 274, 108th Congress, 1st Session. The bill provides that any plaintiff class member or any single defendant can file in—or remove to—federal court a class action in which one class member is a citizen of a state different from any one defendant. Eligible cases must involve a class with at least 100 members, and their claims must, in the aggregate, exceed $2,000,000. The statute also demarcates a class of cases of overriding state interest that are not subject to minimal

[8]H.R. Rept. No. 370, 107th Cong., 2d Sess., at 36-38 (2002) (letter dated March 1, 2002, from Daniel J. Bryant, Assistant Attorney General, noting that "[t]he Department supports this change [amendments to Federal diversity jurisdiction and removal procedures contained in H.R. 2341, the Class Action Fairness Act of 2001], which recognizes the Federal interest in such significant litigation. In addition, providing for consistent and uniform Federal adjudication of these claims will protect States and their citizens from other State courts' legal rulings from which there is no recourse."

diversity jurisdiction. Where the "substantial majority" of class members and the "primary defendants" are citizens of a single state, and that state's law primarily governs the claims, minimal diversity jurisdiction would be unavailable. Also, if the "primary defendants" are states, state entities, or state officials against whom a federal court may be foreclosed from ordering relief (most often because of sovereign immunity), the case is not subject to the minimal diversity provision.

Whether the particular provisions of a minimal diversity bill strike the proper balance between state interests, federal court workload, and the benefits of federal jurisdiction is subject to legitimate debate.[9] Amount-in-controversy and class-size requirements are among the appropriate factors to be considered, but the precise terms can only be worked out in the legislative process. Rather than focus on particular provisions, which may well change, it would be better at this time to address broader considerations. Such an approach would encourage Congress to address the problem of overlapping class actions through minimal diversity while preserving an appropriate balance between federal and state courts.[10]

5. General Objections.

The Committee on Federal-State Jurisdiction has expressed its opposition to this legislation in two ways. First, it objects generally to solutions incorporating the minimal diversity concept as inappropriately divesting the state courts of jurisdiction over these cases, citing federal workload and concerns with "long-recognized principles of federalism." And second, assuming

---

[9]In 1999, the Executive Committee, on behalf of the Judicial Conference, expressed its opposition to earlier legislation that provided minimal diversity jurisdiction in cases involving 100 class members and $2 million because of workload and federalism concerns (JCUS-SEP 99, p. 45).

[10] Congress should also be encouraged to preserve the Rules Enabling Act process. S. 274 contains provisions that conflict with Federal Rule of Civil Procedure 23. We believe these statutory amendments to Rule 23 are unwise. The procedures specified by the Rules Enabling Act provide the best route to amending the procedural rules. Proposed rule changes should be subject to the full deliberation of the Rules Committees, subject to notice and comment, and subject to approval by the Judicial Conference, the Supreme Court and, ultimately, Congress.

some form of minimal diversity legislation may pass, it suggests specific alternative requirements for enactment.

a. Workload Concerns.

Gauging any increase in the federal workload caused by a minimal diversity provision is necessarily speculative. The Congressional Budget Office estimated that "at least a few hundred additional cases would be heard in Federal court each year" under provisions of earlier minimal diversity legislation, which contained provisions similar to the ones in S. 274.[11] From what we know, this estimate seems reasonable.

In assessing the workload, it must be remembered that many cases filed in both state and federal court are duplicative. Of the 2,916 class actions commenced in federal court in 2002, more than half were filed against the same defendants, many of which were likely competing and duplicative class actions, often filed on the same day or shortly thereafter. And of the 600 diversity class actions, more than two-thirds were filed against defendants already defending cases filed as class actions.[12] Although these numbers do not answer the question how many state-court class action filings are duplicative or overlapping, they may cast some light on the scope of the general phenomenon.

When suits are in federal court, they are subject to centralization. One of the primary benefits of minimal diversity legislation would be the ability to coordinate overlapping actions. It seems likely that many of the cases that would be subject to minimal federal diversity jurisdiction overlap with, or are duplicative of, existing federal class actions. Consequently, the number of

---

[11] H.R. Rept. No. 370, 107th Cong., 2d Sess., at 28 (2002). CBO recognized that the number of class actions filed in federal court as a result of the legislation "is highly uncertain." It expects that a few hundred additional cases would be heard in federal court. CBO did estimate that each additional class action would cost the federal government $20,000 and that the added class actions would cost a total of $6 million, apparently estimating that 300 additional class action cases would be heard in federal court ($20,000 x 300 = $6 million).

[12] See Appendix B for a breakdown of federal court class-action filings.

new, separately adjudicated class actions in federal court is likely to be consistent with the CBO's estimate of an additional 300 cases. Amount-in-controversy and class-size requirements are obvious ways to limit the number of cases that would be heard in federal court, and could be adjusted as needed to minimize any significant effect on the federal caseload. Moreover, the assignment of class actions centralized in federal court would often fall within the purview of the Judicial Panel on Multidistrict Litigation, which can distribute class action cases among the courts to ensure that no single court is overburdened.[13]

b. Federalism Concerns.

Principles of federalism support the concept of minimal diversity for nationwide or multistate actions. Article III creates federal jurisdiction for controversies between citizens of different states. The diversity jurisdiction provision seeks to protect interests of states other than the forum state and to foreclose possible bias against out-of-state litigants. These concerns are arguably at their greatest in nationwide or multistate class actions, which may be the paradigm case for federal diversity jurisdiction. Minimal diversity in appropriate cases would facilitate the harmonious disposition of litigation that affects the interests of citizens of many states and, through their citizens, affects the many states themselves. Current jurisdictional standards do not promote these principles; instead, they prevent the cases arguably most appropriate for federal diversity jurisdiction from reaching a federal forum.

Currently, an ordinary $76,000 slip-and-fall case between two parties who are citizens of different states is subject to federal jurisdiction, while actions involving thousands of litigants from every state, and with millions of dollars in controversy, are often kept out of federal court.

[13]In another respect, this legislation might alleviate the federal workload. Multiple and overlapping cases in state courts can impair the ability of federal judges to adjudicate and manage the cases already before them, often resulting in much additional work.

Thus, cases of significant federal interest, where the concerns arising from state-court adjudication of interstate disputes are at their greatest, are excluded from a federal forum. The historical purpose of diversity jurisdiction would be best served in large, multistate class actions.

The Federal Courts Study Committee's Subcommittee on the Role of the Federal Courts and Their Relation to the States recognized this anomaly in 1990 (Judge Richard A. Posner, chair, Congressman Robert W. Kastenmeier, Chief Justice Keith A. Callow of the Washington Supreme Court, and former Solicitor General Rex E. Lee). Though advocating that general diversity jurisdiction be abolished, the Subcommittee recommended that diversity jurisdiction be preserved in complex, multistate cases, and suggested that "Congress may want to broaden jurisdiction from its present boundaries in these cases by eliminating the complete diversity requirement." Report to the Federal Courts Study Committee, March 12, 1990, at 458.[14]

The problems of multiple and duplicative class actions are of recent vintage. The rise of modern class-action litigation can be traced to the 1966 changes to Rule 23. Yet even in the modern era of recent civil litigation, there has been a sea change in the nature of complex litigation involving class actions and the aggregation of individual cases and also in the complex relationship between federal and state jurisdiction, especially regarding duplicative and competing class actions. Changing the diversity requirements for these kinds of cases would not reflect a rejection of longstanding principles of federalism, but rather, reflect the application of those principles to a new problem.

[14] The subcommittee's recommendation was adopted by the full Federal Courts Study Committee, which stated, "Congress should amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and should create a special federal diversity jurisdiction, based on minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation." Federal Courts Study Committee Report, at 44 (April 2, 1990).

Within our traditional notions of federalism, the question arises whether mass claims truly national in scope affecting litigants in many states should be handled in the courts of a single state. That there are class actions that are more appropriately adjudicated in state courts[15] does not undermine the conclusion that minimal diversity jurisdiction is appropriate in many large class actions. There is no principled reason why these concerns cannot be incorporated into appropriate legislation containing a minimal diversity provision.

6. Specific Reactions to S. 274.

In addition to its general objections, the Committee on Federal-State Jurisdiction has offered specific recommendations with respect to a minimal diversity law. We think the Committee's recommendations highlight the difficulty of striking the appropriate balance—a task better left to the legislative process.

The Committee's recommendation would exclude from federal jurisdiction cases in which "(1) substantially all members of the class are citizens of a single state, or (2) the claims arise from death, personal injury, or physical property damage within a state." The first is similar to the first exception in S. 274, but it omits the requirements that the primary defendants be residents of the same state and that the state's own law be the primary law governing the case.

The Committee's proposal would prevent the filing in, or removal to, federal court of most actions where the class is limited to nearly all in-state plaintiffs—no matter what the primary defendants' relationship is to the state or whether that state's law governed—so long as one non-diverse defendant was joined. The likely consequence would be that a defendant might find itself litigating statewide class actions in many states. While avoiding potential concerns

---

[15] The American Law Institute has suggested that "'single disaster' events, area pollution cases, and insurance coverage litigation" may exemplify such cases. Complex Litigation Project, Proposed Final Draft, April 5, 1993, at 209.

about a state court applying its law nationwide, many of the consequences associated with multiple actions would remain. A federal court could still find itself competing with as many as fifty overlapping class actions; the litigants might still find themselves competing for recovery; and the defendants might still seek protection under the bankruptcy laws, because they offer the sole means of consolidating and resolving multiple claims.[16]

The Committee's proposal also would exclude from federal jurisdiction cases where substantially all plaintiffs are from the same state and a primary defendant is from out of state. While these cases might implicate the forum state's interests more than cases not falling under the exception, certain cases would remain of significant national interest and might be appropriate candidates for federal jurisdiction.

The Committee on Federal-State Jurisdiction's second exclusion would likely have a similar effect. It would prevent federal filing or removal on the basis of minimal diversity whenever "the claims arise from death, personal injury, or physical property damage within the state." These are cases in which the states may be viewed as having a special interest in the outcome. But these claims are regularly heard by federal courts in individual litigation under existing diversity jurisdiction. If personal injuries occur nationwide, this provision would permit multiple class actions in multiple states.[17] The approach in S. 274 would provide a greater possibility of a coordinated response in such cases.

[16] Removal of these S. 274 requirements would mean that federal jurisdiction in any case in which the class was limited to nearly all in-state plaintiffs could easily be avoided by including at least one plaintiff and one defendant that share a common citizenship, even if the primary defendants were from a different state and the law applied was that of a different state. The result would not materially change the present situation: a suit in which residents of a single state sued a primary defendant from another state, and joined one in-state defendant, could not be removed. This would be true even if the likelihood of recovery against the in-state defendant was slight, and even if, as frequently happens, the in-state defendant is ultimately dismissed after the one-year limitation on removal.

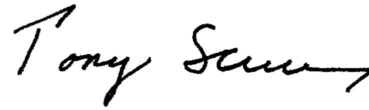
[17] It is uncertain what effect this provision would have in addition to the Committee on Federal-State Jurisdiction's first proposal. Many of these cases would likely have plaintiffs who are "substantially all" from the forum state, making them likely candidates for the first exception. It is unclear how many additional cases would be excepted from federal minimal diversity jurisdiction.

The Committee on Federal-State Jurisdiction's proposals highlight the difficult policy decisions that need to be made. We do not believe the Judicial Conference should involve itself in the specific provisions of proposed legislation. At this point, any positions on details may not be relevant to later revisions of a bill. But more importantly, the substantive provisions of the legislation engage sensitive and powerful political considerations. We think it is sufficient for present purposes to endorse the concept of minimal diversity if enacted in a way that respects state courts' legitimate interests in adjudicating cases of genuine state character, and that avoids an undue increase in the federal court workload.

For these reasons, we believe that special diversity jurisdiction, based on the minimal diversity authority conferred by the Constitution, may be appropriate to the maintenance of major multi-party, multi-forum class action litigation in the federal courts. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed. Moreover, Congress should not detract from the Rules Enabling Act process by legislating amendments to Federal Rule of Civil Procedure 23, particularly given that amendments to Rule 23 have been approved by the Judicial Conference and are now pending

before the Supreme Court of the United States. Further, we should continue to explore additional approaches to the coordination and consolidation of overlapping or duplicative class actions.

Respectfully submitted,



Anthony J. Scirica

David M. Bernick
Charles J. Cooper
Sidney A. Fitzwater
Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
J. Garvan Murtha
Larry D. Thompson
A. Wallace Tashima
Thomas W. Thrash
Charles Talley Wells

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

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

FROM: Honorable David F. Levi, Chair
Advisory Committee on Civil Rules

DATE: May 7, 2002

RE: Report of the Advisory Committee on Civil Rules

Over the last ten years, the Advisory Committee on the Civil Rules has undertaken an intensive consideration and review of Rule 23, the class action rule. This ongoing review by the Committee is the first review of Rule 23 following the thorough reworking of the Rule in the 1966 amendments. But in the now almost 40 years since that time, Rule 23 has figured prominently in the explosive growth of large scale group litigation in federal and state courts, and has both shaped and — in its interpretation and application — been shaped by revolutionary developments in modern complex litigation. The drafters of the 1966 amendments knew that after some appropriate period of time it would be important to reconsider what they had done. We are well underway in that process even as we must take account of continuing rapid changes in Rule 23 practice.

A historical perspective may be helpful in placing our current efforts in context and considering our future course.

I. A Brief History of Rule 23

The class action has its ultimate roots in the English Court of Chancery and the bill of peace. It was a practical rule of joinder where joinder was otherwise impractical. The American courts adopted the procedure in the 19th and early 20th centuries. Federal Equity Rule 48, in place from 1842 to 1912, provided for a class action, but, significantly, also provided that the "decree shall be without prejudice to the rights and claims of all the absent parties." In 1938, Rule 23 was included in the new Federal Rules of Civil Procedure. The Rule was adopted with little fanfare or discussion. It divided class actions into three categories: the "true," the "hybrid," and the "spurious." These categories, with their infelicitous names and formalistic attributes, proved difficult to apply. After almost 30 years of experience, the Advisory Committee entirely rewrote the Rule in 1966, and it is that Rule that we still use today.

The 1966 Rule kept a three-part structure but the structure became functional: (b)(1) classes for situations in which necessary parties under Rule 19(a) were too numerous to be joined, including claims involving a common fund, (b)(2) classes for claims involving common injunctive relief, particularly intended for civil rights litigation, and, finally, (b)(3) class actions for damage based on predominant common issues. The 1966 rule provided new procedural protections, for example, by requiring notice to (b)(3) class members of certification, and, for all classes, notice of a proposed settlement. It provided that class members could be bound if they did not affirmatively opt out of (b)(3) damage class actions. In adopting the "opt out" approach, the Committee apparently had in mind small claim, consumer class actions in which no one class member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member's desire to participate, given the small

stakes involved. The 1966 Rule also clarified that any judgment would bind the members of the class in all certified class actions.

It is not entirely clear what the Committee of 1966 expected. Professor Arthur Miller, who was involved with the work of the Committee at that time, tells us that "Nothing was in the Committee's mind . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of application that it now has." But, as Professor Miller went on to explain, the Rule, perhaps by serendipity, caught the wave of "the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction."

An esteemed member of the 1966 Committee, John Frank, corroborates Professor Miller's recollection. According to Mr. Frank, the Committee of 1966 was operating in "a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law [were] still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but . . . were expected to be too big for the new rule."

It is probably fair to say that the 1966 Committee was most interested in facilitating civil rights class actions for injunctive relief under (b)(2), and in this respect the Committee's intentions were fully realized. But it is also fair to say that the Committee did not foresee the scale or range of litigation that was unleashed by the opt out damage class action in (b)(3). Certainly, the Committee then had no expectation that the Rule would be used in the context of

dispersed mass torts, a concept that the Committee could not have been familiar with. The Committee did know about mass accidents, but considered that "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." So much for the persuasive power of Committee notes!

According to the then Reporter of the Committee, Harvard Professor Benjamin Kaplan, "It will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23." In 1991, well past a generation in the world of civil litigation, the Judicial Conference asked the Committee to begin a reconsideration of the Rule in light of the upheaval in modern civil litigation since adoption of the Rule.

II. The Advisory Committee Begins its Reconsideration of Rule 23

There have been several phases in the Committee's work although many continuing themes. At the beginning, the Committee developed a comprehensive re-draft of the Rule. In 1992, Judge Pointer, Chair of the Committee, relying on a 1986 proposal from the Litigation Section of the ABA, prepared a revision that did away with the three part (b)(1), (b)(2), and (b)(3) classification, provided for opt-in classes at the court's discretion, and provided that exclusion from the class could be conditioned upon a prohibition against institution or maintenance of a separate action. Notice was made more flexible such that sampling notice might be permitted depending on the circumstances. This far-reaching draft was presented to the Standing Committee but then withdrawn on the Standing Committee's advice that further consideration would be required before such a sweeping proposal could be published for public

comment. In the years since that time, we have engaged in that further consideration and can now appreciate how prescient and sophisticated that first effort was.

The Committee then began the painstaking and careful inquiry into class action practice in which we are still engaged. The new Chair of the Committee, Judge Higginbotham, pioneered the investigatory model that the Committee continues to use to good effect whenever it considers a complex issue. The model combines multiple informal opportunities for involvement by judges, interested academics, members of the bar, and bar organizations, with targeted empirical work. Thus, the Committee was educated at several class action and mass tort conferences, drawing together academic experts and experienced practitioners. The Federal Judicial Center undertook an empirical study of federal class actions. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996). The Reporter circulated a variety of proposals informally to gather guidance from members of the bar. Eventually, several different proposals were published resulting in extraordinarily helpful comment from practitioners and others.

The Committee first turned to the all important certification decision in (b)(3) class actions. The Committee was concerned that the certification decision was the critical issue in class action litigation, and yet the rule included no provision for interlocutory appeal. The Committee was also concerned that the Rule's certification criteria were too loose, leading to improvident certification of actions that were more appropriately handled on an individual basis. The Committee was told repeatedly that class actions were rarely tried and that once the class was certified, defendants were placed under overwhelming pressure to settle. In this portion of its inquiry, the Committee considered a variety of additional certification factors such as the

probable success on the merits of the class claims and whether the public interest in, and the private benefits of, the probable relief to individual class members justified the burdens of the litigation. From this work, one significant amendment emerged: Rule 23(f) providing that a court of appeals may, in its discretion, entertain an appeal from an order of a district court granting or denying class action certification. This provision has apparently had its intended effect of developing the case law on certification thereby providing greater guidance to district judges on the certification decision. In addition, the testimony on the various additional certification criteria provided the Committee with a wealth of new information about class action practice.

The possible tightening of certification criteria required the Committee to consider whether litigation classes should be subject to more exacting standards than settlement classes. The Committee's attention was drawn to the question because of the Third Circuit decision in *Georgine/Amchem* holding that settlement classes must be certified as if they were litigation classes. Because of the importance of settlement to class action litigation, the Committee considered whether a class action might be certified for settlement even if the class could not be certified for trial. A proposed (b)(4) was circulated for public comment in 1996 at the same time as the additional (b)(3) certification criteria. Proposed (b)(4) provided for certification where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial." All of the 23(a) requirements would still apply, however.

The response to this proposal was as copious and thoughtful as the response to the new certification criteria. Opponents of the change warned the Committee that class action

settlements were already prone to unfairness to class members and that this proposal would exacerbate the situation by permitting class counsel to negotiate from a position of weakness, knowing that unless there was a settlement, the class could not be certified for trial. This controversial topic was put aside when the Supreme Court granted certiorari in *Amchem*. The result of *Amchem* has been to permit a certain flexibility in the certification of settlement classes. However, some continue to advise the Committee that there is need for still greater flexibility for settlement classes.

The Committee then entered the present phase of our inquiry. At this point the Committee not only had the comments from the hearings on the proposed amendments, but also the benefit of the RAND Institute for Civil Justice's case study of ten class actions eventually published in 2000 as *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. In addition, in 1998, on the recommendation of Judge Niemeyer, the Chief Justice authorized the formation of an ad hoc working group to study mass torts that would bring together representatives of several Judicial Conference committees under the leadership of the Civil Rules Committee. The Working Group was given one year to study the problems associated with mass tort litigation and to submit a report. Judge Niemeyer designated Judge Scirica as chair of the Working Group. The papers and report of the Working Group provided additional information about the operation of Rule 23 in the context of mass torts and illuminated many of the problems, including the problems associated with multiple, overlapping class actions. See *Report on Mass Tort Litigation* (1999). The Committee was also assisted by appointment of a sub-committee, chaired by Judge Rosenthal, and appointment of a special reporter, Professor Richard Marcus, to support Professor Cooper.

Building on the RAND study, the hearings on the settlement class proposal, and the report of the Working Group on Mass Torts, the Committee determined to provide better judicial supervision of settlements and of class counsel. Proposed new 23(e) requires disclosure of all settlement terms, a fairness hearing, and findings by the court. The court may permit class members who believe that the settlement is unfair to exclude themselves from the settlement. Proposed new Rule 23(g) and (h) provide the court a framework for appointing, monitoring, and compensating class counsel. Notice and the timing of the certification decision also receive attention in the new proposals.

III. Unfinished Business

As this history may demonstrate, the Committee has reason to be both humble, given the complexity and magnitude of the issues, but also proud of its work over the past ten years. It has done much to enhance judicial supervision of the class action process and provide new tools for judicial review, at both the trial and appellate levels.

There are several areas that may yet deserve additional attention and that have not received definitive answers from the Committee. Each has proven controversial and difficult. The first is whether the Rule should incorporate a separate standard for settlement classes. This is a familiar topic. We may wish to reconsider this issue in light of case law under *Amchem* as well as the new proposal on settlement review, including the permission to class members to exclude themselves from settlement upon review of the terms. There may be need for further empirical work in this area. Second, the unique questions surrounding the settlement of future claims in mass tort cases may also merit continued study. Third, we may wish to reconsider the opt in/ opt out question. The 1966 Committee adopted an "opt out" provision but did not foresee

the consequences of doing so. The Committee's 1992 draft, giving the court discretion to certify the class as an opt in or opt out class action, might provide a starting point. Alternatively, we might reasonably conclude that further study of this question is likely to generate more controversy than any clear consensus for change.

Finally, we should complete the substantial inquiry already begun into the difficult problem of overlapping and competing state and federal class actions. Certain aspects, the more modest ones, may be amenable to rule making. The more fundamental issues do not seem so amenable, at least not without specific legislative authorization. At the January meeting the Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems. The remainder of this memorandum is addressed to this issue.

IV. Overlapping Class Actions

The Committee has been told repeatedly in a variety of forums, by both defense and plaintiff counsel, and without contradiction, that as Rule 23 is reformed to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements, an ever growing number of cases will be filed in those state courts where this kind of supervision is perceived to be less demanding. This results often in multiple filings of multi-state diversity class actions in both federal and state courts. Yet this result is precisely the outcome that the class action device was designed to prevent. The purpose of the class action device is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find a forum, and achieve uniform results in similar cases. But as our Reporter has noted,

"duplicative class litigation is destructive of just these goals . . . . Multiple filings can threaten appropriate judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads."

The problems generated by overlapping, duplicative, and competing class actions have commanded the attention of many observers. According to the American Law Institute's 1994 Complex Litigation Project, the problems caused by multiple class actions are so pressing that "[w]e are in urgent need of procedural reform to meet the exigencies of the complex litigation problem." "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system." American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (1984-1994) at 9. Although the Federal Judicial Center's study focused on class-action dispositions in only four federal districts over a period of two years, it found several illustrations of unresolved duplicating filings, pp. 14-16, 23-24, 78-79, 163-164 (Tables 5-7). The RAND study confirmed the seriousness of the problem. Part of this project involved intense study of ten class actions. In four of the ten, class counsel filed parallel actions in other courts. In five of the ten, other groups of plaintiffs' attorneys filed competing actions in other jurisdictions. Only two of the ten cases did not experience either type of additional filings. More recent information suggests that the frequency and number of overlapping class-action filings are growing.

Legislative proposals to deal with overlapping actions have been pursued for several years. In March 1988 the Judicial Conference approved in principle creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property damage arising out of a "single event." This position was confirmed in March 2001 when the Judicial Conference supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." The 1990 *Report of the Federal Courts Study Committee* recommended, pp. 44-45, that Congress "should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation." Congress has considered many bills that would provide easier access to federal courts by initial filing or by removal from state courts. In 2002 the House of Representatives passed one of these bills, H.R. 2341.

One specific source of the concerns reflected in these legislative proposals has arisen from state-court filings on behalf of classes that include plaintiffs from other states. Many of these actions seek — and frequently win — certification of nationwide classes. Membership in these classes may overlap with classes sought — or actually certified — in other courts, state or federal. Pretrial preparations may overlap and duplicate, proliferating expense and forcing delay now in one proceeding, now in another, as coordination is worked through. Settlement negotiations in one action may be played off against negotiations in another, raising the fear of a "reverse auction" in which class representatives in one court accept terms less favorable to the class in return for reaping the rewards that flow to successful class counsel. Moreover, the certification of nationwide or multi-state class actions in one state court poses a threat to the

proper allocation of decisionmaking in a federal system. Individual state courts may properly apply the policy choices of the residents of that state to those residents. But local authorities ought not impose those local choices upon other states and certainly not on a nationwide basis.

After studying these proposals and the underlying problems, the Civil Rules Advisory Committee authorized its Reporter to issue a "Call for Informal Comment: Overlapping Class Actions" in September 2001. The call for comment included draft amendments of the class-action rule that might reduce the incidence of forum shopping and settlement shopping.[1]

Responses to the call for comment were provided in tandem with reactions to the proposed amendments of Civil Rule 23 that were published for comment in August 2001. The most concerted responses were provided in major segments of the class-action conference sponsored by the Advisory Committee at the University of Chicago Law School in October 2001. Many additional responses were provided in the written comments and oral testimony at hearings in San Francisco (November 2001) and Washington, D.C. (January 2002). Although this process does not match any model of rigorous social-science research, it provided repeated evidence of actual experiences that must not be allowed to continue. This evidence is outlined in the

---

[1] The call for comment included three sets of possible rule amendments. The first set attempted to end the relitigation of the same class certification issues by providing that a federal court that refuses to certify a class because it does not meet the standards of Rule 23(a)(1) or (2) or 23(b)(1),(2), or (3) "may direct that no other court may certify a substantially similar class." The second set of proposals sought to reduce "settlement shopping," in which counsel may take the same settlement disapproved by one court into another court for approval. The proposal provided that "A refusal to approve a settlement . . . on behalf of a [certified] class . . . precludes any other court from approving substantially the same settlement." The third set of proposals addressed the potential clash between multiple, overlapping cases and provided that a federal court could "enter an order directed to any member of the . . . class that prohibits filing or pursuing a class action in any other court."

summaries of comments and testimony prepared for the Advisory Committee. The question is not whether something should be done, but what should be done and by whom.

One means of doing something about the problems created by overlapping class actions might be through new provisions in the Civil Rules. Some relatively modest provisions might fit comfortably within the authority of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 23, for example, might address the effect one federal court should give to the refusal by another federal court to certify a class action or to approve a class-action settlement. Modest provisions, however, would provide no more than modest benefits — there is no general feeling that federal courts have experienced particular difficulties in working through overlapping actions in different federal courts. The Judicial Panel on Multidistrict Litigation works well within the federal system to achieve coordination and consolidation. Provisions that might address overlapping class actions in state courts, on the other hand, are not likely to be seen as modest. Serious objections were made to the illustrative drafts in the informal call for comments. Both Enabling Act limits and Anti-Injunction Act limits were invoked. There may be room to adopt valid rules provisions in the face of these objections, but to do so might test the limits of rulemaking authority thus inviting litigation over the rules themselves.

In light of these constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question. There is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to consolidating overlapping class actions by bringing them into federal court. One approach, exemplified in several of the bills that have been before Congress, would establish minimal diversity jurisdiction in federal court for class

actions of a certain size or scope. This approach may embody some elements of discretion; several recent bills bring discretion into the very definition of jurisdiction in an attempt to maintain state-court authority over actions that involve primarily the interests of a single state. Another approach would be to rely on case-specific determinations whether a particular litigation pattern is better brought into federal-court control. This approach could be implemented by authorizing the Judicial Panel on Multidistrict Litigation to determine whether a particular set of litigations should be removed to federal court. The potential advantage of this approach would be that it could prove more flexible over time, enabling the federal court system to respond to actual problems as they arise and to stay on the sidelines when the problems are effectively resolved in the state courts. Yet another approach would be to authorize individual federal courts to coordinate federal litigation with overlapping state-court actions, by enjoining state-court actions, if necessary, when the state-court actions threaten to disrupt litigation filed under one of the present subject-matter jurisdiction statutes. While this approach may have the apparent advantage of leaving federal jurisdiction where it is, it also has the obvious disadvantage of potential conflict and tension between the court systems.

Careful study will suggest still other approaches. Many of the possible approaches are likely to provide the occasion for adapting present class-action procedures or developing new ones. The rules committees, acting through the Enabling Act process, can make important contributions. The nature of these contributions will depend on the nature of the underlying legislation; some forms of legislation may present such particular opportunities that supplemental rules-enabling authority should be included in the legislation.

Any proposal to add to federal subject-matter jurisdiction must be considered with great care. But the problems that persist with respect to overlapping and competing class actions are precisely the problems of multistate coordination that can claim high priority in allocating work to the federal courts. It is very difficult for any single state court to fairly resolve these problems, and nearly as difficult for state courts to act together in shifting ad hoc arrangements for cooperation. The apparent need is for a single, authoritative tribunal that can definitively resolve those problems that have eluded resolution and that affect litigation that is nationwide or multi-state in scope.

V. Minimal Diversity as a Possible Partial Solution

Having delved deeply into this topic, the Committee is in a position now to make the following findings and recommendations to the Standing Committee on the Rules of Practice and Procedure and the Committee on Federal-State Jurisdiction concerning the problems posed by overlapping class actions:

1. Beginning in 1991, the Advisory Committee on Civil Rules has undertaken a searching review of class action practice under Rule 23. This review has involved several conferences, close consultation with judges, members of the bar and bar organizations, publication for comment of several proposals, consideration of extensive testimony and comments on the published proposals, review of empirical studies, and creation of the Working Group on Mass Torts and adoption of its report;

2. On the basis of this extensive inquiry, the Advisory Committee finds that overlapping and duplicative class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat

appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage;

3. The Advisory Committee has given close consideration to several rule amendments that might address the problems of multi-state class actions but concludes that these proposals test the limits of the Committee's authority under the Rules Enabling Act;

4. Large nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes;

5. With respect to multi-state class actions, the Advisory Committee agrees with the recommendation of the Federal Courts Study Committee that Congress eliminate the complete diversity requirement in complex, multi-state cases to make consolidation possible;

6. Minimal diversity legislation could be crafted to bring cases of nationwide scope or effect into federal court without unduly burdening the federal courts or invading state control of in-state class actions;

7. Minimal diversity legislation could resolve or avoid some of the problems posed by conflicting and duplicative class actions;

8. The federal and state judicial systems, class members, other parties to the litigation, and conscientious class counsel will benefit from the efficient supervision of these multi-forum, multi-state class actions in one federal forum;

9. For these reasons the Advisory Committee on the Federal Rules of Civil Procedure respectfully recommends to the Standing Committee on the Rules of Practice and Procedure and to the Committee on Federal-State Jurisdiction that they support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.

Federal Class Actions Filed Against the Same Defendant

The overall number of class actions steadily increased by 55%, from 1,881 in 1998 to 2,916 in 2002. But the number of class actions commenced against the same defendants increased by 180%, from 549 in 1998 to 1,535 in 2002, significantly outpacing the increase in overall class actions commenced. The following chart shows the impact of cases filed against the same defendants on the overall number of class actions:

Class Actions Commenced in Federal Court

	1998	1999	2000	2001	2002
Overall Number of Class Actions	1,881	2,133	2,393	3,092	2,916
Filed Against Same Defendant	549	876	920	1,613	1,535
Excluding Actions Filed Against Same Defendant	1,332	1,257	1,473	1,479	1,381

The number of class-action filings in "mega-cases" can be dramatic. For instance, there were 286 class actions filed against Sulzer Orthopedics, Inc., and 88 against Bayer Corp. in 2002, 134 separate class actions against Sulzer in 2001, and 167 class actions against AC&S Inc. in 1999. The number of cases filed against the same defendant, however, usually ranges from about 5 to 20.

A similar, but more striking, pattern is evident regarding diversity-based class actions commenced in federal court during this same five-year period – the rate of filings against the same defendants tripled from 1998 to 2001, and jumped in 2002 to a figure more than sevenfold the number for 1998.

Diversity-Based Class Actions in Federal Court

	1998	1999	2000	2001	2002
Overall Number of Diversity-Based Class Actions	254	286	321	410	600
Filed Against Same Defendant	57	72	136	197	420
Excluding Actions Filed Against Same Defendant	197	214	185	213	180

These statistics were compiled from data listing defendants in class actions and dates of filing for 1998 through 2002 provided by the Statistics Division, Office of Human Resources and Statistics, Administrative Office of the United States Courts.