REPORTER'S CALL (PROFESSOR EDWARD H. COOPER) FOR INFORMAL COMMENT:

OVERLAPPING CLASS ACTIONS

Reporter's Call for Informal Comment: Overlapping Class Actions

September 2001

Introduction

Request

At the request of the Advisory Committee on the Federal Rules of Civil Procedure, I am circulating these materials to many persons and groups who are able to provide information about actual experience with multiple, conflicting, overlapping, and competing class actions. Practicing lawyers, judges, academics, and bar groups are included. The project will be most useful if responses are provided by large numbers of people who have different experiences and perspectives. The lists are not closed -- everyone who gets these materials is encouraged to share them with anyone else who may be willing to provide useful information.

This circulation and request for comment is separate from the current formal publication of several proposed amendments to Rule 23. These proposals have been published for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference as part of the statutory rule amendment process. These proposed amendments address primarily the timing of the certification decision, the provision of notice to class members, judicial review of settlement, and attorney appointment and compensation. The proposed rule amendments and the accompanying Committee Notes are available at www.uscourts.gov/rules.

By contrast, this informal circulation reflects the "work-in-progress" stage of Advisory Committee examination of possible rule-based approaches to the problems of duplicative or overlapping class actions. It may be that none of the rule-based approaches will merit eventual adoption. The issues are both complex and controversial. The difficulties begin with the question whether whatever problems exist in current practice are so severe and persisting as to warrant new rules in any form. If indeed there are problems that deserve new solutions, it remains to determine whether the solutions are better sought in court rules, in legislation, or in some integrated combination of statute and rules. Even if there is a strong case for acting to revise Rule 23 or to adopt some new Civil Rule, it must be decided whether the preferred rule revisions are within the reach of the rulemaking process.

This Introduction describes the background and purposes of this request for information and informal comment. The draft rules and statutes that follow are meant to provide a focus to the discussion, but not to discourage alternative proposals.

Responses should be addressed to Edward H. Cooper in care of Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, Washington, D.C. 20544, or via the Internet to <http://www.uscourts.gov/rules/submit>. To be fully useful, comments should be received by February 15, 2002.

Background

The Advisory Committee on the Federal Rules of Civil Procedure began to study Civil Rule 23 in 1991. A first set of proposed Rule 23 revisions was published for comment in 1996. The public comment on these proposals was extensive and enlightening. The testimony and written comments are included in the four-volume set of Committee Working Papers published in May 1997. The Committee, informed by this outpouring of advice, concluded that proposals to amend the standards and occasions for class certification were not ripe for adoption. Instead, Rule 23(f) was adopted in the expectation that improved opportunities for appellate review of class certification decisions would spur the process of common-law development. Early experience with Rule 23(f) suggests that the permissive appeal process is working as expected. Since then, the Committee has turned its attention to the processes of class-action administration; as noted above, several proposed Rule 23 amendments have been published for comment in the regular course of Rules Enabling Act procedure.

The Committee's work has been supported by the comments and testimony on the 1996 proposals. It has been further supported by the Federal Judicial Center's 1996 empirical study of federal class-action suits; the RAND Institute for Civil Justice's publication in 2000 of Class Action Dilemmas: Pursuing Public Goals for Private Gain, analyzing the results of detailed case studies and surveys of lawyers engaged in class-action litigation in state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts. The Committee also gained practical insight from a number of experienced class-action practitioners representing a variety of viewpoints.

The information and studies the Committee received raised concerns about duplicative class actions. The frequency of competing and overlapping parallel suits is high and appears to be rising. The trend is demonstrated in the RAND Institute for Civil Justice's study of ten class actions. In four of the ten cases, class counsel filed parallel cases in other courts. In five of the ten class actions, other groups of plaintiff attorneys filed competing actions in other jurisdictions. There were only two of the ten cases where neither type of additional filings occurred.

While competing federal class actions can be consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation (MDL), neither MDL consolidation nor similar intrastate consolidation provisions can address the problem of competing class actions in different states, or in both federal and state courts. All federal courts, moreover, are subject to the same rules concerning certification standards and to the guidance afforded by the opportunity for appellate review under Rule 23(f). These and other features of the federal courts diminish the opportunities and incentives for evading judicial supervision in one federal court by filing in another federal court. But consolidation is not available when multiple actions are simultaneously pending in both federal courts and state courts, and state-court actions can be framed in ways that defeat removal to federal courts.

The purpose of the class action is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find a forum, and achieve uniform results in similar cases.

Duplicative class litigation is destructive of just these goals: "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 Project*, 9. 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 proliferation of competing and overlapping class suits, pending simultaneously in federal and state courts, raises a number of issues. One concern is the potential of such filings to frustrate judicial scrutiny of certification motions, settlements, and fee requests as the means of regulating class-action practices. In the current system, class counsel and defendants who wish to evade careful scrutiny in one court have the ability to take their proposed class or proposed settlement to another court, where the standards may be less rigorous or the court may be more accommodating. Another concern is that competing — or even cooperating — groups of attorneys may file overlapping class actions to seek advantages through earlier class counsel appointments, different rulings on threshold motions, different discovery timetables and requirements, and the opportunity to seek compensation as the price of ending competing suits. Multiple filings offer the opportunity for the "reverse auction." Competition among putative class attorneys for control of the class action may come at the expense of the class. The process and the outcome can be unfair, not only to class members, but also to conscientious class counsel who may find their action pretermitted by a settlement negotiated by class counsel in another litigation. Present procedural mechanisms appear inadequate to provide effective relief or coordination.

Whatever the specific proposals may be, any attempt to regulate the relationships between federal courts and state courts must deal with important and sensitive issues of judicial federalism. Importance and sensitivity do not defeat reform. But it is imperative that careful attention be paid to the precise details of reform, and also to the choice between the means of reform — whether legislation or federal court rule. The first step of this careful process must be gathering as much information as possible about the nature and severity of the perceived problems. The Advisory Committee has been repeatedly advised that the nature of the phenomena being studied makes it impracticable to launch an empirical study that is both rigorous and comprehensive. That obstacle makes it all the more important to gather as much experiential information as possible. It can be said with confidence that a great many "routine" class actions are filed, and proceed to disposition, without any parallel litigation in other courts, state or federal. It also can be said with confidence that some cases quickly give rise to parallel class-action filings; the more spectacular illustrations may involve large numbers of filings. Equal confidence cannot be brought to the more important questions. How often do multiple filings occur? Are the same lawyers filing duplicative suits in multiple courts, or is the source of duplicative litigation more often from lawyers competing to direct the litigation? Is it possible to identify substantive areas or categories of cases that are particularly likely to generate multiple filings? What motives lead to multiple filings? What burdens do multiple filings impose on the courts and on litigants who face the need to respond to multiple filings? What are the results for class members — does the competition or other source of duplicative litigation lead to greater

protection of class-member interests, or do multiple overlapping class suits increase the overall costs, or the benefits to the lawyers, at the expense of class members? Is there any basis to determine whether the lead role is taken by courts best equipped by resources and experience, or whether instead the lead falls to courts least prepared to manage such litigation and thus most likely to let it slide through to expeditious closure? Can informal cooperation among federal and state courts sufficiently respond to the problems that multiple or duplicative class litigation generate? These and other questions need to be addressed as carefully and fully as possible.

Much of the material provided below sets out the most recent drafts considered by the Advisory Committee. These drafts provide a framework and focus for discussing rule-based approaches to addressing the problems. The proposals center around three topics. The first addresses repetitive litigation when certification is denied. Draft Rule 23(c)(1)(D) provides that a court that refuses to certify a class "may direct that no other court may certify a substantially similar class" unless there is a "difference of law or change of fact that creates a new certification issue." This proposal defers to state certification rules that may be more generous than Rule 23 while otherwise recognizing that a fully litigated decision on certification should not be "shopped" to other courts. There are three additional variations that would (1) include the denial of certification by any court as a new Rule 23(b)(3) "matter" pertinent to the federal court's certification decision; (2) attempt to achieve finality by entry of judgment under an analogy to Rule 54(b); and (3) address the court's direction to counsel for the putative class, rather than to other courts. The latter two proposals address both certification and settlement and are presented in a separate section following the settlement provisions.

The second area concerns the effect of settlement disapproval by a supervising court. Draft Rule 23(e)(5) on settlements would provide that a court's refusal to approve a settlement should bar others court from approving the same settlement. The proposal keeps parties from "shopping" a settlement that a court has rejected as inadequate or unfair, to the detriment of class members. Several variations are offered: (1) the previous disapproval of the same settlement by any other court is a factor weighing against, or may preclude, federal court approval; (2) the court may enter judgment under an analogy to Rule 54(b), (3) the order may be addressed to class counsel, precluding counsel from taking the settlement to another jurisdiction for approval.

Draft Rule 23(g) is a more general provision that would authorize the court to enter an order prohibiting class members from "filing or pursuing a class action in any other court that involves the class claims" with a possible exception, indicated by brackets, where the further action is purely an in-state class action "on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state." The issuance of an order under Rule 23(g) can only be made upon findings that other litigation will interfere with the court's management of the class action before it. The draft rule also provides that the federal court may coordinate with the state court or stay the federal action to avoid inefficiency and conflict.[1] An alternative draft of Rule 23(g)

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[1] While the Rule is drafted with diversity class actions in mind, Rule 23(g) could be employed to halt a state-court class action that might resolve federal law claims, even where the

is provided that would authorize a federal court to prohibit class members from pursuing even individual, non-class litigation in other actions. If this authority is granted, it surely must be exercised with great restraint. Vital needs may drive truly individual actions and the class itself may benefit from experience with a number of completed individual actions. But the authority may be important as a means of reaching the de facto equivalent of parallel class litigation, in which a single firm or a small group of lawyers amass hundreds or even thousands of individual clients whose claims are filed formally as individual or consolidated actions, yet are processed as if class actions but without the protective benefits of class-action procedure.

Other approaches also merit discussion. The Committee does not wish to restrict comments to the drafts that have been prepared. Any serious proposal, whether for rule amendment, legislative action, or some combination, deserves the Committee's attention.

These proposals may raise a question as to the scope of the Committee's authority under the Enabling Act and a further question as to consistency with the Anti-Injunction Act. Two memoranda have been prepared to address issues raised by both the Enabling Act and the Anti-Injunction Act. These memoranda spell out the reasons for concluding that the draft proposed rules are consistent with these statutes although some uncertainty remains. This uncertainty is itself important. The Enabling Act issues are a matter of particular importance. The distinction between matters of "practice and procedure" on one hand, and matters of "substance" on the other hand, is always uncertain, and is shaped by the question being addressed. The Advisory Committee and the Standing Committee, the Judicial Conference, and the Supreme Court itself should test these uncertainties only when there are important problems that are best addressed through the painstaking Enabling Act processes. That is why it is so important to gather as much information as possible about the nature of the problems presented today by overlapping class actions.

The drafts set out to focus comment are not endorsed by the Advisory Committee as proposals for eventual adoption. To the contrary, they represent one set of proposals that should stimulate discussion. Discussion must begin with the questions whether there are real-world problems that are not being addressed effectively through ongoing judicial responses or efforts to increase informal cooperation among federal and state courts managing duplicative class litigation. There is no point in pursuing solutions to problems that do not exist. Even if there are problems that deserve attention, they must be defined before solutions can be shaped. The shape of any desirable solutions will in turn guide the choice whether to act through court rules or whether to rely on legislative solutions. The Advisory Committee has taken no position on these questions. The greater the volume and variety of responses to this request, the better able the Committee will be to decide on a course of action.

— Edward H. Cooper, Reporter

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state court would not have jurisdiction to entertain the federal claims. See *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996).

I. Certification Finality

A. Draft Rule 23(c)(1)(D)

Rule 23

(c) Determiningation by Order Whether to Certify a Class Action ~~to Be Maintained Certified~~; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

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(D) A court that refuses to certify — or decertifies — a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue.

Discussion:

Proposed new Rule 23(c)(1)(D) is the first of the proposals designed to address, and ameliorate, some of the problems raised by competing, overlapping, and duplicative class litigation proceeding in different courts. This proposal seeks to end the relitigation of the same class-certification issues. The benefits of ending relitigation seem clear. Most immediately, the very process of litigating the issue can be prolonged and costly. As with other issues, one full and fair opportunity to litigate should suffice. In addition, certification of a class often affects pursuit of the claims in important ways. The cost of litigating against a class, and the risk of enormous consequences, may force settlement of disputes that would not be settled in other environments. The mere anticipation of certification may exert similar pressures; successive exposures to possible certification — and especially the prospect of multiple exposures to possible certification — may force surrender, perhaps even in the action that first seeks certification.

New Rule 23(c)(1)(D) provides that a court refusing to certify, or decertifying, a class "may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue." The proposed rule is limited to a refusal to certify a class on grounds other than those based on the failings of the would-be class representative. If a court refuses to certify a class because the proposed class does not satisfy Rule 23(a)(1) or (2), or 23(b), the proposed rule permits the court to direct that its order be binding on subsequent courts faced with a substantially similar class pursuing substantially similar claims, issues, or defenses. An exception is created if the later court determines that a difference of law or change of fact creates a new certification issue.

The provision that preclusion only attaches if the court denying certification so directs recognizes that the court may believe that the reasons for denying certification are not likely to apply in another action. The argument for certification may have been poorly presented, for example, or the action may turn on the law of another forum that is in a better position to decide on certification and to administer a class once certified. Preclusion is limited by expressly recognizing that a difference of law or change of fact may create a new certification issue. Ordinarily, the court asked to certify a class will determine whether the direction provided by an earlier court precludes certification. Thus, a state court considering a later application for class certification is free to conclude that its own class-action rule means something different from Federal Rule 23. A federal or state court considering a later application for class certification is free to conclude that the facts have changed so as to create a new certification issue.

It might be hoped that the judge-made doctrines of res judicata would develop to regulate successive attempts to win certification of the same class. Ordinary res judicata traditions, however, pose several obstacles. These obstacles, grounded in traditional individual litigation, may forestall judicial development of "common-law" certification finality. Moreover, much of the case law developed prior to the adoption of the interlocutory appeal provision in Rule 26(f). The rule-based development of res judicata recognizes that contemporary class-action litigation presents new challenges and conceptual needs.

A difficulty with preclusion may seem to arise from personal jurisdiction concepts. Whatever the reach of personal jurisdiction over absent class members following certification of a plaintiff class, it is difficult to articulate the grounds for asserting jurisdiction over persons who have no other contact with the forum that refuses to certify the putative class. The court found the lack of personal jurisdiction so apparent as to be resolved with only brief discussion in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 134 F.3d 133, 140-141 (3d Cir.1998). But an assertion of personal jurisdiction solely for the purpose of precluding repeated attempts to win certification of the same class after it has been once rejected, leaving class members free to pursue the merits of their claims in other ways — including differently defined class actions — is not untoward with respect to any person who has significant contacts with the United States. Preclusion, moreover, does not apply even to certification of the same class by a court in a state that applies different tests for certification.

B. Federal Courts shall defer; Draft Rule 23(b)(3)(E)

(b) Class Actions Maintainable

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

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(E) whether any other court has refused to certify a substantially similar class for reasons that continue to apply.

Discussion:

The policies that underlie Rule 23(c)(1)(D) apply as well when a federal court is asked to certify a class that a state court has refused to certify. A provision requiring deference to state court certification decisions could also be included as part of the certification decision. This could be part of Rule 23(b)(3)(B) or could be phrased as a new factor, Rule 23(b)(3)(E), which is the suggested approach above. The factor could be phrased in terms that would admit of less discretion.

Two additional approaches to successive certification litigation are addressed in III below.

II. Settlement Finality

A. Settlement Finality; Draft Rule 23(e)(5)

(e) Settlement, Voluntary Dismissal, ~~or~~ Compromise, and Withdrawal.

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(5) A refusal to approve a settlement, voluntary dismissal, or compromise on behalf of a class that has been certified precludes any other court from approving substantially the same settlement, voluntary dismissal, or compromise unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement.

Discussion:

Draft Rule 23(e)(5) seeks to reduce "settlement shopping." It establishes the preclusive effect of an order that refuses to approve a settlement, voluntary dismissal, or compromise on behalf of a certified class. Another court may not approve substantially the same settlement "unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement." Substantial sameness is shown by close similarity of terms and class definition; closely similar terms applied to a substantially different class, or to individual claims, do not fall within the rule.

The preclusion applies only when a class has been certified. Absent the protection of class interests that arises from the certification decision, the class should not be bound. The common practice of ordering "provisional" class certification for purposes of settlement review does not count as class certification for purposes of Rule 23(e)(5) if the settlement is not approved. A court that is not prepared to certify a litigation class may find that preclusion is denied because the inadequacy of a proposed settlement forces it to deny certification of a class for that settlement. Other courts, however, should remain reluctant to approve the rejected settlement without the showing of changed circumstances that would defeat preclusion under this rule.

The preclusion reflects the careful consideration that accompanies a decision to reject a proposed class settlement, as well as the court's continuing supervision of the class action after a settlement is disapproved. It would be inconsistent with that supervision to permit a competing action to compromise the class claims on the basis of the rejected settlement. The preclusion is not absolute, however. Another court can approve a settlement that is not "substantially the same," or can approve the same settlement if changed circumstances significantly alter the calculus of fairness. Preclusion is defeated when changed circumstances present new issues as to the reasonableness, fairness, and adequacy of a proposed settlement. Disapproval of a settlement may be followed by improved information about the facts, intervening changes of law, results in individual adjudications that undermine the class position, or other events that enhance the apparent fairness of a settlement that earlier seemed inadequate. Discretion to reconsider and approve should be recognized. A second court asked to consider a changed-circumstances argument should approach the settlement review responsibility much as it would approach a request that it reconsider its own earlier disapproval, demanding a strong showing to overcome the presumption that the earlier refusal to approve should be honored.

The proposal balances the deference that should be due a court's rejection of a class settlement with the respect due to the ability of other courts to reach a different result when changed circumstances warrant. The proposal plugs a procedural hole that, if left open, may continue to frustrate the effectiveness of judicial scrutiny over class action settlements.

It would be possible to take a more draconian approach, requiring that any subsequent settlement attempt be brought to the court that refused to approve the first attempt. It might be possible to overcome the conceptual obstacles and seek to regulate subsequent settlement attempts when rejection of the first attempt occurred without having certified a class.

B. Deference; Draft Rule 23(e)(1)(C)

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(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. But the court must not approve a settlement, voluntary dismissal, or compromise where another court has refused to approve substantially the same settlement, voluntary dismissal, or compromise unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement.

Discussion:

This provision parallels the proposal above on deference in the certification decision but is phrased in more mandatory terms. Another variation might require the court to state on the record why it is approving a settlement or compromise that another court has previously rejected.

III. Certification and Settlement Disapproval Finality by Entry of Judgment or Order Addressed to Counsel.

A. Rule 23( ) based on analogy to Rule 54(b)

Rule 23. Class Actions

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( ) The court may direct entry of a final judgment on an order that denies class certification, decertifies a class, or refuses to approve a settlement, voluntary dismissal, or compromise on behalf of a class. [A final judgment entered under this Rule 23( ) precludes any other court from certifying substantially the same class or approving substantially the same settlement, {but is not in itself a final decision for purposes of appeal under 28 U.S.C. § 1291}.]

Discussion:

The advantage of the Rule 54(b) analogy is that it invokes a familiar rule provision that establishes preclusion by judgment. The time to appeal a Rule 54(b) judgment begins to run when the judgment is entered. The judgment establishes preclusion from the time of entry, and under the familiar rule preclusion continues while an appeal is pending. It has been recognized in case law that one proper reason to enter a Rule 54(b) judgment is to achieve preclusion. Without the bracketed

provision in the second sentence, the proposal would appear unexceptionable under the Rules Enabling Act. See 28 U.S.C. § 2072(c) ("Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.").

This draft extends beyond the Rule 23(e) draft set out above because it is not limited to situations in which a class has been certified. As compared to the Rule 23(c)(1)(D) and 23(e) drafts, this draft is more open-textured, leaving more to be explained in a Committee Note. The Note would address the considerations that might lead a court to conclude that further pursuit of the proposed class certification or settlement should be precluded.

The bracketed sentence makes explicit the preclusion effects of the judgment. An alternative approach would be to delete this sentence, stating in the Committee Note that the purpose is to establish preclusion but that this result must be reached through the ordinary process of judicial development that has shaped most res judicata rules. Without the bracketed sentence, the named representatives would be bound by the entry of judgment, but it would take an extension of case law to bind putative class members to a denial of certification or refusal to approve a settlement prior to certification.

The major disadvantage of the Rule 54(b) approach is that it emphasizes the interplay of preclusion and appealability. A fairly high price might be paid if entry of a final judgment supported the right to appeal. The recent adoption of Rule 23(f) reflects a judgment that there should not be a right to appeal every order granting or denying class certification. The same is true as to refusal to approve a class settlement. Denial of an automatic right to appeal could be written into the rule, but this might detract from the preclusive value of the entry of judgment. Moreover, if appellate review is deferred, an important protection against improvident preclusion is also deferred.

Perhaps the Committee Note could emphasize that the certification decision should not routinely be reduced to judgment. If the litigation is of a scale or type that makes future certification litigation probable and if the court and parties have committed considerable time and resources in resolving the certification question, entry of judgment on the denial of certification may be appropriate despite the likelihood of appeal. It seems less likely that the parties would appeal the refusal to approve a settlement as opposed to addressing the district court's specific concerns through a process of redefinition of the proposed class or renegotiation of the proposed settlement terms.

B. Lawyer preclusion

Rule 23. Class Actions

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( ) An order that refuses to certify a class, decertifies a class, or refuses to approve a class-action settlement as to any conduct, transactions, or occurrences precludes any attorney who has directly or indirectly participated in the action from participating,

directly or indirectly, in any class-action or other representative proceeding in any other court that arises out of the same conduct, transactions, or occurrences.

Discussion:

The potential advantage of this draft is that it transfers the burden of preclusion from the class to the most directly engaged would-be class representatives, class counsel. Preclusion cannot be accomplished by addressing the representatives involved in the unsuccessful attempt at certification or settlement, since other representatives can readily be found to renew the quest. Preclusion cannot fairly be addressed to the class on certification questions, since the denial of certification may reflect inadequate representation by would-be class counsel. Similar doubts may be harbored as to settlement preclusion, although draft Rule 23(e)(5) proceeds in the belief that it is fair to preclude the class by a finding that a proposed settlement is not fair, reasonable, and adequate. Class counsel, on the other hand, may fairly be held to the consequences of their own first efforts. If they fail, the interests of class, courts, and class adversaries combine to suggest that any further pursuit of certification or settlement should be confined to the same action or should be taken up by other counsel. Disappointed class counsel should not be able to escape a first defeat by simply changing courts.

It seems necessary to reach indirect participation both in the first action and in later actions. Without this reach, it would be too easy for cooperating groups of lawyers to defeat preclusion by taking turns as identified counsel.

Some observers will believe that this draft goes straight to the heart of the incentives that account for multiple and competing filings. The draft also ties to the belief — likely to be shared by much the same set of observers — that some class actions are brought more for the benefit of class counsel than for the benefit of class members. It does not address the contrasting fear that duplicative class actions are filed by competing groups of lawyers seeking to control the litigation. It is difficult to predict how the balance of forces would play out. By ensuring that each affiliated group of lawyers is dependent on the first outcome that is brought about, this approach might simply increase tactical maneuvering as each rival group struggles to achieve favorable rulings in its own action to the exclusion of all others. On the other hand, to the extent that responsibility for multiple filings lies with the same lawyers or groups of cooperating lawyers, the result might be a significant diminution in overlapping filings.

This draft is framed as a regulation of class-action procedure, not as a regulation of the practice of law. It does not entail any of the consequences that attach to rules of professional responsibility. Nonetheless it is vulnerable to the protest that it would interfere with state regulation of attorney conduct by limiting the freedom of an attorney to represent a hoped-for class client in as many proceedings as may be required to persuade a court to create the client by class certification or to approve a bargained-for settlement on behalf of the class client. It also might be seen as an intrusion on the right of the class, through class representatives, to retain counsel of the class's own choice.

IV. Overlapping Classes: Revised Rule 23(g)

This third portion of the overlapping classes draft is the most general approach to the problem of multiple simultaneous class litigation. It reflects the "urgent need of procedural reform to meet the exigencies of the complex litigation problem," in particular the problems generated by uncoordinated, overlapping, duplicative class action lawsuits. American Law Institute, Complex Litigation Project at 9. Draft Rule 23(g) is presented in two alternatives. Each alternative gives limited preemptive control to a federal court that is asked to certify a class or that has certified a class, through orders addressed to members of the proposed or certified class, to protect the purposes of class litigation.

Subdivision (g) addresses the need to establish the authority of a federal class-action court to maintain the integrity of federal class-action procedure against the risk of competing class filings. It is always open to the court, under the existing rule, to decline to certify a federal class action because of pre-existing individual and class actions. But if the court does decide to certify a class action, then it must have the tools to protect the litigation and the class. Another court, for example, may certify a class and approve a settlement on terms that do not adequately protect the federal class's interests. Special occasions to protect the federal action may arise when a (b)(1) or (b)(2) class presents pressing needs to achieve uniformity of obligation and to ensure equality among class members. The mandatory (b)(1) class is established for the very purpose of protecting against the effects of competing litigation that may impose inconsistent liability or prevent effective protection of all class members' rights. Similarly, in (b)(2) classes the need to protect against inconsistent injunctive or declaratory relief is evident, particularly when reform of important social institutions is involved. In any class action, the distractions, burdens, and conflicting orders that may be imposed by parallel class proceedings can impede or even block effective preparation and ultimate disposition of the federal class action. Even with opt-out (b)(3) classes, the pressure of competing actions may prevent fulfillment of the purposes served by class certification, whether because of the reverse-auction effect or simply because of the costs and inefficiencies of multiplied litigation.

The competition between overlapping class actions may take forms that present particularly persuasive occasions for regulation. The most persuasive reasons demonstrated in published decisions arise when a proceeding in another court threatens to disrupt an imminent class-action settlement. The disruption may be direct, as when another court is asked to withdraw some class members from the certified class or to bar specific settlement terms. See, e.g., *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir.1993); *In re Corrugated Container Antitrust Litigation, Three J Farms, Inc. v. Plaintiffs' Steering Committee*, 659 F.2d 1332 (5th Cir.1981). The disruption also may be indirect, as when another court is asked to participate in a "reverse auction" through which alternative class representatives and counsel bargain with the class adversary for terms less favorable to the class but more beneficial to them. Even when there is no impending settlement to protect, overlapping class actions may be mutually stultifying, defeating the ability of any court to achieve the purposes of class litigation.

The proposal reconciles the competing interests of the parties and other courts that are involved in parallel litigation. The first alternative allows a federal court to regulate competing

litigation in any form, whether it be framed as a class action or otherwise. The Committee Note would emphasize the need to use this authority with great restraint with respect to individual actions. The second alternative leaves undisturbed individual, non-class action litigation in other courts; it is only addressed to other class litigation concerning the same class claims that are pending before the federal court, and even then only on a finding that the need to protect against interference with the court's ability to achieve the purposes of the class litigation is greater than the class member's need to pursue other litigation. Further, in recognition of the central role of the state courts in a federal system, the bracketed portion of the second alternative bars a federal court from issuing orders restraining a "state-wide" class action on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state.

Rule 23(g)(2) explicitly recognizes that the federal court may choose to stay its own proceedings to coordinate with proceedings in another court, and may defer the class certification decision as part of this coordination effort. The third paragraph expressly authorizes and thereby supports consultation with other courts as part of the process of determining what course to pursue.

As compared to certification preclusion and settlement preclusion, the range of alternative approaches is very broad. The models described below could be limited to situations in which a federal class has actually been certified. Deference to earlier-filed state court class actions could be built in. Moving outside Rule 23, legislation could move in many directions. Bills containing a "minimal diversity provision," that have been introduced through several sessions of Congress, would bring into federal court, through removal, most large multi-state class actions. Alternatively, legislation could be drafted to curtail the freedom of state courts to certify nationwide or multi-state classes. Still other approaches would bring state-court actions into the jurisdiction of the Judicial Panel on Multidistrict Litigation, perhaps changing the Panel structure to include state judges. An interstate compact might be drafted, or states could be encouraged to enact the Uniform Transfer of Litigation Act, perhaps supplemented to complementary federal legislation. The wealth of opportunities available only through legislation must be accounted for in determining whether to consider Rule 23 amendments, either alone or in conjunction with legislation. Here too, advice about possible alternatives will be at least as valuable as reactions to the specific models described below. The Advisory Committee can recommend a legislative approach to the Judicial Conference in lieu of rule amendments.

Alternative 1: Any Class-Member Action Regulated

* * * * *

(g) (1) Related Class Actions. When a member of a class sues or is sued as a representative party on behalf of all, the court may — before deciding whether to certify a class or after certifying a class — enter an order directed to any member of the proposed or certified class respecting [the conduct of] litigation in any other court [tribunal?] that involves the class claims, issues, or defenses. [The specific findings required in Alternative 2, identified as (1)(A), (B), and (C) could be added; (2) and (3) would be as below.]

Discussion:

[Alternative 1: Individual Actions Regulated] The power to regulate related litigation by class members should be exercised with care. Special occasions to protect the federal action may arise when a (b)(1) or (b)(2) class presents pressing needs to achieve uniformity of obligation and to ensure equality among class members. Special reasons to allow other litigation to proceed, on the other hand, may be equally pressing. A state court, for example, may be well on the way to determination of a class action that will resolve part or all of the dispute brought in federal court. Or individual class members may be parties to actions that are well advanced toward decision, or may have urgent needs for prompt relief that cannot be met in the framework of the federal class action. Pragmatic judgment is required, informed by careful appraisal of the actual challenges in managing the federal class action and full knowledge of the opportunities and dangers created by parallel litigation.

*[*Proceedings in nonjudicial tribunals may at times interfere with effective management of a federal class action in ways similar to proceedings in other courts. The federal court must be careful to honor the substantive right to arbitrate, but may in special circumstances order a stay of arbitration proceedings. Administrative proceedings may generate similar challenges.*]*

Alternative 2: Only Class Actions Restrained

* * * * *

(g) Related class actions.(1) When a person sues or is sued as a representative of a class, the court may — before deciding whether to certify a class or after certifying a class — enter an order directed to any member of the proposed or certified class that prohibits filing or pursuing a class action in any other court that involves the class claims, issues, or defenses [,but the court may not prohibit a class member from filing or pursuing a state-court action on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state]. In entering an order under this Rule 23(g)(1) the court must make findings that:

(A) the other litigation will interfere with the court's ability to achieve the purposes of the class litigation,
(B) the order is necessary to protect against interference by other litigation, and
(C) the need to protect against interference by other litigation is greater than the class member's need to pursue other litigation.

(2) In lieu of an order under Rule 23(g)(1), the court may stay its own proceedings to coordinate with proceedings in another court, and may defer the decision whether to certify a class notwithstanding Rule 23(c)(1)(A).

(3) The court may consult with other courts, state or federal, in determining whether to enter an order under Rule 23(g)(1) or (2).

Discussion

Effective regulation of a class action may be impeded by litigation in other courts that is not framed as a class action. The interference may approach the level that flows from a competing class action when large numbers of actions framed as individual actions are informally coordinated in ways that amount to effective aggregation. But there may be compelling reasons to persist with an individual action while a class action is pending. This alternative limits the federal court to control of other class actions. If the litigation in another court is framed as a representative action in which a party sues on behalf of others who have not individually authorized the representation, the litigation counts as a "class action" for purposes of Rule 23(g) no matter what label is attached by forum procedure.

The need to rationalize the relations between parallel class actions does not of itself dictate which court should become the leader. Any decision must take account not only of priority in filing and certification, but also of the progress of each action toward judgment, differences in class definitions that may support accommodations that make sense of parallel proceedings, comparative advantages in administering the underlying substantive law, and other factors that may be unique to the particular situation.

The power to direct orders to class members respecting the conduct of other class litigation is limited during the pre-certification stage to members of the proposed class. After certification, the power is limited to members of the certified class; a former member who has opted out of a Rule 23(b)(3) class is no longer subject to this power.

The power to regulate related class proceedings should be exercised with care. This need is emphasized by subdivision (g)(1)(B) and (C): the need to protect against interference by another class action must be greater than the interest in pursuing the other class action. There are many reasons, including many that are common rather than special, that may weigh in favor of permitting another class action to proceed.

Particular care must be taken when the court has not yet certified a class action. There may never be certification of a class that would be thwarted by parallel litigation. Even if a class is eventually certified, the definition of class membership and class claims, issues, or defenses may be different from the proposal advanced in the initial complaint. A member of a merely putative federal class, moreover, may have no connection to the court other than membership in the proposed class; the assertion of personal jurisdiction to regulate class litigation elsewhere may impose significant burdens on the right to seek relief from the order.

The sources of law involved in the class action and other actions also must be considered. There are powerful reasons for asserting federal control of claims that lie in exclusive federal subject-

matter jurisdiction. (*Cf. Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1996).*) The federal interest in closing off litigation of state-law claims in state courts, on the other hand, may often be slight. But even in state-law cases, a federal court may be concerned to protect against the consequences of pursuing claims arising out multistate events in many independent actions. There even may be reason to prefer a single federal action that, although bound by forum-state choice-of-law principles, advances the prospect of a coherent choice-of-law process. Mixed concerns arise in cases that involve both state and federal law.

The power recognized by subdivision (g)(1) may be limited by constraints of international comity and limits on personal jurisdiction when parallel litigation is pending in the courts of another country. Personal jurisdiction may be uncertain as to class members who are not citizens of the United States, and such class members raise as well the greatest concerns of comity.

[Alternative 2 Variation — statewide classes not regulated: The authority to restrain state-court class proceedings recognized by subdivision (g)(1) is limited by the exception for a class of persons who reside or were injured in the forum state and who assert claims that arise under the forum state's law. Failure to satisfy the condition that the claims be governed by the forum state's law ousts the exception, but does not mean that a federal court should discount the fact that a state-court class is limited to persons who reside or were injured in the forum state. There may be good reasons to defer to state resolution of such class claims, carving them out of a broader federal class, even when some issues are better governed by the laws of other states. The need to invoke the laws of other states is likely to arise when there are multiple defendants, and is particularly likely in resolving disputes among the defendants.*]*

Subdivision (g)(2) confirms the balancing weight of deference to other courts. The decision whether to certify a class is heavily influenced by the existence of parallel litigation involving class members. Particularly when there are numerous other actions, or when one or more aggregated actions embrace many potential class members, it may be better to put aside the ordinary Rule 23(c)(1)(A) direction that a class certification decision be made at an early practicable time. The question is not one of abstention, nor shirking the obligation to exercise established subject-matter jurisdiction. The problem is to define the best use to be made of federal class-action litigation in the particular setting. Class disposition is properly deferred — and ultimately denied — if better disposition is promised by proceedings in other federal courts or the courts of the states or another country. Deference instead may take the form of an ordinary determination that in light of other pending actions, certification of a federal class is inappropriate under the prerequisites of Rule 23(a) or the standards of Rule 23(b). Rule 23(g) is not needed for such rulings.

Subdivision (g)(3) confirms the propriety of a tactic that has often worked well. Judges confronted with parallel litigation have resorted to the most obvious and direct means of working out effective coordination by talking to each other. "[W]e see nothing wrong with members of the federal and state judiciary trying to coordinate where their cases overlap. Coordination among judges can only foster the just and efficient resolution of cases." *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 345 (3d Cir. 1998). There has been some uneasiness,

however, arising from the lack of any official authorization for communications that frequently are unofficial and ex parte. This rule authorizes this means of rationalizing overlapping and perhaps competitive litigation in two or more courts. When feasible, the cooperating judges should provide a means for the parties to be heard on the best means of coordination. Ordinary adversary procedures may not always be feasible, however, and the actual process of decision can properly be as confidential as the deliberations of any multi-member court.

V. Statutory Amendments

Questions of Enabling Act authority and Anti-Injunction Act restraints could be addressed by statutory amendments. The following three sketches illustrate some of the approaches that might be taken.

Enabling Act Alternative — 28 U.S.C. § 2072

* * * * *

(c) Such rules may define:

(1) when a ruling of a district court is final for the purposes of appeal under section 1291 of this title;

(2) when a [district court] ruling in an action in which persons sue or are sued as representatives of a class precludes consideration by any other court of the subject covered by the ruling; or

(3) when a district court may enjoin proceedings in a court of any State to protect the court's ability to consider certification and to proceed to judgment in an action in which persons sue or are sued as representatives of a class.

28 U.S.C. § 2283 Alternative

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or in aid of its ability to proceed effectively in an action in which persons sue or are sued as representatives of a class, or to protect or effectuate its judgments.

28 U.S.C. § 1738D Alternative

§ 1738D. An order by a court of the United States or a court of any State, Territory, or Possession of the United States refusing to certify, or to approve the proposed settlement of, a class action or similar representative action precludes any other such court from certifying a substantially similar class or representative action or from approving a

substantially similar settlement on behalf of a substantially similar class or similar represented group.

Discussion

Each of these alternatives is cast in simple terms. Simplicity seems desirable for the Enabling Act and Anti-Injunction Act amendments, but many alternative approaches could be expressed in equally simple terms. Greater detail seems desirable for a full-faith-and-credit approach, and in any event the first question is whether to undertake to prescribe rules that govern relationships among state courts as well as between federal and state courts.

In addition to these statutes, it would be possible to amend 28 U.S.C. § 1407 to establish a mechanism for consolidating actions filed in state courts with actions filed in — or removed to — federal courts.

State legislation also is possible. The Uniform Transfer of Litigation Act provides a model that could enable willing state courts to consolidate parallel actions. Similar provisions, or a more direct approach, could be embodied in an interstate compact. These alternatives would have the advantage of making it possible to utilize the resources of the many state courts in a flexible fashion, keeping in state courts proceedings that may now fall to the federal courts for want of any opportunity for control by a single state court.

VI. Enabling Act and Anti-Injunction Act Memoranda

The following memoranda were initially prepared to address a version of draft Rule 23(g) that is identified above as "Alternative 1." They were revised to address the version that is identified as "Alternative 2." The questions are the same as to either version. The more recent versions are set out here to avoid a proliferation of changes.

As will be seen, the arguments supporting the authority to adopt provisions like Rules 23(c)(1)(D), 23(e)(5), and 23(g) are worthy of confidence but they are by no means conclusive. The conclusions will depend in part on the degree of reticence brought to the interpretation of statutes that federal courts should approach with sensitivity and restraint, lest they seem to be overreaching with respect to their own powers. Even if the authority exists, moreover, it is better exercised only to address problems that occur with sufficient frequency and that have sufficient consequences to justify significant restraints on state-court autonomy. Restraint in the exercise of authority makes it all the more important to have extensive comment on actual events over the last few years, and thoughtful projections for the future.

MEMORANDUM

Enabling Act Authority For Addressing Overlapping Class Actions

Introduction

Draft Civil Rules 23(c)(1)(D), 23(e)(5), and 23(g) address the problems that arise when management of a federal class action is affected by parallel class actions growing out of the same basic dispute. The parallel actions may lie in state courts or other federal courts. Coordination of actions pending in federal courts has been substantially facilitated by pretrial consolidation under 28 U.S.C. § 1407. Coordination is more difficult when some of the related actions are pending in state courts.

The Ad Hoc Working Group on Mass Torts undertook a study of the problems that arise from overlapping actions concerning "mass torts." The Report provides an impressive picture of the situation in one area of practice, but recognized that practices may be different in litigation that grows out of different subject matters. Perhaps more importantly, it recognized that practice is continually evolving at a rapid pace. The exact state of present practice cannot be defined with precision. The lack of fully detailed information, however, does not defeat useful general description.

The simplest statement is that in some areas the effective management of federal class actions is seriously affected by overlapping, duplicating, and at times competing, class litigation. If the underlying dispute generates claims that support meaningful individual litigation, individual actions can present a problem. Individual claims may be pursued individually or in aggregations based on basic party joinder rules. The form of individual litigation may mask the underlying reality that in some settings a single law firm may represent hundreds or even thousands of clients and pursue their claims in ways that amount to large-scale aggregation. A time may come when a means is found to address these problems. The current proposals, however, aim only at parallel class actions. Whether or not individual actions are feasible, competing class actions also are brought. Competing class actions may generate incredible inefficiencies in discovery, although the potential problems often are reduced by the informal cooperation of pragmatic judges who understand the need to ameliorate the formal rules of jurisdiction and procedure. A greater concern is that competing class actions may devolve into competitions for judgment, whether or not abetted by one or more courts. The most particular concern is that this competition will lead to settlement on terms that do not effectively protect class interests.

One response to these concerns is reflected in various bills framing federal legislation to deal with class actions in state courts. Legislative approaches to these problems are welcome. Great care will be required, however, to avoid the temptation to legislate in terms that sweep too much into federal courts without adequate opportunity for case-specific adjustment of the relationships between federal and state courts. Some problems will be better addressed by state courts than by federal courts.

Rule 23 Drafts

The Rule 23 drafts embody approaches that focus on the particular problems that parallel class-action litigation poses for effective management of federal class actions. Rule 23(c)(1)(D) authorizes a judge to direct that a denial of class certification precludes another court from certifying a substantially similar class to pursue substantially similar claims, subject to several limits. This rule reduces the dilution of control that results when another court is asked to certify the same class. Rule 23(e)(5) addresses the problem that arises when rejection of an inadequate settlement is "shopped" by asking another court to approve substantially the same settlement for substantially the same class. Rule 23(g) seeks to preserve the ability to proceed in an orderly way to determine whether to certify a class and, if a class is certified, the ability to manage the class to achieve the goals of uniformity, fairness, and efficiency that underlie class-action procedure. The method adopted by Rule 23(g) is to recognize the power of the federal class-action court to control class actions brought on behalf of members of a potential or certified federal class in other tribunals. There is no automatic rule, nothing as severe as the "automatic bar" raised by initiation of bankruptcy proceedings. Instead, the court is to make case-specific determinations based on the actual needs and opportunities of its "own" class action in relation to other class proceedings. The outcome may be a stay of the federal action. And cooperation with the judges of other courts is directly encouraged.

The advantages of these draft rules are described in somewhat greater detail in the draft Committee Notes. This memorandum addresses the question whether the Rules Enabling Act, 28 U.S.C. § 2072, confers authority to adopt such rules. The question of authority reflects relationships between federal courts and state courts that must be considered with the utmost sensitivity even apart from issues of authority.

Enabling Act — General Supreme Court Interpretation

Section 2072(a) grants authority "to prescribe general rules of practice and procedure." Section 2072(b) limits this authority, requiring that "[s]uch rules shall not abridge, enlarge or modify any substantive right." There are additional limits. The power to make rules of practice and procedure is the power to make rules for the exercise of subject-matter jurisdiction established by statute, and "is not an authority to enlarge that jurisdiction * * *." *U.S. v. Sherwood*, 312 U.S. 584, 589-590 (1941). The statute, moreover, cannot delegate authority beyond the limits on Congress's authority to regulate federal procedure. Congressional regulation of federal judicial procedure originates in the Article III definition of judicial power and the Article I authority to establish federal courts, supplemented by the "necessary and proper" clause. See *Hanna v. Plumer*, 380 U.S. 460, 469-474 (1965). The implication of the *Hanna* opinion is that Congress meant to delegate all of its own power to the Supreme Court through the Enabling Act. This implication is confirmed in *Burlington No. R.R. v. Woods*, 480 U.S. 1, 5 (1987): A Federal Rule [Appellate Rule 38] that speaks to a question "must * * * be applied if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act."

The Rule 23 drafts present several issues along these dimensions. The most pressing issues arise from the Rule 23(g) authority to control the litigating behavior of class members outside the federal class-action court. One simple illustration can be used to frame the questions. Rule 23(g) would authorize a federal court to restrain members of a proposed or certified class from pursuing class litigation in another court on a claim involved in the class proceeding. It must be asked whether this authority is a rule of procedure; whether, although a rule of procedure, it abridges or modifies a "substantive right"; and whether it effects an impermissible expansion of federal subject-matter jurisdiction.

The questions whether a rule is indeed a rule of procedure and whether it impermissibly affects a substantive right may well collapse into a single question. The leading case is *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941). It is not possible to provide a definitive restatement of an opinion so prominent and so evocative. The setting is remembered by all lawyers. Sibbach, injured in an accident in Indiana, brought suit in a federal court in Illinois. The court ordered a physical examination under Civil Rule 35, and [mistakenly] imposed a contempt sanction under Civil Rule 37 for refusing to comply with the order. It was assumed that if the judicial act of ordering physical examination of a party is a matter of substantive law, the order would be authorized by the law of Indiana where the accident occurred. Sibbach thus conceded that Rule 35 is a rule of procedure, and argued only that Rule 35 nonetheless abridged or modified the right not to be subjected to a court-ordered examination. The Court — noting that Sibbach "admits, and, we think, correctly that Rules 35 and 37 are rules of procedure" — rhetorically translated this argument into an argument that the claimed right, although not "substantive," must be protected because "important" or "substantial." The Court rejected this test as one that would "invite endless litigation and confusion worse confounded. The test must be whether the rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted." The Court went on to reject the argument that Rule 35 effected "a major change of policy." The Enabling Act itself established a "new policy" — "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."

Academics are given to making light of the seemingly tautological statement that "the test must be whether the rule really regulates procedure." The Court indeed barely purported to apply that test, pointing out only that Sibbach had conceded, "we think[] correctly," that Rule 35 is procedural. But the full context of the opinion does more. It seems to say that § 2072 authorizes rules that affect substantial and important "rights" so long as the purpose is to serve the "speedy, fair and exact determination of the truth." This purpose may also be expressed in the terms of the Court's own Civil Rule 1, looking for "the just, speedy, and inexpensive determination of every action."

The most important elaboration of the *Sibbach* test was provided in *Hanna v. Plumer*, 380 U.S. at 472-474. The Court there stated:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carried with it congressional power to make rules governing the

> practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

The Court concluded in terms that seem to say that Congress used § 2072 to delegate all of its power to the Court:

> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

(Recall the more explicit statement quoted above from the *Burlington Northern* opinion: "Congress' rulemaking authority * * * has been bestowed on this Court by the Rules Enabling Act.")

Three more recent Supreme Court opinions address the reach of the Enabling Act in the context of Civil Rule 11 disputes. In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990), the Court referred to "the Rules Enabling Act's grant of authority [to] streamline the administration and procedure of the federal courts." In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551-554 (1991), the Court rejected dissenting arguments that a Rule 11 attorney-fee sanction violated the Enabling Act as a new rule on liability for attorney fees and as a federal law of malicious prosecution. Rule 11 is designed to deter baseless filings and curb abuses. The Enabling Act is not violated by the incidental effect on substantive rights. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-139 (1992), upheld imposition of Rule 11 sanctions for filings made in a case that eventually was held to fall outside federal subject-matter jurisdiction. The Constitution authorizes Congress to enact laws regulating the conduct of federal courts. The concern to maintain orderly procedure justifies the requirement that those who practice in federal court "conduct themselves in compliance with the applicable procedural rules" until there is a final determination whether there is subject-matter jurisdiction.

Semtek Internat. Inc. v. Lockheed Martin Corp., 2001 WL 182650 (Feb. 27), the Supreme Court's most recent opinion, provides little additional guidance, either in what it says or in the nature of the Enabling Act question it avoids. A federal diversity court in California invoked the California statute of limitations to dismiss an action "on the merits and with prejudice." The plaintiff then brought an action on the same claim in a Maryland state court, seeking the shelter of the longer Maryland limitations period. The state court concluded that the federal judgment precluded the action, applying federal law. The Supreme Court held that California claim-preclusion rules govern the effect of the federal judgment. In reaching that conclusion, it interpreted the Civil Rule 41(b) provision that a dismissal "operates as an adjudication upon the merits." Rule 41(b) is "ensconced in rules governing the internal procedures of the rendering court itself." "[I]t would be peculiar to find" that it governs the preclusion effect that other courts must give a federal judgment. At this point, the Court added the observation that Enabling Act questions would arise from an interpretation of Rule 41(b) that establishes an independent rule of claim preclusion. If a California court would

allow an action in another state following dismissal under the California statute of limitations, reading Rule 41(b) to preclude an action in a different state "would seem to violate" the direction that a Civil Rule may not abridge, enlarge, or modify a substantive right. This observation addresses a distinctive question. Federal diversity courts are bound to apply state limitations law to state-created claims, and to choose the law of the state that would be chosen by the forum state. If California courts would apply California limitations law only for the purpose of barring a remedy in a California state court, a federal court applies it only for the same purpose. An attempt to magnify the effect of the California statute through Rule 41(b), to serve no apparent federal procedural purpose or need, would indeed seem to violate § 2072(b). There is no useful analogy to proposed Rule 23(g). [The Court addressed a second Enabling Act question in a footnote. As interpreted, a Rule 41(b) dismissal with prejudice bars filing the same action in the same federal court. But an Enabling question would arise even then if a state court would dismiss only without prejudice to refiling the same action. The Court chose not to address this question either. The question is not likely to arise with a limitations dismissal. It could easily arise in other circumstances — one obvious illustration would be failure to satisfy a precondition to suit. In that setting dismissal should bar relitigation of the question whether the precondition must be satisfied, but should not bar relitigation after the precondition is satisfied. Again, the possible questions are far removed from proposed Rule 23(g).]

Enabling Act — Rule 23

There is little specific guidance to help interpret the scope of the Enabling Act in relation to Rule 23. It seems to be accepted that Rule 23 itself is generally within Enabling Act authority. Accepting that assumption carries a long way in examining provisions that help to make class actions more effective, fair, and efficient. A few scattered reflections are noted here, leaving the more detailed questions for the final section.

The Enabling Act was noted in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 629 (1997), to support the proposition that Rule 23 must be construed to honor the Enabling Act limit that a Civil Rule must not abridge substantive rights. It also was noted that since 1966, "class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one. * * * The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue." 521 U.S. at 617-618. This recognition of the purposes of class actions may provide some support for amendments designed to support better fulfillment of those purposes.

Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999), provides similar references to the Enabling Act. The limit that bars abridgment of substantive rights by Rule was said to "underscore[] the need for caution" in interpreting Rule 23. The Court noted the argument that the settlement, by compromising full individual recoveries, abrogated state law rights. The argument was seen to present "difficult choice-of-law and substantive state-law questions" that need not be resolved, apart from noting the tension between the settlement "and the rights of individual tort victims at law." This observation was followed immediately by suggesting that it is best to keep "limited fund practice

under Rule 23(b)(1)(B) close to the practice preceding its adoption, "[e]ven if we assume that some such tension is acceptable under the Rules Enabling Act." 119 S.Ct. at 2314. The Court went on to notice further implications for the Seventh Amendment right to jury trial and the due process right of each individual to have his own day in court. 119 S.Ct. 2314-2315. The jury trial concern focused on the nature of a mandatory settlement class, which by avoiding any trial necessarily avoids jury trial. The day-in-court concern, if pushed very far, would undermine any mandatory class, a result the Court clearly did not intend. These concerns nonetheless stand as a warning that enthusiasm for the advantages of class litigation must be tempered by recognition of the sacrifices it may entail. Finally, toward the close of the opinion the Court relied on the Enabling Act in a manner similar to the Amchem opinion — courts are bound to honor Rule 23 as adopted, and should seek to change it through the orderly processes of the Enabling Act rather than through de facto amendment by interpretation. 119 S.Ct. at 2322.

Two other Supreme Court cases may provide some tangential perspective. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-125 (1968), rejected the view that decisions before adoption of amended Civil Rule 19 in 1966 had established a federal "substantive law" of party joinder that could not be affected by Rule. Rule 19 takes account of substantive rights in the process of determining mandatory party joinder questions. So it may be understood that Rule 23 takes account of substantive rights — as indeed it must — in determining whether to certify a class. So too, the effects on substantive rights must be calculated in determining how to respond to the threats that other class litigation may pose to realization of the purposes of federal class-action litigation. The 1966 Rule 19 amendments, indeed, were deliberately coordinated with the 1966 Rule 23 amendments — Rule 23(b)(1) in many ways reflects the same concerns as Rule 19(a), written for situations better approached wholesale than retail.

The decision in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) dealt with the effects of a state class-action judgment, and had no occasion to deal with the Enabling Act. But the effect recognized for class-action procedure is so momentous as to deserve comment. The class representatives settled not only state-law claims but also federal securities law claims that fell into exclusive federal subject-matter jurisdiction. The Court ruled that the full faith and credit statute, 28 U.S.C. § 1738, compels a federal court to honor the preclusion effects of the settlement judgment as measured by state law. The class representatives had no real-world relationship whatever with most class members, and without certification of a class action could not have done anything to affect class members' rights. Recognition of their status as class representatives by a court that lacked any authority to adjudicate the federal claims, however, conferred on them authority to dispose of class members' rights by a private agreement later confirmed by the state court. This conclusion at least allows state courts to place a very — on some views an astonishingly — high value on the efficiencies of class-based adjudication.

Finally, an Enabling Act challenge to the very institution of class-action settlement has been summarily rejected in recent federal litigation. *In re: The Prudential Ins. Co. of America Sales Practices Litigation*, 962 F.Supp. 450, 561-562 (D.N.J.1997), affirmed 148 F.3d 283, 324 (3d Cir.1998). The argument that the settlement necessarily abridged or modified state-law rights was

transformed by the district court into the response that Rule 23(e) approval of a settlement "merely recognizes the parties' voluntary compromise of their rights." The court of appeals affirmed "for the reasons outlined by the district court."

Application to Draft Rules

The proposition that these authorities support Enabling Act authority to adopt the proposed Rule 23 amendments is easily stated, but difficult to evaluate with assurance. The testing example put at the outset remains sufficient: Can Rule 23 be framed, as proposed subdivision (g) would do, to authorize a federal court to support a proposed or certified class by directing class members to stay a competing class action?

The starting point is simple. Rule 23 is a rule of procedure, validly adopted under § 2072. The purpose of draft Rule 23(g) is to support the procedural goals of Rule 23. A federal court, if it certifies a class, is acting within the framework of a general procedural rule to create a legal construct — the class — that can fulfill the reasons for its creation only if protected against the intrusion of other class litigation. The reason for creating the class is to achieve, with as much efficiency as possible, a fair and uniform disposition with respect to all class members. Competing class litigation may make this task more difficult, and in some circumstances may thwart it completely. Fulfillment of the procedure, and effective implementation of the jurisdictional authority that supports resort to federal procedure, require that the class be protected in much the same way that a court is authorized to protect the res that supports in rem jurisdiction. (The analogy to in rem litigation is particularly persuasive with respect to a (b)(1)(B) class created to ensure equitable division of a limited fund.) When the effect of an order directed to a class member is to enjoin state-court class-action proceedings, the order is necessary in aid of the federal court's jurisdiction within the meaning of the anti-injunction act, 28 U.S.C. § 2283.

The procedural character and purpose of the draft rule bring it within the *Sibbach v. Wilson* test. The rule "really regulates procedure," and such effect as it has on substantive rights is legitimated by that character. It readily meets the elaboration of this test provided in the *Burlington Northern* opinion, where the Court repeated the *Hanna v. Plumer* understanding that a rule that falls in the uncertain area between substance and procedure is valid if it is arguably capable of classification as procedural. The Court went on to recognize that the purpose of developing "a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision [barring abridgement of a substantive right] if reasonably necessary to maintain the integrity of that system of rules." 480 U.S. at 5-6. Proposed Rule 23(g) is necessary to maintain the integrity of federal class-action procedure.

Similar considerations support the other Rule 23 proposals. If another court can certify a class that has been denied certification by a federal court, the authority to make a wise certification decision is undermined. The prospect that another court may certify the class may impel a federal court to grant a certification that otherwise would be withheld, believing that it is better to maintain control

of a dubious class than to stand by helpless while another court pursues the same class to judgment. Even more obviously, the federal court's effective power to reject a proposed class-action settlement as inadequate or unfair is held hostage to the prospect that the parties can simply shop the country for a court willing to bless the same settlement.

These arguments seem compelling so far as they address relationships among different federal courts. They have great force even as to relationships between federal courts and state courts. But the wisdom of adopting a rule that touches highly sensitive relationships between federal and state courts is not resolved by the conclusion — if it is accepted — that the rule is authorized by the Enabling Act. Decision must depend on the severity and persistence of the threats competing litigation poses to fulfillment of Rule 23's purposes. In judging these threats, it also is appropriate to take account of the proposed remedy. None of the draft rules would impose a rigid limit on state-court action, nor even a detailed and nuanced but prescribed regulation. Instead, federal-court discretion is recognized. A federal court acting under draft Rule 23(g) can allow state court class-action proceedings to continue, can stay its own proceedings, and may confer with state judges to achieve the best practicable accommodation. Draft Rule 23(c)(1)(D) establishes preclusion only on express direction of the court that denies certification, and even then is subject to stringent limits. Even the refusal to approve a proposed class settlement can be followed under draft Rule 23(e)(5) by another court's approval if warranted by changed circumstances.

Preliminary Notes: § 2283 - Rule 23

Effective pursuit of a class action may require that the class-action court be able to stay proceedings in competing class actions. As among federal courts, this need can be served by adding provisions to Civil Rule 23. As between a federal court and state courts, on the other hand, restrictions arise both from general concepts of comity and from the specific strictures of 28 U.S.C. § 2283. These Notes seek to frame the question, not to provide an exhaustively researched answer.

I. The Statutes

The general authority to issue an injunction is confirmed by 28 U.S.C. § 1651(a), the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This general authority is limited by § 2283 with respect to injunctions directed at proceedings in a state court: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It is common to say that the exceptions in § 2283 are read narrowly. That statement should not be taken at full face value. The possible bearing of the exceptions for injunctions authorized by Act of Congress or necessary in aid of a federal court's jurisdiction — and a more general limit on § 2283 — are explored below after a brief look at the general view of Rule 23 injunctions. There is no apparent reason to consider further the exception that allows an injunction to protect or effectuate a judgment. Res judicata injunctions are authorized after final judgment without any need to rely on special characteristics of class actions. The special needs of a class judgment may affect the exercise of injunction discretion, but do not seem necessary to support injunction authority.

II. Rule 23 Injunctions in General

The works that review use of injunctions to protect orderly disposition of a federal class action against encroachment by state litigation generally take a restrictive view of the effects of § 2283. A detailed statement of the proposition that an injunction is most likely to be available to protect an imminent opportunity to achieve settlement of the class action is provided in Marcus & Sherman, Complex Litigation 368-372 (3d ed. 1998). A markedly pessimistic view is taken in Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1798.1, p. 435: "[T]o date all the courts of appeals that have ruled on the applicability of the statute in the class action context have refused to authorize injunctions of coordinate state actions in order to protect the federal class action before them." A more optimistic view is taken, more as a matter of principle than as a matter of authority, in 17 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d, § 4425, pp. 531-533 & n. 11: "A good argument can be made that * * * it should be permissible for a federal court to enjoin state proceedings that would interfere with efficient disposition of a federal class action." And a decidedly encouraging view is urged in Weinstein, Note, Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions, 2000, 75 N.Y.U.L.Rev. 1085.

These views rest on the present form of Rule 23. They do not address the question whether Rule 23 can be cast in a form that provides greater support for invoking both the general § 1651 authority to issue injunctions necessary or appropriate in aid of the jurisdiction that supports a class action and also the specific § 2283 exception that permits an injunction necessary in aid of the federal court's jurisdiction.

III. In Aid of a Revised Rule 23 Jurisdiction

Civil Rule 23 can be framed to authorize injunctions that support orderly, efficient, and fair development of a class action. Draft Rule 23(g) does that. The question is whether express authority provided by a court rule can affect application of § 2283.

The § 2283 question is interdependent with the question of Enabling Act authority. If there is Enabling Act authority to add an antisuit injunction provision to Rule 23, it is because the provision is part of the very construct of a class action. The new rule provision helps to define what it is that a federal court is doing when it contemplates certification of a class and then when it certifies a class. If it is decided that the Enabling Act authorizes the provision, the first step has been taken toward integrating the provision with § 2283.

One of the next steps is easy. Section 2283 does not apply to an injunction against proceedings that have not yet been filed. E.g., *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). A Rule 23 antisuit injunction provision can authorize restraints that bar filing future actions, even if it can do nothing more. That authority may be useful in itself.

The remaining steps explore two exceptions: whether clarification of the class-action concept can support an antisuit injunction as necessary in aid of the underlying jurisdiction, and whether a Civil Rule 23 injunction counts as one expressly authorized by Act of Congress.

The in-aid-of-jurisdiction argument is straight-forward. In rather open-ended dictum, the Supreme Court has stated that this exception — along with the exception for protecting a federal judgment — allows federal relief where "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.Co. v. Brotherhood of Locomotive Engineers*, 298 U.S. 281, 295 (1970). Those words do not mean all that they might; in the ordinary setting of two parallel in personam actions, a federal court cannot simply say that a state proceeding is impairing its flexibility to decide the case and enjoin the state proceeding. Not even the prospect that victory by the state court in the race to judgment will preclude further federal proceedings will support an injunction. But these words suggest that there is room to build on the equally well-settled rule that a federal court that has in rem jurisdiction of property can enjoin a state proceeding that threatens to interfere with control of the property.

The in-rem analogy is most persuasive if a federal class is viewed as something akin to a thing in the jurisdiction of the federal court. This "entity" view of a federal class is developed in the

memorandum on Enabling Act authority. To the extent that Rule 23 revisions clarify the practical concept of a class that has evolved with the startling transformation of class-action practice since 1966, the very act of making rules amendments provides added support for the in-rem analogy.

Very slight added support may be found in *Battle v. Liberty National Life Ins. Co.*, 11th Cir.1989, 877 F.2d 877, 882. The circumstances do not permit much reliance on the court's use of in-rem concepts. The district court entered a class-action judgment in 1978, involving a class of about 1,000,000 burial insurance policyholders, and retained jurisdiction to implement the decree. In 1985 it enjoined state-court class actions that sought to win added relief on the theory that the federal judgment was not valid to bind class members. Affirming the injunction, the court of appeals relied in part on the rule that state proceedings may be enjoined to protect or effectuate a federal judgment. But it also relied on the rule that an injunction may be issued when necessary in aid of federal jurisdiction. Distinguishing the rule that parallel in personam proceedings are not to be enjoined, it said that "it makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered." This statement was immediately followed by quoting the district court's observations about the need to protect the federal settlement and judgment, but it does offer a sound description of the in-rem analogy. (In *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir.1993) the Eleventh Circuit repeated the Battle opinion's view "that a lengthy and complicated class action suit is the virtual equivalent of a res to be administered." The court affirmed an injunction that barred a state-court class action seeking to adopt a congressional redistricting plan different from the plan enforced by the final judgment and injunction earlier entered by the federal court. The in rem analogy is interesting, but does not play any significant role in the court's decision.)

Similar use of the in rem analogy can be found in other cases. *In re Baldwin-United Corp.*, 2d Cir.1985, 770 F.2d 328, 337, upheld an injunction against state proceedings. The injunction issued after the court had tentatively approved settlements in 18 of 26 class actions pending before it, and while settlement negotiations were continuing in the other 8. "The existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it." "[T]he need to enjoin conflicting state proceedings arises because the jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts.'" The class action proceeding was "so far advanced that it was the virtual equivalent of a res over which the district court required full control."

Rather greater support can be found in a case that moves beyond the in rem analogy to announce a general principle that a federal court can enjoin state proceedings that threaten the federal court's control of its own orderly procedure. Many of the things said in *Winkler v. Eli Lilly & Co.*, 7th Cir.1996, 101 F.3d 1196, 1201-1203, are clear and helpful. The district court had managed consolidated pretrial proceedings involving claims arising from the use of Prozac. The lead counsel appointed in the consolidated proceedings settled a Kentucky state-court action where he also was lead counsel. The settlement was reached shortly before submission to the jury, and the parties initially denied having reached any settlement. The state judge became suspicious and launched an inquiry that was barred by prohibition from the intermediate court of appeals. Meanwhile lead

counsel withdrew from the federal proceedings. After most of the consolidated actions were remanded, plaintiffs who had been involved in the federal consolidation sought discovery in various state courts of the settlement arrangements in the Kentucky action. The federal court enjoined the discovery. In the end the injunction was reversed because the federal court had not inquired into the nature of the settlement agreement — without learning at least in camera about the nature of the settlement, there was no basis for the injunction. But the court said in clear terms — characterized as a holding — that § 2283 did not prohibit the injunction. "[T]he question is whether a federal court has the authority to issue an injunction to protect the integrity of a discovery order." In rem jurisdiction is not necessary to support an injunction as one necessary in aid of federal jurisdiction. The in-aid-of-jurisdiction principle has been "extended * * * to consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." More generally, the court approved a suggestion by Professor Redish that a federal court should have power to enjoin a concurrent state proceeding that might render nugatory the exercise of federal jurisdiction. Indeed, the policies of federalism and comity embodied in § 2283 "include a strong and long-established policy against forum-shopping." Section 1407, by authorizing pretrial consolidation, creates a policy of control that is intended to prevent predatory discovery and "to conserve judicial resources by avoiding duplicative rulings." There is more in this vein; the summary statement is this:

> [W]e hold that the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings, including pre-trial rulings like discovery orders, as long as the injunctions are narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly.

This principle can be transferred readily to the class-action setting. If anything, the purpose of class-action procedure provides greater support because it is broader than the limited purposes of a § 1407 consolidation, which gathers in only cases from federal courts.

One potential limit of the in-aid-of-jurisdiction theory deserves note. *Amalgamated Clothing Workers v. Richman Brothers*, 1955, 348 U.S. 511, ruled that this exception does not authorize a federal court to enjoin state-court proceedings that arguably are preempted by exclusive NLRB authority. Even if the state-court injunction against labor activities was preempted by federal protection of those activities, a federal court does not have "jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided." 348 U.S. at 519. This ruling has been extended by most lower federal courts to mean that a federal court cannot enjoin a state-court proceeding simply because the dispute lies in exclusive federal judicial jurisdiction. 17 Federal Practice & Procedure, Jurisdiction 2d § 4425, pp. 538-539. It might be urged that denial of authority to protect exclusive federal subject-matter jurisdiction entails denial of the less necessary authority to protect effective federal procedure in cases of concurrent jurisdiction. Protection of effective federal procedure, however, is not a matter of less necessity. To the contrary, protection of exclusive jurisdiction is little different from protection of concurrent jurisdiction. Parallel in personam actions among private parties can proceed; if necessary, exclusive

federal authority might be protected by denying preclusive effect to a state judgment, although that conclusion may well be denied. State proceedings that interfere with the federal court's ability to manage its own proceedings, on the other hand, can be enjoined. The cases described above — and here, most particularly, the several cases recognizing antisuit injunction authority to protect imminent settlement of a concurrent-jurisdiction federal class action — show as much.

In combination, then, the in-aid-of-jurisdiction injunction power recognized by § 1651 and the parallel exception in § 2283 provide some support for the Rule 23(g) proposal that would expressly authorize litigation-controlling orders directed at members of a prospective or certified federal class.

IV. Expressly Authorized by Act of Congress

The § 2283 exception that permits an injunction "expressly authorized by Act of Congress" is not quite as precise as it may seem. The leading illustration may be *Mitchum v. Foster*, 1972, 407 U.S. 225, 237-238. The Court ruled that 42 U.S.C. § 1983 is an Act of Congress that expressly authorizes injunctions against state proceedings. Section 1983 does this by providing "an action at law, suit in equity, or other proper proceeding for redress." That language does not match any obvious standard of express authorization. But the Court announced that "[t]he test * * * is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." Section 1983 embodies the policy that federal courts should protect federal rights against intrusion by any branch of state government, including state courts.

Proposed Rule 23(g) surely meets the "expressly authorized" part of the § 2283 exception. The question remains whether it qualifies as authorized by an "Act of Congress."

Some slight guidance might be found in the opinion in *Piambino v. Bailey*, 5th Cir.1980, 610 F.2d 1306, 1331. Reversing an injunction against distributing funds from an escrow fund established by a California judgment, the court said that the general provisions of Rule 23(d) do not establish the exception. The test of the Mitchum decision is not met: "Rule 23(d) is a rule of procedure and it creates neither a right nor a remedy enforceable in a federal court of equity." It would indeed be surprising to find express authorization in the general terms of Rule 23(d).

The more difficult question addressed by this brief statement is whether a Civil Rule can ever qualify as expressly authorized by Act of Congress. This is the point at which the question of Enabling Act authority returns. In some ways the question may seem almost circular. The Enabling Act is an Act of Congress. It provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." A Civil Rule provision that legitimately implements Enabling Act authority may seem to fit. It is the Enabling Act that expressly authorizes the rule that expressly authorizes stays and like orders addressed to members of a federal class. The supersession provision simply underscores the status of Enabling Act rules as the equivalent of Acts of Congress. In some sense, a rule becomes as if part of the Enabling Act itself.

Of course the reliance on the Enabling Act simply returns the question to Enabling Act authority. There is no logical way out of the circle. If the Enabling Act authorizes Civil Rule provisions that authorize antisuit "injunctions," then the § 2283 exception should be read to apply. But the broader anti-injunction policy of § 2283, drawn from deeply rooted concepts of comity and federalism, must be considered in determining whether proposed Rule 23(g) really is a rule of practice and procedure, and really does not impermissibly abridge, enlarge or modify any substantive right.

V Supersession

Rather than the terms of § 2283, reliance may be placed on the Enabling Act's supersession provision: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This approach again depends on the initial conclusion that proposed Rule 23(g) regulates procedure and does not abridge, enlarge, or modify any substantive right. It also depends on the conclusion that the rule does not impermissibly enlarge federal-court jurisdiction.

The tie between Enabling Act validity and supersession is apparent. An invalid rule does not supersede a valid statute. Little elaboration is required. Some help may be found, however, in *Henderson v. U.S.*, 1996, 517 U.S. 654. The Suits in Admiralty Act, enacted in 1920, waives sovereign immunity and requires that the plaintiff "forthwith" serve process on the United States Attorney. At the time of the Henderson litigation, Civil Rule 4(j), enacted by Congress in terms different from those recommended by the Supreme Court, allowed 120 days for service and further provided for additional time by court order. With authority from a court order, Henderson made service 148 days after filing. The Court concluded readily that "forthwith" embraces a period "far shorter than 120 days," much less 148 days. Rule 4(j), however, was held to supersede the statute. Initially, the Court ruled that the time for service was not so much a condition of the immunity waiver as to limit subject-matter jurisdiction, or as to be "substantive." Then it asked whether the "forthwith" requirement "is * * * a rule of procedure superseded by Rule 4." The Court observed that it was among other provisions that "have a distinctly facilitative, 'procedural' cast. They deal with case processing, not substantive rights or consent to suit." Rule 4 likewise is "a nonjurisdictional rule governing 'practice and procedure' in federal cases * * *." The conflict between a statutory rule of procedure and a Civil Rule was then readily resolved — Rule 4 supersedes the earlier and inconsistent statute. (There is a modest ambiguity in the opinion. The Court addressed as a "preliminary issue" the question whether supersession is affected by the fact that Rule 4(j) "was enacted into law by Congress as part of the Federal Rules of Civil Procedure Amendments Act of 1982." This issue was resolved by accepting the acknowledgment of the United States that "a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes." The Court then quoted the United States brief statement that § 2072 provides the best evidence of congressional intent regarding the interaction of Rule 4(j) with other laws. 517 U.S. at 668-669. Later, however, the Court referred to § 2072(b) as the source of supersession. 517 U.S. at 670. It is proper to read the opinion to invoke § 2072(b), not the more general rule that a later statute supersedes an earlier statute.)

The "jurisdiction" question in some ways seems easy. There is substantial authority that § 2283 does not limit subject-matter jurisdiction, but operates only to limit the injunction remedy.

See 17 Federal Practice & Procedure 2d, § 4422, p. 514. To that extent, a rule that qualifies a remedial limit does not expand jurisdiction. And there is little force to the possible argument that federal jurisdiction is enlarged by an injunction that, by ousting state-court jurisdiction, effectively transforms a statutory grant of concurrent federal jurisdiction into an unauthorized assertion of exclusive federal jurisdiction. The injunction is simply an exercise of established jurisdiction, such as occurs in any other situation where an antisuit injunction is proper because a § 2283 exception applies or because § 2283 itself does not apply.

The supersession approach may not be as simple as these arguments make it seem. The federalism policies that have become embodied in the lore and practice of § 2283 are important, whether or not they are in some meaningful sense "jurisdictional." Even accepting the important procedural goals that are advanced by authorizing a federal court to establish control of a class action by controlling state-court class-action litigation by class members, a clash of values remains. The anti-injunction policies must be weighed in measuring the validity of proposed Rule 23(g) as a rule of practice and procedure, in the same way that jurisdictional concerns are weighed despite the failure of § 2072(b) to say anything about abridging, enlarging, or modifying federal jurisdiction. The arguments that Rule 23(g) is valid are powerful and should prevail. But use of the Enabling Act to supersede § 2283 may seem over-reaching to some. For that reason, it is wise to rely as well on the exceptions stated in § 2283. The in-aid-of-jurisdiction exception is clearly independent of supersession concerns. Reliance on the "Act-of-Congress" exception, on the other hand, is interdependent with the supersession approach. If a valid injunction rule is expressly authorized by Act of Congress, it prevails both because of the §1.