Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23

Volume One

Leonidas Ralph Mecham, Director
Administrative Office of the United States Courts

May 1, 1997

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Compiled by the
Rules Committee Support Office

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Working Papers
Advisory Committee on Rules of Civil Procedure
Proposed Amendments to Civil Rule 23

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PREFACE

At the request of the Judicial Conference in 1990, the Advisory Committee on Civil Rules began an in-depth study of class action procedures. In August 1996, the advisory committee on the approval of the Judicial Conference's Committee on Rules of Practice and Procedure published proposed amendments to Civil Rule 23 for public comment. The *Working Papers of the Judicial Conference's Advisory Committee on Civil Rules on the Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure* (Working Papers) are a compilation of the information on class actions considered by the advisory committee leading up to the proposed rule amendments and the reaction to the rule amendments from the public.

The Working Papers are set out in four volumes. Volume One contains the background information of the advisory committee's consideration of class action procedures. In addition to earlier draft versions of proposed Rule 23 amendments and relevant excerpts from the minutes of committee meetings, Volume One contains an empirical study on class actions by the Federal Judicial Center. A summary of the public input, which was prepared by Professor Edward H. Cooper, reporter to the advisory committee, is also included. Appendix A in Volume One lists chronologically all organizations and individuals commenting or testifying on the proposed amendments to Rule 23 and the corresponding volume and page references to Volumes Two, Three, and Four.

Volume Two contains written comments. The advisory committee received comments on the proposed Rule 23 amendments before the amendments were published for formal comment. These comments are also included in this volume.

Volume Three consists of the testimony provided at three public hearings held in Philadelphia, Dallas, and San Francisco on the proposed rule amendments.

Volume Four contains witnesses' statements on the proposed rule amendments. Every witness who requested to testify at one of the three public hearings was asked to submit a written statement before the hearing. In several instances, an individual may have submitted a written comment and later a written statement.

The Working Papers were compiled to assist the advisory committee in its further consideration of the proposed amendments to Rule 23. It also serves as a convenient public record to better understand the advisory committee's thinking on improving class action procedures. The Introduction on the next page explains the present status of the advisory committee's work on the proposed amendments.

The Judicial Conference Standing Committee on Rules of Practice and Procedure has not approved the proposed Rule 23 amendments, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

May 1, 1997

Memorandum to Members of the Standing Committee and
Civil Rules Advisory Committee
and
Introduction to Advisory Committee's Working Papers
Collected in Connection With Proposed Changes
to Fed. R. Civ. P. 23 (Class Actions)
by
Paul V. Niemeyer, Chairman
Civil Rules Advisory Committee

While our consideration of changes to Rule 23 (Class Actions) has been protracted, I believe that such care is justified by the importance of the issues. I sense, however, that we may not be finished; rather we find ourselves at a crossroad.

Our inquiry began with the concerns raised several years ago about whether Rule 23 adequately addressed mass torts. Mass tort class actions, because of their basis in state law, their interstate character, and their sheer size -- often involving persons in differing stages of exposure to or injury from a product or condition -- were being handled at or beyond the limits of Rule 23 authority. And settlement of such claims sometimes sought to go well beyond what would have been allowed under Rule 23 were the cases to have been tried.

To understand the full scope and depth of the problems, the Advisory Committee, under the leadership of Judge Patrick Higginbotham, sponsored or participated in a series of conferences at the University of Pennsylvania, New York University, Southern Methodist University, and University of Alabama, as well as regularly scheduled meetings elsewhere. During these conferences and meetings, we heard from experienced practitioners, judges, and academics. We learned that many of the problems called for solutions falling well beyond the scope of rulemaking authority. We did, however, consider a broad array of procedural changes, including ideas to collapse (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, to define the fiduciary responsibility of class representatives and counsel, and to regulate attorneys fees. In the end, with the intent of stepping cautiously, we opted for what we believed were five modest changes which we published for comment in August 1996.

During the six-month commentary period that followed, we received hundreds of pages of written commentary and testimony from about 90 witnesses at hearings in Philadelphia, Dallas, and San Francisco. Comments and testimony were received from the entire spectrum of experienced users of Rule 23 -- plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and even persons who had been class members. The Committee was impressed both by the breadth and depth of the comments and, I feel confident in concluding, many Committee members became better informed of the difficult and unresolved policy decisions that underlie current application of Rule 23.

Our reporter, Professor Edward Cooper, has made the substantial effort of summarizing the comments, and his summary is included with our working papers generated during the comment period. I commend his summary to you in preparation for our May 1, 1997, meeting in Naples, Florida.

As most of you probably agree, the principal thrust of the testimony and commentary to our proposed changes related to the "just ain't worth it" factor (Rule 23(b)(3)(F)) and the settlement class provision (Rule 23(b)(4)). Speaking for myself, I believe that each of those provisions needs further discussion and perhaps further modification. I am also convinced that we have to look more closely at our Committee Notes to assure ourselves that they do not undermine the intent of the proposed changes. As for the testimony and commentary relating to the other proposed changes, we should review them also, but I do not believe that they generated as much pressure for further modification.

While I am now convinced that our changes would have some unanticipated effects, I was particularly struck by the testimony that suggested that Rule 23 itself is at the core of a profound and significant change that is now occurring in civil litigation. As the phenomenon of the 1990's, there appears to be an impending shift from individualized litigation to representational litigation. Even though common sense suggests that the aggregated resolution of torts and other claims resulting from the repetitious effects inherent in a mechanized age would be on the increase, the testimony reveals an increase in the last two to three years beyond our reasonable expectations. One witness stated that his company's exposure to class actions has increased 300% in the last three years; another stated 400-500% in the last two years; another, 500-1000% in the last three years; and yet another 300-400% in the last three years. One financial institution's counsel stated that his company was involved in 65 class actions in 1996 alone.

Intentionally or not, we may be coming to rely on civil litigation not only for individualized dispute resolution, but also, through the class action device, to bring about changes in the safety of products, in the disclosure requirements of securities laws, in disclosures connected with banking and insurance billing methods, and in the method for compensating broad segments of society affected by singular torts. Indeed, in a few instances, Congress has passed legislation relying on class action procedures. As attorneys systematically turn to the use of class action litigation to resolve simultaneously thousands and occasionally millions of claims and potential claims, the Third Branch is being bombarded with litigation of a type not anticipated when Rule 23 in its current form was passed.

We have received persuasive testimony from those involved in 1966, when the class action rule in its present form was adopted, that no such class action use was on the minds of the Civil Rules Advisory Committee members. The changes then enacted to Rule 23 were aimed at the rising civil rights litigation and other aggregation of damage claims, but as the comments then observed, they were never aimed at mass torts.

John Frank, who was a member of the Committee in 1966, relates the background against which Rule 23(b)(3) was enacted. He states:

> This is a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law was still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but, as will be shown, they were expected to be too big for the new rule.

Professor Arthur Miller, who was also a member of the Committee at that time, recalls similarly. He testified:

> Nothing was in the Committee's mind. . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of implication that it now has.

About the current far-reaching application of Rule 23, Professor Miller added:

> But you can't blame the rule, because we have had the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction, now codified in the supplemental jurisdiction statute.
>
> It's a new world. It's a new world that imposes on this Committee problems of enormous delicacy. And you're shooting at a moving target.

Lawyers representing plaintiff classes and in a few instances class members themselves testified about the current importance of being able to correct fraudulent and obviously wrongful conduct in the circumstances where individualized litigation could not be financially justified. We were told of classes so large that claims, if litigated individually, would protract years into the future, risking no recovery from tortious conduct. We were told how attorneys, with the incentive of collective fees, were able to uncover devious conduct. Some characterized the rule's purpose as furthering social policy by effecting disgorgement of illegally obtained gains. In response to repeated Committee questions about the appropriate role of private class action litigation, we heard opinions that the concept of private attorneys general is now well accepted under Rule 23 and that in a few recent enactments, Congress seems to have accepted the notion also. The testimony in support of these positions manifested a growing bar of consumer advocates and mass tort lawyers who find it profitable to resolve the mass disputes of a highly mechanized society only through the aggregation of claims -- mostly under Rule 23, but not exclusively.

From the defendants in these actions, we heard some of the same stories about the use of class actions, but also stories of abuse and extortive pressure exerted through the sheer mass of aggregated claims. Pervasive testimony pointed to an increasing use of the risks attending class

action litigation as a mechanism to settle in circumstances where the defendants would not otherwise have settled. One witness testified that the class action device is "extraordinarily inefficient and unwise method for penalizing the defendant." These witnesses for class action defendants argued that the class action rule has a substantive effect independent of underlying claims and that it is being abused when used for any purpose beyond affording a procedural mechanism to aggregate claims for judicial efficiency.

The paradigmatic case, from the viewpoint of both plaintiffs' and defendants' lawyers, seems to have been represented by the Sandeo case settled in Texas. The defendants in that case improperly rounded insurance premium charges upward to the nearest dollar, thereby overcharging policyholders several dollars a year. The charges in the aggregate amounted to tens of millions of dollars. Attorneys representing the plaintiffs' class settled the case, obtaining for each class member a $5.50 refund. The attorneys received in excess of $10 million in fees.

Testifying plaintiffs' lawyers argued that the Texas litigation served an important social goal in disciplining the overcharging insurance companies, in forcing disgorgement of all ill-gotten gains, and in enjoining future misconduct. The defendants' lawyers argued that the case was instituted for the benefit of the attorneys and not the litigants and that the litigants could hardly have cared to receive $5.50 each, particularly when most had to send a request for the refund. They argued that such an action would better have been litigated before the Texas Insurance Commissioner who would have the power to order a refund to the insureds.

The unresolved question raised by the differing perceptions of the Sandeo case and by similar testimony and commentary about other cases is whether the class action rule is intended to be solely a procedural tool to aggregate claims for judicial efficiency or whether it is intended to serve more substantively as a social tool to enforce laws through attorneys acting de facto as private attorneys general. If the rule is to serve only as a tool for the aggregation of claims, then its purpose is clearly undermined by policies that class members are presumed to be litigants unless they opt-out. If the rule is to serve as a tool of social policy, however, the size and membership of the class become irrelevant except as to the amount of pressure that can be exerted to enforce a statute or correct a wrong. This fundamental question has not, to my knowledge, ever been expressly addressed by the Committee, and with the increased efficiency and use of class actions, it may be ripe now. That policy issue is most directly implicated by the provision for notice in 23(b)(3) actions.

Rule 23(b)(3) provides for class actions aggregating damage claims of representative members who usually have not taken any initiative to file suit. Often the class members may not even have known that they had a claim. In response to a class action notice authorized for Rule 23(b)(3) actions, these persons will become members of the class unless they opt-out. The presumption underlying the rule, thus, is that the person defined in a class is a litigant because the default position for no response to a notice is that he remains a member of the class. The effect of this presumption is enhanced by the inability of most people to understand and appreciate the complexity of class action notices and by the well-recognized inertia against taking steps to opt-out.

One witness analogized the notices sent in class actions to prospectuses filed with the SEC, observing that even the SEC is trying to make prospectuses easier to read. Another class action lawyer stated,

> Notices that come out are really sort of absurd. As a lawyer, I receive these notices at my home about class actions that I am supposedly a member of, and I have trouble figuring out what it's all about. It takes me two hours, three hours.

As class action litigation becomes more efficient and pervasive, we can expect a trend toward the situation where every member of society is a litigant represented by some representative seeking to redress the claims of all class members. In the extreme, every member of society would become a litigant -- a circumstance that our judicial system was not designed to handle.

The question is, accordingly: Should the notice rule for 23(b)(3) class actions presume that all class members are litigants unless they opt-out or should it require class members to opt-in if they wish to be litigants? If we were to reverse the default position of class membership to require members of the class to indicate that they wish to become litigants, then, based on all the testimony we received, class membership would be significantly smaller. One experienced plaintiffs' class action lawyer testified against such an idea: "I am going to have a hard time convincing people to step forward even to make claims, let alone to step forward to be a `participant' in the litigation." One professor testified that there would be an enormous swing in the number of class members "depending on which way you cast the default rule." And another professor stated that the "very powerful social instrument of a class action would not be as effective. . . . [T]he incentive structure isn't there" without the opt-out provision.

If the prophecy that we must move from individualized litigation to litigation of aggregated claims is fulfilled, then it behooves us to address these difficult fundamental questions about the appropriate purpose of class actions.

If you did not hear or have not read all of the testimony given by the witnesses, I urge you do so in preparation for the May 1 meeting in Naples, Florida. I also suggest that you review Ed Cooper's summary of the written comments. This preparation will enable us to discuss the full range of questions raised by the testimony and commentary, which I think should include:

1. Do we proceed with the proposed changes to Rule 23 without modification?
2. Should we delete Rule 23(b)(3)(F) or modify it to make the "just ain't worth it" factor inapplicable if the judge orders an opt-in notice or to make that factor the decision point for choosing between an opt-out class and an opt-in class?
3. Should we delete Rule 23(b)(4) or modify it to include changes of the type proposed by Professors Coffee and Resnick or of some other type?
4. Should we change the opt-out requirement in 23(b)(3) classes to opt-in or should we provide both options as suggested in an earlier proposal considered by the Committee?
5. Should we simplify notice or mandate more direct notice in 23(b)(3) class actions?

6. Should we enhance the procedure for approving class action settlements, particularly representation of absent class members?
7. Should we revise the Committee Notes to the rule to address witnesses' comments about the tension between the notes and the proposed changes?

And there are surely more open questions. Since I think we have reached the point anticipated earlier by Professor Ben Kaplan, the Committee's reporter in 1966 -- "It will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23" -- I think we must now discuss the broader issues. I look forward to seeing you in Naples.

Paul V. Niemeyer
March 15, 1997

VERSIONS OF PROPOSED AMENDMENTS TO RULE 23 CONSIDERED BY THE ADVISORY COMMITTEE ON CIVIL RULES

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties and their attorneys are willing and able to ~~will~~ fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition the court finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to this finding include:

(1) the extent to which the prosecution of separate actions by or against individual members of the class ~~would~~ creates a risk of

(A) inconsistent or varying adjudications with respect to ~~individual~~ members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to ~~individual~~ members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; ~~or~~

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final~~ the extent to which the relief sought would take the form of injunctive relief or corresponding declaratory relief with respect to the class as a whole; ~~or~~

(3) ~~the court finds that~~ the extent to which 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:~~;

(~~A~~4) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(~~B~~5) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(~~C~~6) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(~~D~~7) the difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) Determination by Order Whether Class Action to be Maintained; Notice and Membership in Class; Judgment; Actions Conducted Partially as Class Actions; Multiple Classes and Subclasses.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order

whether and with respect to what claims or issues it is to be so maintained.

(A) The court shall also determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include: (i) the nature of the controversy and the relief sought; (ii) the extent and nature of any member's injury or liability; (iii) the interest of the party opposing the class in securing a final resolution of the matters in controversy; and (iv) the inefficiency or impracticality of separately maintained actions to resolve the controversy. When appropriate, exclusion may be conditioned upon a prohibition against institution or maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separately maintained action of any judgment rendered in favor of the

class from which exclusion is sought, and inclusion may be conditioned upon bearing a fair share of the expense of litigation incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) ~~In any class~~ When ordering that an action be maintained as a class action under ~~subdivision (b)(3)~~ this rule, the court shall direct that notice be given to the ~~members of the~~ class under subdivision (d)(2), concisely and clearly describing the nature of the action, the claims or issues with respect to which the class has been certified, any conditions affecting membership in the class ordered under paragraph (1)(A), and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider, in addition to the matters affecting its decision to certify a class under subdivision (b), the expense and difficulties of providing actual

notice to all class members and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action ordered maintained as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3),~~ whether or not favorable to the class, shall ~~include and~~ specify or describe those ~~to whom~~

~~the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are found to be members of the class or have as a condition to exclusion agreed to restrictions affecting any separately maintained actions.

(4) When appropriate ~~(A)~~ an action may be brought or ordered maintained as a class action (A) with respect to particular claims or issues, or (B) by or against multiple classes or subclasses. Each class or subclass must separately satisfy the requirements of this rule except for subdivision (a)(1). ~~A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, including pre-certification

determination of a motion made by any party pursuant to Rules 12 or 56 if the court concludes that such a determination will promote the fair and efficient adjudication of the controversy and will not cause undue delay; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action, or to be excluded from the class; (3) imposing conditions on the representative parties, class members, or ~~on~~ intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time

to time.

(e) Dismissal or Compromise. An ~~class~~ action filed as a class action shall not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for maintenance as a class action, or be compromised without the approval of the court~~, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs~~. An action ordered maintained as a class action shall not be dismissed or compromised without the approval of the court, and notice of a proposed voluntary dismissal or compromise shall be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action ordered maintained as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of subdivision (b) thereof.

(f) Appeals. A Court of Appeals may permit an appeal to be taken from an order of a district court granting or denying a request for class

action certification under this rule if application is made to it within ten days after entry of such order. Prosecution of an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof, shall so order.

COMMITTEE NOTES

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming and lengthy procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy." This becomes the critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard,

once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues under subdivision (c)(4)(A), if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development.

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made the

controlling issue; namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) become factors to be considered in making this ultimate determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to be exclusive of other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"--or, in some cases, require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class if, as a condition, the person agreed to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take

advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases when it may be impossible or impractical to give meaningful notice of the class action to all putative members of the class.

Under the revision, notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under paragraph (4), some claims or issues may be certified for resolution as a class action, while other claims or issues are not so certified. For example, in some mass tort situations it may be appropriate to certify as a class action issues relating to the defendants' culpability and general causation, while leaving issues relating to specific causation, damages, and contributory negligence for resolution through individual lawsuits brought by members of the class. Since the entirety of the class representative's claim will be before the court, there

is a "case or controversy" justifying exercise of the court's jurisdiction; and the rule is intended to eliminate the problems that might otherwise arise based on the splitting of a cause of action.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(2) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(2) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g.*, *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for

class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of these proposals conducted by independent counsel can be of great benefit to the court. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potential ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not

stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

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

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

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

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

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* New matter is underlined; matter to be omitted is lined through.

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

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) ~~When~~ Whether a Class Action~~s Maintainable~~ Is Superior. ~~An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition~~ The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which ~~the prosecution of~~ separate actions by or against individual members ~~of the class would create a risk of~~ might result in

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

(B) adjudications ~~with respect to individual members of the class which would~~ that, as a practical matter ~~be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede,~~ would dispose of the nonparty members' interests or reduce their ability to protect their interests; ~~or~~

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief~~ the extent to which the relief may take the form

of an injunction or ~~corresponding~~ declaratory ~~relief with respect to~~ judgment respecting the class as a whole; ~~or~~;

(3) ~~the court finds that~~ the extent to which common 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:~~;

(~~A~~4) the class members' interests ~~of members of the class~~ in individually controlling the prosecution or defense of separate actions;

(~~B~~5) the extent and nature of any related litigation ~~concerning the controversy already commenced~~ begun by or against members of the class;

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

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

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

(1) As soon as practicable after ~~the commencement of an action brought as a class action~~ persons sue or are sued as representatives of a class, the court ~~shall~~ must determine by order whether and

with respect to what claims, defenses, or issues ~~it is to be so maintained~~ the action should be certified as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

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

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

(iii) potential conflicts of interest among members;

(iv) the interest of the party opposing the class in securing a final and

consistent resolution of the matters in controversy; and

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against its maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision

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

(2) ~~In any class~~ When ordering that an action be ~~maintained~~ certified as a class action under ~~subdivision (b)(3)~~ this rule, the court ~~shall~~ must direct that appropriate notice be given to the ~~members of the~~ class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing

actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action certified ~~maintained~~ as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall~~

~~include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3),~~ whether or not favorable to the class, ~~shall include and~~ must specify or describe those ~~to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are ~~to be~~ members of the class or have elected to be excluded on conditions affecting any separate actions.

(4) When appropriate ~~(A),~~ an action may be ~~brought or maintained~~ certified as a class action with respect to particular claims, defenses, or issues, ~~or (B)~~ by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1). ~~a class may be divided into subclasses and each subclass treated as~~

~~a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) **Orders in Conduct of Class Actions.**

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(~~1~~A) ~~determining~~ determine the course of proceedings or ~~prescribing~~ prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;

(B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(~~2~~C) ~~requiring, for the protection of the members of the class or otherwise for the fair~~

~~conduct of the action, that~~ require notice ~~be given in such manner as the court may direct~~ to some or all of the class members or putative members of

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class ~~or of~~

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

(iii) the members' opportunity ~~of members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3D) ~~imposing~~ impose conditions on the representative parties, class members, or ~~on~~

intervenors;

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

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

(2) ~~The orders~~ An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal or Compromise. An ~~class~~ action in which persons sue or are sued as representatives of a class must ~~shall~~ not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or be compromised without the approval of the court~~, and notice of the proposed~~

~~dismissal or compromise shall be given to all members of the class in such manner as the court directs~~. An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

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

COMMITTEE NOTE

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on whether and how the case should proceed as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added to subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions — and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries — at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not however an unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts. The rule does not attempt to authorize or establish a system for "fluid recovery" or "class recovery" of damages, nor does it attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions

will be certified under this rule, and most that were not certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility respecting notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style conventions adopted by the Committee to simplify the present rules.

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

Paragraph (5) — the superiority requirement — is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues"

are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made a controlling issue for all class actions and moved to subdivision (a)(5); namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) then become factors to be considered in making this determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to exclude other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7) — the consideration of the difficulties likely to be encountered in the management of a class action — is revised by adding a clause to emphasize that such difficulties should be assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the

court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs" — or, in some cases, even require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class actions remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion — the fact pattern described in subdivision (b)(1)(A) — a person might nevertheless be allowed to be excluded from the class upon the condition that the person will not maintain any separate action and hence, as a practical matter, be bound by the outcome of the class action. The opportunity to elect exclusion from a class may also be useful, for example, in some employment discrimination actions in which certain employees otherwise part of the class may, because of their own positions, wish to align themselves with the employer's side of the litigation either to assist in the defense of the case or to oppose the relief sought for the class.

Ordinarily putative class members electing to be excluded from a plaintiff class will be free to bring their own individual actions, unhampered by factual findings adverse to the class, while potentially able, under the doctrine of issue preclusion, to benefit from factual findings favorable to the class. The revised rule permits the court, as a means to avoid this inequity, to impose a condition on "opting out" that will preclude an excluded member from relying in a separate action upon findings favorable to the class.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class. With defendant classes it may be appropriate to impose a condition that requires the "opting-in" defendant class members to share in the litigation expenses of the representative party. Such a condition would be rarely needed with plaintiff classes since typically the claims on behalf of the class, if successful, would result in a common fund or benefit from which litigation expenses of the representative can be charged.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations it might be appropriate to certify some issues relating to the defendants' culpability and — if the relevant scientific knowledge is sufficiently well developed — general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision if this will promote the fair and efficient adjudication of the controversy. See *Manual for Complex Litigation, Second*, § 30.11.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Subdivision (c)(2) requires that notice be given if a class is certified, though under subdivision (d)(1)(C) the particular form of notice is committed to the sound discretion of the court, keeping in mind the requirements of due process. Subdivision (d)(1)(C) contemplates that some form of notice may be desirable with respect to many other important rulings; subdivision (d)(1)(C)(i),

for example, calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to

members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of the fairness of these proposals conducted by an independent master can be of great benefit to the court, particularly since the named parties and their counsel have ceased to be adversaries with respect to the proposed dismissal or settlement. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. The plaintiff, in order to obtain appellate review of a ruling denying certification, will have to proceed with the case to final judgment and may have to incur litigation expenses wholly disproportionate to any individual recovery; and, if the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. The appellate procedure would be the same as

for appeals under 28 U.S.C. § 1292(c). The statutory authority for using the rule-making process to permit an appeal of interlocutory orders is contained in 28 U.S.C. § 1292(e), as amended in 1992.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

Rule 23. Class Actions

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

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

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

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

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

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) ~~When~~ Whether a Class Actions ~~Maintainable~~ Is Superior. ~~An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition~~ The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which ~~the prosecution of~~ separate actions by or against individual members ~~of the class would create a risk of~~ might result in

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

(B) adjudications ~~with respect to individual members of the class which would~~ that, as a practical matter ~~be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede,~~ would dispose of the nonparty members' interests or reduce their ability to protect their interests; ~~or~~

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief~~ the extent to which the relief may take the form of an injunction or ~~corresponding~~ declaratory ~~relief with respect to~~ judgment respecting the class as a whole; ~~or~~

(3) ~~the court finds that~~ the extent to which the common 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:~~;

(A4) the class members' interests ~~of members of the class~~ in individually controlling the prosecution or defense of separate actions;

(B5) the extent and nature of any related litigation ~~concerning the controversy~~ already ~~commenced~~ begun by or against members of the class;

(C6) the desirability or undesirability of concentrating the litigation ~~of the claims~~ in the particular forum; and

(D7) the likely difficulties ~~likely to be encountered~~ in ~~the management of~~ managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified;

Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) As soon as practicable after ~~the commencement of an action brought as a class action~~ persons sue or are sued as representatives of a class, the court ~~shall~~ must determine by order whether and with respect to what claims, defenses, or issues ~~it is to be so maintained~~ the action should be certified for maintenance as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

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

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

(iii) potential conflicts of interest among members;

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

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, exclusion may be conditioned upon a prohibition against maintenance of a separate action on some or all of the matters in controversy in the class action or a prohibition against use in a separate action of any judgment rendered in favor of the class from which exclusion is sought, and inclusion may be conditioned upon bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before ~~the~~ a decision on the merits.

(2) ~~In any class~~ When ordering that an action be ~~maintained~~ certified as a class action under ~~subdivision (b)(3)~~ this rule, the court ~~shall~~ must direct that appropriate notice be given to the ~~members of the~~ class under subdivision (d)(1)(B). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion from or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider, in addition to the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice. ~~the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

(3) The judgment in an action certified ~~maintained~~ as a class action ~~under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3)~~, whether or not favorable to the class, ~~shall include and~~ must specify or describe those ~~to whom the~~

~~notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds~~ who are ~~to be~~ members of the class or have, as a condition to exclusion, agreed to restrictions affecting any separate actions.

(4) When appropriate ~~(A)~~ an action may be ~~brought or maintained~~ certified as a class action with respect to particular claims, defenses, or issues, ~~or (B)~~ by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1). ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.~~

(d) Orders in Conduct of Class Actions.

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(~~1~~A) ~~determining~~ determine the course of proceedings or ~~prescribing~~ prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument, including pre-certification decision on a motion under Rule 12 or 56 if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(~~2~~B) ~~requiring, for the protection of the members of the class or otherwise for the fair conduct of the action,~~ that require notice ~~be given in such manner as the court may direct~~ to some or all of the members or putative members of;

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class ~~or of~~;

(ii) the proposed extent of the judgment; or ~~of~~

(iii) the members' opportunity ~~of members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

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

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

(5E) dealing with similar procedural matters.

(2) ~~The orders~~ An order under Rule 23(d)(1) may be combined with an order under Rule 16, and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal or Compromise. An ~~class~~ action filed as a class action must ~~shall~~ not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for maintenance as a class action, or be compromised without the approval of the court, ~~and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs~~. An action certified as a class action must not be dismissed or compromised without the approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

(f) Appeals. A court of appeals may permit an appeal from an order granting or

denying a request for class action certification under this rule upon application to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

PURPOSE OF REVISION. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on the practicality of the case proceeding as a class action.

In the revision the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined and treated as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added to subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions--and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries--at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not however a unqualified license for certification of a class whenever there are

numerous injuries arising from a common or similar nucleus of facts, nor does the rule attempt to establish a system for "fluid recovery" or "class recovery" of damages. Such questions are ones for further case law development. Nor does the revision attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be so certified under this rule, and most that were not so certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility respecting notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style conventions adopted by the Committee to simplify the present rules.

SUBDIVISION (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities owed to the class.

Paragraph (5)--the superiority requirement--is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues" are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

SUBDIVISION (b). As noted, subdivision (b) has been substantially reorganized. One element, drawn from former subdivision (b)(3), is made a controlling issue for all class actions and moved to subdivision (a)(5); namely, whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The other provisions of former subdivision (b) then become factors to be considered in making this determination. Of course, there is no requirement that all of these factors be present before a class action may be ordered, nor is this list intended to exclude other factors that in a particular case may bear on the superiority of a class action when compared to other available methods for resolving the controversy.

Factor (7)--the consideration of the difficulties likely to be encountered in the management of a class action--is revised by adding a clause to emphasize that such difficulties should be

assessed not in the abstract, but rather in comparison to those that would be encountered with individually prosecuted actions.

SUBDIVISION (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"--or, in some cases, even require that a putative class member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class action remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion--the fact pattern described in subdivision (b)(1)(A)--a person might nevertheless be allowed to be excluded from the class upon the condition of agreeing to be bound by the outcome of the class action. The opportunity for imposition of appropriate conditions on the privilege of exclusion enables the court to avoid the unfairness that resulted when a putative class member elected to exclude itself from the class action in order to take advantage of collateral estoppel if the class action was resolved favorably to the class while not being bound by an unfavorable result.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdivision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations it might be appropriate, incident to the case or controversy involving the

named plaintiffs, to certify some issues relating to the defendants' culpability and general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

SUBDIVISION (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision when this will promote the fair and efficient adjudication of the controversy.

Inclusion in former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Revised subdivision (d)(1)(B) takes on added importance in light of the revision of subdivision (c)(2). Subdivision (d)(1)(B) contemplates that some form of notice to class members should be given in virtually all class actions. The particular form of notice, however, in a given case is committed to the sound discretion of the court, keeping in mind the requirements of due process. The language of (d)(1)(B)(i) calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

SUBDIVISION (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members. *E.g., Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circumstances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of these proposals conducted by independent counsel can be of great benefit to the court. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

SUBDIVISION (f). The certification ruling is often the crucial ruling in a case filed as a class action. If denied, the plaintiff, in order to secure appellate review, may have to incur expenses wholly disproportionate to any individual recovery. If the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. These consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. As authorized by 28 U.S.C. § 2072(c), the rule has the effect of permitting the appellate court to treat as final for purposes of 28 U.S.C. § 1291 an otherwise conditional and interlocutory order.

It is anticipated that orders permitting immediate appellate review will be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of error.

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

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

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

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

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

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

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

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

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

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

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

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

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

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

~~the class~~;

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

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

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

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

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

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

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

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

(C) potential conflicts of interest among members;

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

matters in controversy; and

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

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

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

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

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class

members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

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

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

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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

(3) Whether or not favorable to the class.

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

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

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

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

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

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

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

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

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

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

(B) ~~(2)~~ requir~~e~~ing, ~~for the protection of~~ to protect the members of the class or otherwise for the fair

conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

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

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

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

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

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

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

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

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

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

(2) An ~~class~~ action certified as a class action shall not be

dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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

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

DRAFT ADVISORY COMMITTEE NOTE

March, 1996

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of protecting public interests through enforcement of large numbers of small claims that would not support individual litigation. The experience of more than three decades has shown the wisdom of those who crafted the 1966 rule, in matters both foreseen and unforeseen. Inevitably, this experience also has shown ways in which Rule 23 can be improved. These amendments will effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. A new "opt-in" class category is created by subdivision (b)(4). Settlement problems are addressed, both by confirming the propriety of "settlement classes" and by strengthening the procedures for reviewing proposed settlements. Changes are made in a number of ancillary procedures, including the notice requirements. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

Stylistic changes also have been made.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*. The study provided much useful information that has helped shape these amendments.

Subdivision (a). Subdivision (a) is amended to emphasize the opportunity to certify a class that addresses only specific claims, defenses, or issues, an opportunity that exists under the current rule. The change, in conjunction with parallel changes in subdivision (b)(3) and elsewhere in the rule, may make it easier to address mass tort problems through the class action device. One or two common issues may be certified for common disposition, leaving individual questions for individual litigation or for aggregation

on some other basis — including aggregation by certification of different, and probably smaller, classes.

Paragraph (4) is amended to emphasize the fiduciary responsibilities of counsel and representative parties. The new language is intended only to provide a forceful reminder to court, counsel, and representative parties that attorneys who undertake to represent a class owe duties of professional responsibility to the entire class and all members of the class. It does not answer any specific question.

Subdivision (b). Subdivision (b)(2) is amended to make it clear that a defendant class may be certified in an action for injunctive or declaratory relief against the class. Several courts have resolved the ambiguity in the 1966 language by permitting certification of defendant classes. Defendant classes can be useful, but particular care must be taken to ensure that the defendants chosen to represent the class do not have significant conflicts of interest with other class members and actually provide adequate representation. Care also must be taken to ensure that the responsibilities of adequately representing a class do not unfairly increase the expense and other burdens placed on the class representatives, and do not coerce or impede settlement by class representatives as individual parties rather than as class representatives.

Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. When Rule 23 was substantially revised in 1966, the Advisory Committee Note stated: "A `mass accident'resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits seprately tried." Although it is clear that developing experience has superseded that suggestion, the lessons of experience are not yet so clear as to support detailed mass tort provisions either in Rule 23 or a new but related rule.

The probability that a claim would support individual litigation depends both on the probability of any recovery and the probable size of such recovery as might be won. One of the most

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

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing on the merits. Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force — a substantial settlement value — when the small probability of defeat is multiplied by the amount of liability to the entire class.

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

Item numbers have been added to emphasize the individual importance of each of the three requirements enumerated in the first paragraph of subdivision (b)(3).

Item (i) has been amended to reflect the other changes that emphasize the availability of issues classes. The predominance of law or fact questions common to the class is measured only in relation to individual questions that also are to be resolved in the class action. Individual questions that are left for resolution outside the class action are not included in measuring predominance. One frequently discussed example is provided by certification of issues of design defect and general causation as the only matters to be resolved on a class basis, leaving individual issues of comparative fault, specific causation, and damages for resolution in other proceedings.

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

Superiority and necessity take on still another dimension when

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

Item (iii) has been added to the findings required for class certification, and is supplemented by the addition of new factor (E) (F) to the list of factors considered in making the findings required for certification. It addresses the concern that class certification may create an artificial and coercive settlement value by aggregating weak claims. It also recognizes the prospect that certification is likely to increase the stakes substantially, and thereby increase the costs of the litigation. These concerns justify preliminary consideration of the probable merits of the class claims, issues, or defenses at the certification stage if requested by a party opposing certification. If the parties prefer to address the certification determination without reference to the merits, however, the court should not impose on them the potential burdens and consequences entailed by even a preliminary consideration of the merits.

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

The "first look" approach adopted by item (iii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses "are not insubstantial on the merits." This phrase is chosen in the belief that there is a wide — although curious — gap between the higher possible

requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims "on the merits," not to the dollar amount or other values that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

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

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

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

{{These paragraphs follow either Version 1 or Version 2.}}

It may happen that different parties appear, seeking to represent the same class or overlapping classes. Or it may happen that parties appear to request certification of a class for purposes of a settlement that has been partly worked out, but not yet completed. These and still other situations will complicate the task of integrating the preliminary appraisal of the merits with the other proceedings required to determine the class-certification question. No single solution commends itself. These complications must be worked out according to the circumstances of each case.

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

[Alternative that would reflect substitution of new factor (A) in the matters pertinent to finding superiority for the proposed item (ii) requirement that a class action be "necessary" for the fair and efficient disposition of the controversy.] The list of factors that bear on the finding whether a class action is superior to other available methods for the fair and efficient [disposition] of the controversy has been amended in several ways.

Factor (A) is added to focus on the question whether class certification is needed to accomplish effective enforcement of individual claims. The need for class certification is a practical concept. This factor is intended to underscore the importance of individual fairness as well as overall fairness and efficiency. Certification is needed for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount. Such classes provide the traditional and abiding justification for (b)(3) certification. Certification ordinarily should not be used, on the other hand, to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not needed for them, even if it would be more efficient in the sense that it consumes fewer litigating resources, and also more fair to the extent that it may achieve more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, whether or not there are individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be needed if there is to be

any [adjudication] of the claims, but it is neither superior nor needed for the fair and efficient [adjudication] of the claims.

The need for class certification takes on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases may justify certification under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether a (b)(3) class is needed must rest on a conscious choice about the best method of addressing the apparent problem.

Yet another problem, presented by some recent class-action settlements, arises from efforts to resolve future claims that have not yet matured to the point that would permit present individual enforcement. A toxic agent, for example, may have touched a broad universe of persons. Some have developed present injuries, most never will develop any injury, and many will develop injuries at some indefinite time in the future. Class action settlements, much more than adjudications, can be structured in ways that provide for processing individual claims as actual injuries develop in the future. Class disposition may be the only possible means of resolving these "futures" claims. These situations present issues that cannot now be resolved by rule. Classes have been certified on a "limited fund" theory under subdivision (b)(1), limiting any question of exclusion from the class to the settlement terms approved by the court. Subdivision (b)(3) also may present an opportunity for certification, presenting difficult questions as to the means for protecting the right to opt out of the class. It is difficult to provide effective notice to future claimants, and particularly difficult as to those who may not even know that they have been exposed to the common class risk. It also is difficult to make an intelligent decision whether to opt out when the prospect and nature of any future injury are uncertain. Yet any realistic prospect of settlement is likely to be destroyed if the opportunity to request exclusion is extended to include a reasonable period after each future claimant becomes aware of actual injury and of the class settlement and judgment. These problems can be addressed explicitly only in light of the lessons to be learned from developing experience.

Factor (B), formerly factor (A), is amended to emphasize the ability of individual class members to pursue their claims through means other than the proposed class. Often the alternative means will be individual litigation, fully controlled by the litigant. The alternative separate actions, however, also may involve

aggregation on some other basis, including certification of a differently defined class that is not individually controlled by all parties.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is "related" and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Factor (E), formerly factor (D), has been amended to set the difficulties of managing a class action in perspective. If other means of adjudication would create greater difficulties than class adjudication for the judicial system as a whole — including state as well as federal courts — certification should not be defeated by the difficulties of managing a class action.

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

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

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

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

The prospect of significant benefit to class members combines

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

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

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

Factor (G) (H) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and

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

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

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

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

settlement-class action only after receiving actual notice and a reasonable opportunity to opt out of the judgment.

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

When a (b)(3) settlement class seems premature, the same goals may be served in part by forming an opt-in settlement class under subdivision (b)(4). An opt-in class will bind only those whose actual participation guarantees actual notice and voluntary choice. The major difference, indeed, is that the opt-in class provides clear assurance of the same goals sought by requiring actual notice and a right to opt out of a (b)(3) settlement-class judgment. Other virtues of opt-in classes are discussed separately with subdivision (b)(4).

Subdivision (b)(4) creates a new power to certify an opt-in class. The opt-in class is identified as a means of permissive joinder. Joinder under Rule 23 may prove attractive for a variety of reasons. Certification of an opt-in class may provide a ready means of focusing joinder that avoids the difficulties of more diffuse aggregation devices. Reliance on the familiar incidents of Rule 23 can provide a framework for managing the action that need not be reinvented with each new attempt to join many parties.

Opt-in classes may be a particularly attractive means for joining goups of defendants. There is less need to worry about adequate representation of class members who have opted in, and there are far more effective means of reducing the burdens imposed on the representative defendants.

Opt-in classes also may provide an attractive means of addressing dispersed mass torts. The class can be defined to resolve problems that could not be readily resolved without the consent that is established by opting in and accepting the definition. The law chosen to govern the dispute can be stated, terms for compensating counsel announced, procedures established for resolving individual questions in the class action or by other means, and so on. Questions of power over absent parties, analogous to personal jurisdiction questions, are avoided. Claims disposition procedures can be established that facilitate settlement. Perhaps most important, an opt-in class provides a

means more effective than the now familiar opt-out class to sort out those who prefer to pursue their claims in individual litigation. Subdivision (b)(4) thus complements subdivision (b)(3), providing an alternative means of addressing dispersed mass torts. Although a court should always consider the alternative of certification under (b)(3) in determining whether to certify a class under (b)(4), certification under (b)(4) is proper even in circumstances that also would support certification under (b)(3). The same is true as to certification under subdivision (b)(2), although there are not likely to be many circumstances that support an opt-in class for injunctive or declaratory relief. If certification is proper under subdivision (b)(1), on the other hand, reliance should be placed on (b)(1), not (b)(4).

The matters specified in factors (A) through (E) bear on the choice between certifying an opt-in class, certifying an opt-out or mandatory class, and allowing the underlying disputes to be resolved outside Rule 23.

Factors (A) and (B), looking to the nature of the controversy, the relief sought, and the extent and nature of the members' injuries or liability, emphasize closely related considerations. A common course of conduct, for example, may inflict minor injury on many victims and severe injury on a few. An opt-out class makes sense for those who suffered minor injury; an opt-in class, managed in conjunction with the opt-out class, may best protect the interests of those who suffered severe injury. As another example, an opt-in class may make more sense than an opt-out class when damages are demanded against a defendant class.

Factor (C) is a reminder that potential conflicts of interest among class members can cut both ways. An opt-in class may withstand somewhat greater potential conflicts than classes certified under other subdivisions because the members all have elected to join the action. This factor may push toward reliance on an opt-in class rather than attempts to combine subclasses of apparently congruent interest into a single class action. Substantial conflicts, however, may make the class unwieldy or unworkable.

Factor (D) emphasizes the need to consider the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy. In compelling circumstances, this interest justifies certification of a (b)(1)(A) class. It also may bear on certification of a (b)(2) class. In less compelling circumstances, it may justify certification of an opt-out class under (b)(3), including a settlement class. Resort to a (b)(4) opt-in class should be had only after canvassing the suitability of certification under these other subdivisions.

Factor (E), looking to the inefficiency or impracticality of resolving the controversy by separate actions, looks in part to the

interests of our several judicial systems in bringing together closely related disputes. These interests are served by an opt-in class, however, only to the extent that individual litigants voluntarily take advantage of the invitation to join together. A (b)(4) class is a new permissive-joinder device that takes advantage of developed class-action procedures, not a means of serving judicial interests in efficiency by expanding mandatory joinder rules.

Paragraph 5 addresses class actions that seek to combine individual damages recoveries with class-based declaratory or injunctive relief. It requires that damages claims be certified under (b)(3) or (b)(4). Individual damages claims should be included in a mandatory class only if certification is appropriate under (b)(1). Proper certification under (b)(2) for declaratory or injunctive relief does not ensure the appropriateness of class treatment for damages claims. That question must be addressed separately.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is deleted. The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes; notice in (b)(3) classes need not be directed to all identifiable members of the class if the cost is excessive in relation to the generally small value of individual claims; and notice in (b)(4) class is designed to accomplish the purpose of inviting joinder. Other changes are made as well.

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. The appearance may suggest only that practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the rule is applied to require determination "when" practicable, it does no harm. The requirement is deleted, however, to support implementation of other changes in Rule 23. Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise probable success on the merits and to determine whether the public interest and private benefits justify the burdens of class litigation. These and similar inquiries should not be made under pressure of an early certification requirement. {Consideration of a precertification motion to dismiss or for summary judgment under subdivision (d)(1), for example, readily justifies posponement of the certification decision.} If related litigation is approaching maturity, indeed, there may be positive reasons for deferring the class determination pending developments in the related litigation.

Subdivision (c)(1)(A) requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can opt out. It does not address the questions that may arise when settlement occurs after expiration of the initial period for requesting exclusion, or when the class includes members who, because not yet injured at the time of certification or settlement, do not become aware of their membership in the class until the action has been settled. The court has power to condition approval of a settlement on adoption of terms that permit class members to opt out of the settlement. This power should be exercised with restraint, however, because the parties must be allowed to decline the condition and the prospect of extensive exclusions may easily defeat any settlement.

The order certifying a (b)(4) opt-in class may state conditions that must be accepted by those who opt to join the class. The conditions may control not only procedures for managing the action but also such matters as the law chosen to govern decision. The power to require contribution by class members to litigation expenses is noted separately to empahsize this feature of opt-in classes, a matter that may be particularly important when a defendant class is certified under (b)(4).

Subparagraph (B) permits alteration or amendment of an order granting or denying class certification at any time before final judgment. This change avoids any possible ambiguity in the earlier reference to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. The definition of a final judgment should have the same flexibility that it has in defining appeability, particularly in protracted institutional reform litigation. Proceedings to enforce a complex decree may generate several occasions for final judgment appeals, and likewise may demonstrate the need to adjust the class definition.

Subdivision (c)(2) amends the requirements for notice of a determination to certify a class action. In all cases, the order must be both concise and clear. Clarity should have pride of place, but it must be remembered that many class members will not bother to read even a clear notice that is too long. The requirements of concision and clarity can be adjusted to reflect the probable sophistication of class members, but in most cases the notice should be cast in terms that an ordinary person can understand. Description of the right to elect exclusion from a (b)(3) class should include the (c)(1)(A) right to elect exclusion from any settlement in an action certified only for purposes of settlement.

The provisions that require consideration of the merits in determining whether to certify a (b)(3) class may show a strong

probability that a plaintiff class will win on the merits. In such circumstances, subdivision (c)(2)(A) authorizes the court to order that a defendant advance part or all of the expense of notifying the class.

Item (i) adopts a functional notice requirement for (b)(1) and (b)(2) class actions. Notice should be directed to all identifiable members of the class in circumstances that support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine mailing. If substantial burdens would be imposed by an effort to reach all class members, however, the means of notice can be adjusted so long as notice is calculated to reach a sufficient number of class members to ensure the opportunity to protect class interests in the questions of certification and adequate representation. The notice requirement is less exacting than the notice requirement for (b)(3) actions because there is no right to opt out of a (b)(1) or (b)(2) class. If a (b)(3) class is certified in conjunction with a (b)(2) action according to the requirements of subdivision (b)(5), the notice requirements for a (b)(3) action must be satisfied as to the (b)(3) class.

Item (ii) continues the provisions for notice in a (b)(3) class action. The provisions for notice of the right to be excluded and of the potential consequences of class membership are shifted to the body of subparagraph (A). A new provision is added, allowing notice to be limited to a sampling of class members if the cost of notice to all members is excessive in relation to the generally small value of individual claims. The sample should be designed to ensure adequate opportunity for supervision of class representatives and class counsel.

Item (iii) provides a flexible notice system for (b)(4) classes. Notice should be adapted to the purpose of inviting participation, and in some circumstances may be addressed to lawyers conducting related litigation. Although the court need not worry about the effects of the judgment on nonparties, it should direct a reasonable effort to make the opportunity to participate practically available.

Subdivision (c)(3) includes a new subparagraph (C) that specifies the effect of the judgment in an opt-in class certified under new subdivision (b)(4).

Subdivision (c)(4) is amended to provide that the "numerosity" requirement of subdivision (a)(1) need not be satisfied as to each of multiple classes or subclasses. The court is free to choose between the advantages of small subclasses and the advantages of requiring individual joinder of a small number of people who have distinctive interests.

Subdivision (d). Only modest changes, generally stylistic, are made in subdivision (d).

Paragraph (1) is new. It confirms the general practice found by the Federal Judicial Center: courts frequently rule on motions under Rules 12 and 56 before determining whether to certify a class. Some courts have feared that this practice might violate the former requirement that a class determination be made as soon as practicable after the action is filed. Elimination of that requirement should banish any doubt, but this paragraph is added to remind courts and parties of this helpful practice.

Paragraph (2) is adjusted to include notice of matters affecting opt-in classes, and to confirm the potentially useful practice of providing notice of refusal to certify a class.

Subdivision (e). Paragraphs (1) and (3) are new.

Paragraph (1) requires court approval of any dismissal, compromise, or deletion of class issues attempted before a class certification determination is made in an action brought as a class action. This provision is designed to protect the interests of nonrepresentative class members who may have relied on the pending action and the proposed representation.

Paragraph (3) establishes an opportunity to acquire independent information about the wisdom of a proposed class-action settlement. The parties who support the settlement cannot always be relied upon to provide adequate information about the reasons for rejecting the settlement. Information may be provided through objections by class members, but objectors often have found it difficult to acquire sufficient information, and the burdens of framing comprehensive and persuasive objections may be insurmountable. {A magistrate judge or person specially appointed by the court to make an independent investigation and report may be better able to acquire the necessary information and — with expenses paid by the parties — better able to bear the burdens of acquiring and using the information.} [The opportunity provided by this paragraph should, however, be exercised with restraint. In most cases it is better that the trial judge assume the responsibility for directing the parties to provide sufficient information to evaluate a proposed settlement. Direction by the judge will ensure that the judge receives the information needed by the judge, and that the judge bears the front-line responsibility for evaluating the settlement in light of this information.] Appointments under this paragraph are not made under Rule 53 and are not subject to its constraints.

(f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of

Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permsision to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." These differences warrant modest differences in the procedure for seeking permission to appeal from the court of appeals. Appellate Rule 5.1 has been modified to provide the appropriate procedure.

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be "one-way" intervention. That does not seem much of a concern to me — if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of

law. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

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

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

ALTERNATIVE DRAFTS OF PROPOSED AMENDMENTS TO RULE 23
APRIL 1996

Draft Rule Without "Necessary" Element in (b)(3)

This version deletes the new (b)(3) requirement that a court find that class certification is necessary for the fair and efficient adjudication of the controversy.

It retains the proposed new "factor (A)." This factor is intended to serve much the same function as the requirement that certification be necessary, without the confusion that the first drafting has engendered. The purpose is to discourage certification of classes that include members whose claims would support meaningful individual litigation. The alternative versions of the Committee Note suggest that it is easier to explain this purpose as a "need" factor.

Rule 23. Class Actions ("Necessary" Deleted)

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

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

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

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

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

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

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

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

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

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

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

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

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

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

~~the class~~;

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

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

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

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

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

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

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

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

(C) potential conflicts of interest among members;

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

matters in controversy; and

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

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

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

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

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class

members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

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

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

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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

(3) Whether or not favorable to the class.

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

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

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

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

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

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

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

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

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

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

(B) ~~(2)~~ requir~~e~~ing, ~~for the protection of~~ to protect the members of the class or otherwise for the fair

conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of~~:~~

(i) refusal to certify a class;

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

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

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

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

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

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

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

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

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

(2) An ~~class~~ action certified as a class action shall not be

dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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

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

Rule 23. Class Actions (Probable Success Reduced)

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

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

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

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

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

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

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

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

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

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

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

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

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

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

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

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

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

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

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

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

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

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

(C) potential conflicts of interest among members;

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

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

(5) the court finds that a class certified under subdivision

(b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

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

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

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before

~~the decision on the merits~~ final judgment.

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

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

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

generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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

(3) Whether or not favorable to the class.

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

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

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

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

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

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

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

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

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

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

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

(i) refusal to certify a class;

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

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

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

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

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

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

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

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

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

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

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

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

Draft Reducing Role of Probable Success

The November draft of (b)(3) included two alternative versions of a requirement that – if requested by the party opposing the class – the court make findings as to the probable success on the merits of the class claims, issues, or defenses. Although this element was intended to make it more difficult to maintain class actions, it has caused anguish among defendants. A preliminary inquiry into the merits is feared on several grounds.

The most easily demonstrated concern is that a preliminary inquiry into the merits will prolong the class certification process and add great cost. Certification proponents will make persuasive demands to be allowed preliminary discovery on the merits, and these demands will be difficult to resist.

A second concern is that no matter how modest the finding is, any preliminary reference to the merits will cast a heavy pall on subsequent proceedings. The pressure to settle, already increased drastically by certification, will be augmented exponentially. Consideration of disputed pretrial matters, including not only summary judgment but the scope and terms of discovery, will be affected.

A third concern is that any judicial imprimatur on the class claim will exacerbate the collateral effects of the litigation. The effects may be as concrete as stock-market values or as ephemeral as public relations concerns, but they are real and often vitally important.

These concerns are reflected in this draft in several ways. The finding on the merits embodied by item (iii) in the November (b)(3) draft is eliminated. Factor (F), referring to probable success on the merits, is redlined, indicating possible deletion.

If these deletions are made, it remains possible to provide for some preliminary consideration of the merits in ways designed to reduce the costs of the consideration. One way would be to require particularized pleading of all elements of all class claims, as proposed by Sheila L. Birnbaum. Another would be to address these issues in the portion of the Note addressed to consideration of the balance between the probable individual relief and the costs and burdens of class litigation.

A revised Note, attached to what now is Factor (G), might read something like this:

In an appropriate case, assessment of the probable relief to individual class members can go beyond consideration of the relief likely to be awarded should the class win a complete victory. The probability of class success also can be considered if there are strong reasons to doubt success. It is appropriate to consider the probability of success only if the appraisal can be made without extended proceedings and without prejudicing subsequent

proceedings. This factor should not become the occasion for extensive discovery that otherwise would not be justified at this stage of the litigation. Neither should reliance this factor be expressed in terms that threaten to increase the influence that a certification decision inevitably has on other pretrial proceedings, trial, or settlement.

Rule 23. Class Actions (Draft deleting "public interest")

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

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

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

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

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

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

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

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

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

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

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

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

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

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

~~the class~~;

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

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

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

(G) whether the probable relief to individual class members justifies the costs and burdens of class litigation; and

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

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

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

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

(C) potential conflicts of interest among members;

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

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

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

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

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

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses

incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

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

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

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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

(3) Whether or not favorable to the class.

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

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

(C) The judgment in an action certified as a class

action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

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

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

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

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

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

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

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

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

some or all ~~of the~~ members of:

(i) refusal to certify a class;

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

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

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

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

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

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

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

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

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

(2) An ~~class~~ action certified as a class action shall not be dismissed or compromised without the approval of the

court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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

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

Draft Rule Deleting Public Values from (b)(3)

This version deletes consideration of the public interest from the "just ain't worth it" calculation of subdivision (b)(3) Factor (G).

The concerns that bear on this question were explored at the November meeting.

The arguments for considering public interest are straightforward. Rule 23(b)(3) has become an important means of enforcing the policies that underlie much contemporary social legislation. Public enforcement agencies frequently lack the resources necessary to achieve desirable levels of enforcement. Without class actions, wrongdoers can profit from their violations. Small injuries may be inflicted on thousands or even millions of people, who individually have no effective means of redress. If a court is to be authorized to consider the perhaps trivial nature of the individual recovery that may be effected by a class victory on the merits, it also must be authorized to consider the public interests that may require enforcement notwithstanding the lack of any meaningful private benefit.

The countervailing arguments are equally straightforward. The first set of arguments, detailed in the draft Committee Note, emphasizes the view that adversary litigation is a legitimate means of administering social policy only when justified by explicit statute or by the need to redress private injury. We do not recognize citizen standing to compel lawful behavior by renegade public officials – indeed, Article III forbids it. We should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers. The second set of arguments rests on the difficulty of measuring the relative importance of the public values enshrined in different laws. On this view, it is not appropriate for Article III judges to presume to discriminate among the policies that animate various provisions of the Constitution, statutes, administrative regulations, and decisional law. The most that judges should undertake is to determine whether the costs and burdens of class litigation are justified by the objective cash value and subjective intrinsic value of the relief available to actual class members.

Rule 23. Class Actions (Draft Reducing Notice Needs)

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

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

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

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

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

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

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

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

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

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

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

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

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

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

~~the class;~~

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

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

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

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

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

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

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

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

(C) potential conflicts of interest among members;

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

matters in controversy; and

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

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

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

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

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members may elect to be excluded from the class. When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) (A) When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership.

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

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member

that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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

(3) Whether or not favorable to the class.

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

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

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

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

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

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

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

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

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

(A) ~~(1)~~ determin~~e~~ing the course of proceedings or prescrib~~e~~ing measures to prevent undue repetition or complication in ~~the~~ presentin~~gation of~~ evidence or argument;

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

(i) refusal to certify a class;

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

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

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

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

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

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

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

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

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

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

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent

investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

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

Draft Reducing Notice Complications

This draft makes two changes in the notice provisions of subdivision (c).

(c)(1)(A) is changed by deleting the draft requirement that class members be allowed to opt out of any settlement if the class is certified only for purposes of settlement. This requirement would have little effect, and could create some mischief, if the terms of a proposed settlement are known when the class is first certified and notice is given. It would be more important, and could prove more dangerous to the settlement process, if the terms of a proposed settlement are first announced after expiration of the initial opt-out period. Extension of the opportunity to opt out also could aggravate the pressures that surround the determination whether a settlement class can be certified under subdivision (b)(1) on a "limited funds" theory. A court might still choose to condition approval of settlement on recognition of a second right to opt out, a matter discussed in one of the alternative forms of the draft Note on subdivision (e).

(c)(2)(A) is changed by deleting the provision that would allow the court to order a defendant to advance part or all of the expense of notifying a plaintiff class if it finds a strong probability that the class will win on the merits. This deletion reflects the prospect that the Committee will decide to diminish the role played by predictions on the merits in deciding on (b)(3) certification. Even if the stronger form of item (iii) is retained in (b)(3), however, this expense-of-notice provision may generate more controversy than it is worth.

Rule 23. Class Actions (Draft without settlement classes)

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

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

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

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

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

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

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

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

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

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

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

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

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

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

~~the class~~;

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

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

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

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

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

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

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

(C) potential conflicts of interest among members;

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

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

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

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

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

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

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

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

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

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

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

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

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

(3) Whether or not favorable to the class.

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

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

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

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

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

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

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

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

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

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

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

(i) refusal to certify a class;

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

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

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

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

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

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

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

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

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

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

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

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

Draft Rule Without Settlement Classes

This version deletes the new (b)(3) Factor (H) that obliquely recognized the legitimacy of settlement classes.

Deletion of the factor need not foreclose any reference to settlement classes in the Committee Note. The current draft Note discusses settlement classes at several points. Some portions of these discussions could be preserved. The simplest form would state that no attempt is made to regulate settlement class practice, and perhaps explain that it seems too early to attempt to capture the lessons of developing practice in explicit rule provisions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

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

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

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintanable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

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

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

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

(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:

(A) the need for class certification to accomplish effective enforcement of individual claims;

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

separate actions;

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

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

(DE) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

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

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(A) the court will exclude the member from the class if the member so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(A) an action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

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

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the matter proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(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:

(A) the practical ability of individual class members to pursue their claims without class

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

certification;

(~~A~~B) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;

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

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

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

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

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

* * * * *

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without hearing and the approval of the court, ~~and~~ after notice of the proposed

dismissal or compromise ~~shall be~~ has been given to all members of the class in such manner as the court directs.

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

COMMITTEE NOTE

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of aggregating large numbers of small claims that would not support individual litigation. The experience of more than three decades, however, has shown ways in which Rule 23 can be improved. These amendments may effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. New factors are added to the list of matters pertinent to determining whether to certify a class under subdivision (b)(3). Settlement problems are addressed, both by confirming the propriety of "settlement classes" in subdivision (b)(4) and by making explicit the

need for a hearing as part of the subdivision (e) approval procedure. The requirement in subdivision (c)(1) that the determination whether to certify a class be made as soon as practicable after commencement of an action is changed to require that the determination be made when practicable. A new subdivision (f) is added, establishing a discretionary interlocutory appeal system for orders granting or denying class certification. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996).* The study provided much useful information that has helped shape these amendments.

Subdivision (b)(3). Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts by courts and

lawyers to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member recovery figures reported by the Federal Judicial Center study ranged from $315 to $528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however,

the court should consider the possibility of excluding these victims from the class definition.

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

These concerns underlie the changes made in the subdivision (b)(3) list of matters pertinent to the findings whether the law and fact questions common to class members predominate over individual questions and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. New factors are added to the list, and some of the original factors have been reformulated.

Subparagraph (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages — but does not forbid — class certification

when individual class members can practicably pursue individual actions. If individual class members cannot practicably pursue individual actions, on the other hand, this factor encourages class certification. This encouragement may be offset by new subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation.

Subparagraph (B), revised from former subparagraph (A), complements new subparagraph (A). The practical ability of individual class members to pursue individual actions is important when class members have significant interests in maintaining or defending separate actions. These interests include such fundamental matters as choice of forum; the timing of all events from filing to judgment; selection of coparties and adversaries; the ability to gain choice of more favorable law to govern the decision; control of litigation strategy; and litigation in a single proceeding that includes all issues of liability and remedy. These interests may require a finding that class adjudication is not superior because it is not as fair to class members, even though it may be more efficient for the judicial system in the limited sense that fewer judicial resources are required. The right to request exclusion from a (b)(3) class does not fully protect these interests, particularly as to class members who have not yet retained individual counsel at the time of class notice. These interests of class members may be served by a variety of alternatives that may not amount to individual control of separate litigation. The alternatives to certification of the requested class may be certification of a different class or smaller classes, intervention in other pending actions, voluntary joinder, and consolidation of individual actions — including transfer for coordinated pretrial proceedings or transfer for consolidated trial.

The practical ability of individual class members to pursue individual litigation and their interests in maintaining separate actions

may come into conflict when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. The plaintiffs who might win the race to secure and enforce individual judgments have an interest that is served at the cost of other plaintiffs whose interests are defeated by exhaustion of the available assets. In these circumstances, fairness and efficiency may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether to certify a (b)(3) class must rest on a judgment about the practical realities that may thwart realization of the abstract interests that point toward separate individual actions.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is related and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual

litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. If the probable relief to individual class members does not justify the costs and burdens of class litigation, a class action is not a superior means of efficient adjudication. The near certainty that few or no individual claims will be pursued for trivial relief does not require class certification.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is slight, however, the core justification of class enforcement fails.

The value of probable individual relief must be weighed against the costs and burdens of class-action proceedings. No particular dollar figure can be used as a threshold. A smaller figure is appropriate if issues of liability can be quickly resolved without protracted discovery or trial proceedings, the costs of class notice are low, and the costs of administering and distributing the award likewise are low. Higher figures should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits, identification of class members and notice will prove costly, and distribution of the award will be expensive. Often it will be difficult to measure these matters at the commencement of an action, when individually significant relief is likely to be demanded and the costs of class proceedings cannot be estimated with any confidence. The opportunity to decertify later should not weaken this threshold inquiry. At the same time decertification should be

considered whenever the factors that seemed to justify an initial class certification are disproved as the action is more fully developed.

Subdivision (b)(4). Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir.1982); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170-171, 173-178 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir.1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2). As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class. In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied. Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many

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

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

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement. Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a trial class without adequate reconsideration. These

protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3), but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or — if the class is certified under subdivision (b)(3) — whether to request exclusion. One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

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

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules

requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." The amendment makes this approach secure, and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A), (B), (C), and (F). These and similar inquiries should not be made under pressure of an early certification requirement. Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon as practicable."

Amendment of the "as soon as practicable" requirement also confirms the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision. A few courts have feared that this useful practice is inconsistent with the "as soon as practicable" requirement.

Subdivision (e). Subdivision (e) is amended to confirm the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The judicial responsibility to the class is heavy. The parties to the settlement cease to be adversaries in presenting the settlement for approval, and objectors may find it difficult to command the information or resources necessary for effective opposition. These problems may be exacerbated when a proposed settlement is presented at, or close to the beginning, of the action. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

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

Permission to appeal should be granted with restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

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

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

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

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

EXCERPTS FROM MINUTES OF ADVISORY COMMITTEE ON CIVIL RULES MEETINGS ON PROPOSED AMENDMENTS TO RULE 23

ADVISORY COMMITTEE ON THE CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES
OFFICE OF THE REPORTER
DUKE UNIVERSITY SCHOOL OF LAW
TOWERVIEW AT SCIENCE DRIVE
DURHAM NC 27706

MINUTES

MEETING OF NOVEMBER 29-DECEMBER 1, 1990

DURHAM, NORTH CAROLINA

Present: Bertelsman (Standing Committee), Brazil, Eldridge (FJC) Holbrook, Leonard (representing clerks and magistrates), Linder, Macklin (AO), Miller, Hnatowski (AO), Nordenberg, Pfaelzer, Phillips, Pointer, Powers, Stevens, Willging (FJC), Williams (FJC), Winter, Womack (ACTL), and Zimmerman.

Chairman Pointer called the meeting to order at 9 AM. Introductions of those present occurred first. The Chair called attention to the rules of the Judicial Conference Committee bearing on meetings and memberships of committees. Members were cautioned not to speak against policy of Judicial Conference without appropriate disclaimer. Mr. Macklin also commented on the policy, emphasizing the expectation that members will be rotated. He also pointed out the Marshals' Service would be present throughout the meeting.

Chairman Pointer called attention to Judge Keeton's memorandum as new chair of the Standing Committee. Judge Keeton hopes to emphasize positive incentives in rules. Chairman Pointer also reported that the Committee's recommendations on revisions approved at the last meeting in New York have been substantially approved by the Standing Committee, and was also approved by the Judicial Conference. They now pend in the Supreme Court and will, unless derailed, will become effective on December 1, 1991. Chairman Pointer and the Reporter noted that there was some concern among the representatives of international litigants about the draft of Rule 26(a) as it emerged from the Standing Committee. It was also noted that the gender-neutralized Forms as amended were turned down by the Standing Committee.

Chairman Pointer noted that Rules 30 and 56 had been withdrawn by this committee and the Reporter noted that Rule 38 had also been withdrawn by the Standing Committee. The revision had been prompted by the Local Rules Project, but the Standing Committee regarded the resolution of the issue to be incorrect and wanted a draft coming out the other way.

There was general discussion about the time lag in rulemaking. It was observed that the time lag, turnover, and learning time for members create a serious problem about the quality of the committee's work. Justice Zimmerman observed that the turnover schedule was not realistic. There was general agreement and assent to the suggestion of Mr. Macklin that the chair raise the issue with the Chief Justice.

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It was agreed to take up Rule 23 to enlarge the opportunity for mass tort litigation, to provide for defendant class actions, perhaps to specify the fiduciary duties of the class representative, and to consider the ABA Litigation Section report. Mr. Macklin urged moving forward promptly with this.

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ADVISORY COMMITTEE ON THE CIVIL RULES
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919-684-5593 *919-489-8668 (HOME)* *FAX: 919-684-3417*

April 8, 1991

MINUTES

MEETING OF THE COMMITTEE

FEBRUARY 21-23, 1991

NEW ORLEANS, LOUISIANA

Present: Bertelsman, Brazil, Carrington (Reporter), Holbrook, Keeton, Linder, Miller, Nordenberg, Pfaelzer, Phillips, Pointer (Chair), Powers, Stevens, Winter, Zimmerman.

Observers: Hnatowski (AO), Wiggins (FJC), Willging (WJC), Womack (ACTL)

The Committee met briefly on the morning of Thursday, February 21, prior to the public hearing on Rule 11. Materials and comments were distributed and the agenda for the meeting was discussed. The Committee then adjourned to the hearing room for the public hearing, which concluded at 4:30 PM.

The Committee also met briefly following the public hearing and reviewed some of the material distributed during the day. A few reactions to the discussion were recorded. Professor Miller expressed the view that some improvements could be made in the rule. Discussion focussed on the use of fee-shifting as the sanction of choice. Professor Miller reported that it was not intended in 1983 that fee-shifting should be normative. Judge Bertelsman and Justice Zimmerman expressed concern about the chilling effect of the horrendously large fee shift. Judge Winter noted that those who cause large fees are engaged in extortion and ought to clean up the mess they make. Judge Brazil voiced concern about the Rules Enabling Act.

Justice Zimmerman expressed concern about the standard, observing that the problem law in fee-shifting on cases that are not frivolous but merely losers. Professor Miller urged that consideration be given to comprehensive review of all the sanctions

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Discussion turned to Rule 23. Judge Pointer reported that the draft came from the Asbestos Task Force and the Litigation Section. He also called attention to the NY State Bar group's concern about defendant classes. It was agreed to circulate the present draft even though the Committee has not yet considered. Judge Brazil was concerned that the Committee might dilute the quality of the response if too much material is considered at once. Judge Winter thought that no one needed to promise action at May, but that circulation of Rule 23 could do no harm. It was agreed that the May agenda would commence with discovery, Rule 11, Rules 54-56-58, and Rule 23 would be discussed if there was time. Judge Bertelsman, on the other hand, emphasized the need for action on Rule 23.

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ADVISORY COMMITTEE ON THE CIVIL RULES
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MINUTES OF MEETING, LOS ANGELES, NOVEMBER 22, 1991

Present were Bertelsman (Standing Committee), Brazil, Carrington (Reporter), Cooper, Keeton (Standing Committee), Linder, Nordenberg, Phillips, Pointer (Chair), Powers, Spaniol (AO), Wiggins (FJC), Willging (FJC), Winter, Womack (ACTL) and unnamed members of the public.

The Committee first briefly discussed the degree of revision in a rule requiring republication. It was agreed that revisions that are "between what exists and what is proposed for comment" could be adopted without further republication.

It was agreed that further hearings would be conducted at Atlanta on February 19 and 20, and that the committee would meet for a fully day on February 21 to review the hearings and comments.

It was agreed that the spring meeting would be April 13-14 in Washington.

In reviewing the hearing of the previous day, the Committee discussed the differences between its proposal and the present rule of the Central District of California. Judge Bertelsman argued that the duty to produce the smoking gun gave rise to most of the difficulties people were having with vague pleadings. Judge Pointer noted that the reason for the broader rule was that a narrower disclosure requirement would merely lead to a broad interrogatory asking for "smoking guns." Judge Brazil noted that the purpose was to get core information out early to help with scheduling orders and settlement.

Judge Stevens expressed his continuing concern about the timing of disclosure. The provision for early by one side was also identified as one not free of possible difficulty. Judge Brazil suggested this problem could be

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Attention turned to Rule 23. ACTL had raised some questions, but was essentially favorable to the draft circulated for informal comment. The problem of defendant classes was considered; should there be a class where there is no willing representative? Judge Brazil noted that this gave the power to the named party to defeat the class proceeding at will. Judge Keeton raised the question whether it was the party or the counsel who ought to be willing. ACTL also raised the question whether conditions should be imposed on opting in.

The Reporter presented more generally the problem of the faithfulness of representatives of plaintiff classes discussed in the memorandum circulated to the committee. It was tentatively agreed that pre-discovery bidding was too risky and likely to produce collusion. The secondary form of auctioning the representation was regarded as more feasible. Judge Winter emphasized the results of Janet Alexander's work showing no correlation between merits and settlement values as indications that there is a need to discourage groundless cases and reward bad ones; none of the Reporter's proposed remedies did much to discourage bad cases. It was agreed that consideration should be given to further controls on settlement or on the qualifications of representatives to deal with the fiduciary problem. Judge Pointer noted that opposition to settlement was not rare. He also noted the similarity to motions to transfer a case to another district, there being a conflict of interest on the part of the judge. Judge Brazil noted that although the judge might be willing to be an inquisitor, the complexity of the case would prevent that. Judge Pointer thought a smell test might be operative. Judge Stevens thought there were times when one might have suspicions but no basis for pursuing them. Judge Brazil thought that if there is to be a guardian ad litem, it would be better to appoint before the settlement is achieved. Judge Pointer thought that the guardian ad litem is sometimes useful, but should not be imposed in every case. Judge Keeton thought that a master might be more useful than a guardian ad litem. Judge Winter asked how any of the alternatives would play out in an Agent Orange situation, typified by weak showing on causation, where the settlement was either grossly excessive or grossly inadequate, but we can't tell which. Judge Pointer thought that in the absence of cause, the court might as well give a little something to all Viet Nam veterans. He urged that the powers are available to deal with the problem, but generally the court lacks the information on which to act wisely. Judge Brazil thought that if the rule is to be revised, the problem of faithfulness should be addressed.

Conversation returned to the possible requirement of willingness on the part of a defendant class representative. After discussion, it was agreed that the matter merited further consideration.

Judge Pointer called attention to the main purpose of the draft was to eliminate the distinctions in 23(b). No one objected to this aim. The Reporter suggested possible deletion of the typicality requirement in (a), but it was thought that the requirement was worth retaining. Judge Keeton cautioned that no changes ought add to the burden of administering the rule. Judge Pointer noted that the present draft was based on the Uniform Act and the draft prepared by the Litigation Section in 1983. Judge Brazil asked whether the aim was to increase flexibility. Judge Pointer affirmed that this was the aim.

The possibility of increasing appellate review of the class action determinations was discussed. The Reporter was directed to call attention of the Appellate Rules Reporter to this proposal. Professor Cooper noted that the proposal would revive the death-knell or reverse death-knell doctrines.

Dean Nordenberg pointed to the relation between the notice requirement and the opt-in feature. It was suggested that lines 53-66 of the draft should be broken into two sentences. Judge Winter asked about the time limit on opting out after a settlement.

It was observed that the effect of the reform may be to impose more discretion in the district court. Judge Pointer emphasized that appellate review should channel discretion and protect against bad settlements resulting from the intimidating effect of a class action determination. The Reporter asked whether there should be a findings and conclusions requirement to provide a basis for the appellate review contemplated. Judge Brazil asked whether interlocutory appeal would freeze the lower court proceeding. Judge Pointer assured the committee that it would not unless the court of appeals so ordered. The suggestion was made that such issues might be sent to the transfer panel under Section 1407, but resistance was voiced to that proposal.

Judge Brazil urged that the present draft be circulated to scholars and lawyers.

Attention turned to the issue of public access to discovery material. The Reporter reviewed efforts to amend Rule 5 regarding the filing requirement for discovery

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Discussion briefly returned to Rule 23 and possible changes in the draft to be circulated. It was agreed that something should be added to the draft to evoke comment on the problem of investigating settlements.

The meeting adjourned at 4:30 PM.

Paul D. Carrington
Reporter

DRAFT

November 12-14, 1992

MINUTES

Advisory Committee on Civil Rules

The Advisory Committee on Civil Rules met on November 12, 13, and 14, 1992, at the Westin Hotel, Denver, Colorado. The meeting was attended by Judge Sam C. Pointer, Chairman, and committee members Judge Wayne D. Brazil; Carol J. Hansen Fines, Esq; Chief Justice Richard W. Holmes; Dennis G. Linder, Esq.; Dean Mark A. Nordenberg; and Judge Joseph E. Stevens, Jr. Judge William O. Bertelsman, Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Judge Robert E. Keeton, Chairman of the Standing Committee, also attended. Also present were Peter McCabe, Joseph A. Spaniol, and John K. Rabiej of the Administrative Office of the United States Courts; Joe Cecil of the Federal Judicial Center; Ted Hurt of the Department of Justice; Bryan Garner, Esq., of LawProse, consultant to the Standing Committee Style Subcommittee; and Edward H. Cooper, Reporter. Observers included Tripp Baltz, Alfred W. Cortese, Jr., and Joseph Womack.

The meeting began with a report on the progress of the recommendations that were submitted by the Advisory Committee to the Standing Committee at its June, 1992, meeting. The Standing Committee determined to hold Evidence Rule 702 for review by the reconstituted Advisory Committee on Evidence Rules, and made changes to Civil Rule 11 and some portions of Civil Rule 26. Civil Rules 83 and 84 were held back to provide an opportunity to achieve uniformity in the parallel submissions by several advisory committees. With these modifications, the recommendations of the Advisory Committee were submitted to the Judicial Conference. The Judicial Conference made changes in the Civil Rule 4 provisions affecting waiver of service by foreign defendants and determined not to send Civil Rule 56 to the Supreme Court. With these changes, the recommendations have been submitted to the Supreme Court.

Civil Rules 83, 84

Rules 83 and 84 were held back by the Standing Committee at its June meeting to seek uniform language for the parallel rules submitted by different advisory committees.

Rule 84 was discussed first. It was agreed that the draft, with changes in style to conform to the style system being developed by the Style Subcommittee of the Standing Committee, was in proper form for submission to the Standing Committee. The Chairman and Reporter were authorized to negotiate changes in language if appropriate to conform with the versions reported by other committees.

Discussion of Rule 83 focused first on subdivision (d).

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Rule 23

The proposal to revise Rule 23 has received brief consideration by the Committee over the last year. The proposal would eliminate the present sharp distinctions between class actions certified under paragraphs (1), (2), and (3) of Rule 23(b), bringing these paragraphs together as considerations to be evaluated in determining whether to certify a class. This melding would directly affect the provisions for opting out and for notice to class members. The opt-out provision would be supplemented by a provision for opting in; the court could determine whether to permit opting out in any form of class action, or whether to limit the class to those who opt in. Explicit conditions could be imposed on the opportunity to opt out or in. A common approach to notice would be taken to all class actions, authorizing consideration of the expense and difficulties of providing actual notice and of the extent of the adverse consequences that might follow failure to accomplish actual notice. The proposal would make explicit the power to certify a class limited to one or more common issues, but would not address more directly the question of class action treatment of mass tort cases. Other changes would make clear the power to act on motions to dismiss or for summary judgment before determining whether to certify a class; require that a class representative be willing to represent the class; and support the free use of masters to evaluate proposed settlements.

The current draft is based in large part on a 1986 report of the Litigation Section of the American Bar Association, and follows the basic format adopted by the National Conference of Commissioners on Uniform State Laws. One source of encouragement for revisiting Rule 23 has been provided by the Task Force on Asbestos Litigation, which found Rule 23 -- as limited by the Committee Note to the 1966 amendments and by current practice -- too narrow in approaching tort litigation. Other problems found with the current rule include concern that the cost of providing the individual notice now required in Rule 23(b)(3) class actions can be prohibitive, defeating any opportunity for class relief; management of civil rights cases under Rule 23(b)(2) so as to defeat any opportunity to opt out; the effect of Rule 23(b)(1) and (b)(2) class actions in forcing members of a class to remain as unwilling plaintiffs; and difficulties in identifying the proper role for defendant classes.

The basic format of the proposed rule was supported by several members of the Committee. The conflation of (b)(1), (2), and (3) class actions was welcomed.

One question not touched by the draft is the need to enforce the provision for a prompt determination whether to certify a class. It was agreed that delayed determinations can cause significant problems in handling a putative class action. Thought will be given to setting a time for a required motion for certification by a party seeking to represent a class.

The opt-in provision was discussed as an important means of addressing tort class actions and defendant classes. It was suggested that in many circumstances opt-in classes will be more appropriate than opt-out or mandatory classes for these settings. The provisions for establishing conditions on opting out or opting in also were discussed briefly.

The more flexible notice provisions also were discussed. These provisions could work in both directions, helping to reduce the costs of notice required in actions that now are certified under Rule 23(b)(3), but perhaps increasing the costs of notice in actions that now are certified under Rule 23(b)(1) or (2). Costs would increase, however, only upon a finding that the expense was justified in light of the potential adverse consequences to class members who did not get actual notice.

Other aspects of the proposal were discussed briefly. The proposed reference to representation as a "fiduciary duty" in Rule 23(a) was described as a first attempt to emphasize the nature of the representation responsibility. The new requirement in Rule 23(a 4) that representative parties be willing to represent class members was suggested in response to the problem of certifying a defendant class with no willing representative. It was noted that

Rule 23 is used in many different settings, and that it is difficult to define more specific categories of class actions that might support more detailed rules provisions.

It was agreed that revision of Rule 23 is a complex task that must not be rushed to completion. After discussing the costs and benefits of pushing toward official publication of a draft for public comment, it was concluded that it would be better to begin with a reasonably broad request for informal comment. There is much practical experience with administration of Rule 23 that may be useful in shaping a draft that can survive official publication without need for substantial revisions that might require a second official publication. In seeking comments it will be made clear that the present draft is tentative; suggestions will be solicited as to matters not addressed in the draft as well as those that are addressed. The function of the provisions for opting out and opting in will be addressed in more detail than the draft Committee Note provides.

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Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

October 21, 22, 23, 1993

The Advisory Committee on Civil Rules met on October 21, 22, and 23, 1993, at the Park Hyatt Hotel, San Francisco. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Judge Anthony J. Scirica; and Phillip A. Wittmann, Esq. Judge Sam C. Pointer attended as outgoing chair. Judge Alicemarie H. Stotler and Judge Robert E. Keeton attended as chair and outgoing chair of the Standing Committee. Also present were Bryan A. Garner, Esq., consultant to the Standing Committee; Peter McCabe, John K. Rabiej, Mark Shapiro, and Judy Krivit of the Administrative Office; William Eldridge and John Shapard of the Federal Judicial Center; and Edward H. Cooper, Reporter. Observers included Robert Campbell, Esq., and Alfred W. Cortese, Jr., Esq.

Judge Higginbotham led the committee in expressions to Judge Pointer of thanks and appreciation for his devoted and enormously productive service as chair.

The minutes of the May, 1993 meeting were approved.

Discussion of legislative consideration of the pending Civil Rules amendments led to discussion of Civil Justice Reform Act plans. It will not be long – two years – before a massive effort will be needed to evaluate experience under local plans. The lessons learned from this experience may make it possible to incorporate successful experiments in national rules, restoring a greater level of uniformity in procedure across the district courts. It was noted that at the most recent count, 48 CJRA plans had been filed; 26 of them included disclosure provisions cast in a variety of forms. Early experience seems to be favorable, although in the Northern District of California there is some dissatisfaction with the suspension of discovery until the Rule 26(f) conference.

Facsimile Filing

Under the current form of Civil Rule 5(e), papers may be filed by facsimile transmission "if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States." The amended version of Rule 5(e), now pending in Congress and slated to become effective on December 1, 1993, embraces

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Rule 23

The Committee began work on Rule 23 in response to a request from the ad hoc committee on asbestos litigation. The initial basis for consideration was provided by a model approved by the Litigation Section of the American Bar Association. (The TIPS section of the ABA opposed endorsement of this model by the ABA; the resolution was that the Litigation Section could support the model, but not as an ABA proposal.) As revised on the basis of discussions at earlier Committee meetings, a proposed amendment was taken to the Standing Committee for discussion at the June, 1993 meeting. Because the amendment is complex and likely to become controversial, the chair of this Committee suggested to the Standing Committee that the time available for consideration by the Standing Committee at that meeting was not sufficient to allow full exploration of the issues raised by the amendment. It also was noted that this Committee would have several new members in the near future, and that it might be desirable to have the benefit of their consideration before moving toward publication of a proposal for comment. No action was taken by the Standing Committee, and the amendment remains on the agenda of this committee.

Discussion began with recognition that the draft amendment may, in large part, simply describe and validate actual practice

under the current rule, permitting more express focus on what really works. At the same time, it gives the judge more power over notice, opt-out or opt-in choices, and the like. The already large power of the district court will be expanded. And class actions may become available in circumstances that do not now permit certification. Asbestos litigation may serve as an example of current developments. In one recent massive proceeding, settlements in excess of $2 billion were reached by classes of present claimants and future claimants. The parties assert a "limited fund" class; much turns on resolution in state court litigation of a dispute involving denial of insurance coverage. If the insurers prevail, the defendant "will be gone." The future claimants are those who have been exposed to asbestos but who have not filed claims. Certification of a pure "futures class" is questionable under the present rule. The amendments will make it easier to certify future classes.

The framework of present practice shows de facto aggregation by "commodification" of claims. An illustration was offered of a small 3-lawyer firm whose 3,000 class clients are nothing but names in a computer file. The longstanding pressures toward aggregation may be building to a head, with significant movement in the last few months. Class action practice is a major part of this movement, but it must be considered within the setting of potential changes in underlying substantive and remedial law. Efforts to achieve greater uniformity in awards for pain and suffering, for example, could have an obvious impact on administration of aggregated litigation.

A forerunner of the current draft has been circulated to an ad hoc list of practicing lawyers and academics, selected primarily from a list of those who appeared at a single day of the hearings on the proposals that led to the 1993 Civil Rules amendments. There has not been extensive reaction. There was no apparent sentiment favoring more dramatic changes in class action practice. Academics generally seemed to favor the basic structure of the proposal. Less enthusiasm was shown by practicing attorneys, both those commonly representing plaintiffs and those commonly representing defendants. A very common reaction is that lawyers have learned to live with the present rule, and do not need to devote ten years to educating themselves and judges in a new rule. It is common to speculate that any time saved in reducing litigation over the distinctions between (b)(1), (b)(2), and (b)(3) classes will be offset by an equal increase in litigation aimed directly at the points now reached indirectly through categorization. Notice, opt-out, and opt-in choices are very important. The increased level of district court discretion, indeed, may lead to an increase in total litigation addressed to class action procedure. There also is concern that more flexible notice provisions will be used to add increased notice costs to

actions that now are (b)(1) or (2) classes, and to provide inadequate notice in actions that now are (b)(3) classes. The provision for opt-in classes is opposed by many who fear that it will allow judges to defeat effective use of class actions to enforce disfavored substantive principles. The requirement that a class representative be willing is questioned as an almost-certain defeat of most defendant class actions.

It also was noted that opposition may come in forms that defy common stereotypes. Defendants, for example, may favor certification of classes of future claimants as a means of establishing repose. Plaintiff class attorneys, on the other hand, may oppose such classes in the belief that greater recoveries will be available after claims fully mature. The current proposal does not explicitly address future classes, but is sufficiently flexible that it seems to permit them.

One possible modification of the proposed amendment was discussed. It would be possible to add an eighth factor to proposed Rule 23(b), explicitly allowing denial of class certification on the ground that the costs of administration would outweigh the private and public benefits of enforcing the underlying claim. A point of departure for drafting could be found in the Uniform Class Action Rule promulgated by the National Conference of Commissioners on Uniform State Laws. It was concluded that this addition would not be desirable. The superiority requirement of proposed Rule 23(a)(5) provides flexibility to respond to these concerns. A more explicit provision might lead to denial of class actions in "(b)(1)" settings, and would be difficult to restrain by appellate review.

The best means of pursuing further deliberation were discussed. The proposal has been with the Committee for some time. It seems carefully balanced to many Committee members. It is anticipated that although the proposal seems balanced and reasonably conservative to many Committee members, there will be more explicit and hostile reaction when it is formally published for comment. It was agreed that the formal publication and public comment process should not be initiated by recommendation to the Standing Committee until the Advisory Committee is confident that the proposal is desirable. The formal process should not be used to launch trial balloons. It is possible to begin with a formal request for public comment on the need to revise Rule 23, as was done before preparing the proposed 1993 amendment of Rule 11. As an alternative, it is possible to undertake a widespread informal circulation. Or the proposal could be published with a request for comment on suggested alternative draft provisions.

The possibility of widespread informal circulation was thought dangerous by some members because of the risk that it may cause

positions to crystalize without thought, entrenching opposition that would be mollified by a more open deliberative process. It was noted that many lawyers have commented in the past that only a small fraction of the practicing bar have any generalized experience with class actions. Most lawyers who have handled class actions have experience in only one or two substantive fields. The problems encountered in class actions, however, seem to be distinctively different across different substantive fields. It may be better to focus on processes that will provide open and simultaneous expressions from a cross-section of experienced lawyers.

This discussion led to discussion of the extent to which changes can be made following publication and public comment without need for repeating the publication and public comment process. One argument advanced by opponents of the disclosure provisions proposed in the 1993 amendments to Rule 26(a)(1) was that the final proposal was different from the published proposal, and had not been republished for additional comment. The principle urged in responding to this argument was that the final proposal was merely a reduced version of the original proposal, that the original contained all of the duties included in the final proposal and more in addition. That principle seems right to the Committee, but account must be taken of the potential need for republication in determining whether a proposal is ready for publication.

The discussion of Rule 23 closed with the conclusion that, in part because there are several new Committee members, the proposed amendment should be retained on the agenda for further discussion at the next Committee meeting. It was recognized that the draft changes the nature of the certification process. The process is made more open-ended and discretionary by elevation of the superiority requirement to subdivision (a)(5), transformation of the subdivision (b) categories into factors that inform the superiority decision, reduction of the predominance of common questions test from a prequisite in (b)(3) class actions to a factor that simply bears on superiority, increased flexibility as to opting out and opting in, increased flexibility as to notice requirements, and other changes. These changes will generate uncertainty during a significant period of learning the new rule. They will reduce the opportunities for appellate control of discretionary district court decisions. They may generate more complexity even in the long run than the certification process should have to bear.

Additional materials will be supplied to the Committee to assist preparation for renewed discussion of Rule 23 at the next meeting.

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Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

February 21, 22, 23, 1994

The Advisory Committee on Civil Rules met on February 21, 22, and 23, 1994, at The Cloisters, Sea Island, Georgia. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Chief Justice Richard W. Holmes; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Judge William O. Bertelsman attended as liaison member from the Standing Committee, and Judges Robert E. Keeton and George C. Pratt attended as members of the Standing Committee Subcommittee on Style. Professor Daniel R. Coquillette, Reporter of the Standing Committee, was present, as were Standing Committee consultants Joseph F. Spaniol, Jr., Esq., and Bryan A. Garner, Esq., and Peter McCabe, Esq., and John K. Rabiej, Esq., of the Administrative Office. Professor Edward H. Cooper was present as reporter.

The sole agenda item was work on the current draft of a restyled set of Civil Rules, prepared by Judge Sam C. Pointer from the Style Subcommittee draft.

Before turning to the style project, the schedule for the April meeting of the Committee was discussed. One of the major items on the April agenda will be Rule 23; background materials will be sent out soon. Three experienced lawyers have been invited to attend the afternoon session on April 28 to discuss the history of Rule 23 beginning with the 1966 amendments and to discuss its present effects. John P. Frank, Esq., Professor Francis E. McGovern, and Herbert M. Wachtel, Esq. will form a panel. It was observed that settlements of truly massive tort actions now are creating private ADR mechanisms — "the market" is pushing to develop mechanisms that up to now have eluded legislative solution.

Note was made of the October recommendation with respect to offer-of-judgment legislation, which was approved by the Standing Committee in January. The recommendation that the Judicial Conference suspend its endorsement of such legislation pending completion of Enabling Act consideration may be on the Conference discussion calendar in March.

Early experience with the voluntary disclosure provisions of new Rule 26(a)(1) was discussed. Judge Brazil has prepared a tentative list of variations among districts that have suspended

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Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 28 AND 29, 1994

The Advisory Committee on Civil Rules met on April 28 and 29, 1994, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure, as did Chief Judge William O. Bertelsman as Liaison Member from that Committee and Professor Daniel R. Coquillette as Reporter of that Committee. Chief Judge Paul Mannes, Chair of the Advisory Committee on Bankruptcy Rules, and Judge Jane A. Restani, a member of that Committee, also attended. Parts of the meeting were attended by Judge William W Schwarzer, Joe S. Cecil, John Shapard, Elizabeth Wiggins, and Thomas E. Willging of the Federal Judicial Center. Peter G. McCabe, John K. Rabiej, Mark Shapiro, Judith Krivit, and Joseph F. Spaniol Jr., were present from the Administrative Office. Observers included Kenneth J. Sherk, Esq., and Alfred W. Cortese, Jr., Esq.

HEARING

The meeting began with a hearing on the proposals to amend Civil Rules 26, 43, 50, 52, 59, 83, and 84 that were published for comment on October 15, 1993.

Alfred W. Cortese, Jr., Esq. testified on the Rule 26(c)(3) proposal, supporting the amendment as a restatement of current good practice. He provided a history of the public perception that protective orders may defeat public access to information important to protect public health and welfare, and of the efforts that have been made over the past five years to enact state legislation in this area. Some states have adopted statutes or court rules that increase public access; many have failed to act on similar proposals. Washington passed a broad statute and then cut it back. Experience with the Texas rule has shown that it is very difficult to administer. The standards also are difficult to apply; in determining whether there is a public hazard, the judge may seem to be prejudging the merits of the case. He urged that much of the drive for increased access is based not on a need to inform the public of important issues — full information is presently available to protect against any significant hazards — but on the desire for publicity. The examples often given of thwarted public

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Rule 23

The discussion of Rule 23 began with a panel of three class-action experts: John P. Frank, Esq., of the Arizona bar; Professor Francis E. McGovern, of the University of Alabama School of Law; and Herbert M. Wachtell, Esq., of the New York bar.

Herbert Wachtell spoke first. He sketched his own background in class action litigation. His longest experience has been in securities law litigation, commonly defending. More recently, he has been involved in an attempt to use Rule 23 to accomplish an omnibus settlement of a massive asbestos litigation, appearing for a defendant who desired certification of a plaintiff class. He also has been co-chair of the Lawyers Committee for Civil Rights Under Law, and exposed to class actions from the civil rights perspective.

In the securities area, there are abuses and strike suits. There are unseemly races to the courthouse without investigation in an effort to be first in line as class counsel. But despite these problems, and properly administered, Rule 23 can work reasonably well without changes. Abuses are addressed effectively by means both procedural and substantive.

Three procedural devices have been particularly effective in securities class actions. First is rigorous enforcement of Rule 9(b) as to allegations of fraud – the Second and Seventh Circuits are on the front lines of this development. The Second Circuit requires allegation of specific facts giving rise to a strong inference of fraud. The Seventh Circuit effectively requires pleadings of who, what, when, where, and why. A second procedural device has been to expand the scope of materials that can be considered on a Rule 12(b)(6) motion to include materials referred to on the face of the complaint and public-filed documents. If, for example, the plaintiff alleges that X,Y, and Z were not disclosed, the court will consider SEC filings in which X, Y, and Z were disclosed. Third, there is a developing trend to stay

discovery if a substantial motion is made under Rule 9(b) or 12(b)(6). A discovery stay is an effective deterrent to strike suits.

On the substantive side of securities law, the short limitations period set by the Lampf case and the apparent abolition of an implied cause of action for aiding and abetting in the Bank of Denver case have been helpful.

A strong judge sensitive to abuses and willing to take control can do well with present Rule 23. Rule 23 is needed for meritorious claims; opt-outs are not really a problem in the typical securities case. It is, indeed, rare to litigate a class-action motion on the certification issue itself in a securities case; it is a foregone conclusion that a class will be certified, and if the case is settled the defendant wants it to be settled as a class action.

In mass tort cases, there is a difference between litigating and settling. Class treatment is much more appropriate for settling. If the claim is to be litigated, class certification leaves the plaintiff with no free choice and the defendant with no real chance to defend.

The recent asbestos experience is unique, or at least more different than others. The question of liability insurance coverage is being litigated in California state courts. It is common ground that if the insurers win, the insured asbestos producer will be without meaningful resources. The very real coverage dispute gives the impetus to attempt settlement, and supports the framework of a no-opt-out "limited funds" class under Rule 23(b)(1)(B). For the insurers, a no-opt-out class was a sine qua non of settlement. They were willing to put up $3 billion only for "total peace." Total peace includes settlement on terms that preclude any third-party claims, any collateral attack, or any other exposure to additional liability. An opt-out class would pave the way for one-way intervention, depending on the apparent prospects of the California coverage litigation. The plaintiff class lawyers were not attracted to the no opt-out class. Total peace probably raised the cost of settlement, but it was worth it. Questions about the constitutionality of a no-opt-out class were studied and resolved; the Shutts case does not stand in the way. The prospect of total peace was further bolstered by supplementing the (b)(1)(B) class with (b)(1)(A) and (b)(2) classes. The defendant counterclaimed against the plaintiff class, and other defendants, to enjoin future claims by plaintiffs and claims-over by other defendants. The A.H. Robins decision in the Fourth Circuit supports the result.

Not all mass tort claims are like the asbestos case just

described, even for purposes of settlement.

As to the proposed amendments, Mr. Wachtell agreed with most of the written comments submitted by the Association of the Bar of the City of New York. Radical overhaul of Rule 23 is not desirable. The bench and bar have learned to live with Rule 23 as it is now. The proposed requirement that a class representative be willing to represent the class will do away with defendant classes. Defendant classes are essential to settle mass torts. In corporate litigation, defendant classes can serve the function of a "bill of peace" to make sure there are no more claims out there. It might be desirable, however, to find some way to compensate the unwilling defendant class representative for the additional costs of defending on behalf of a class.

Opt-in classes should not be restored. This device was abandoned for a reason.

A provision for interlocutory appeal in the sole discretion of the court of appeals is a desirable supplement to interlocutory appeal by certification of the district court and permission of the appellate court under 28 U.S.C. § 1292(b). The decision on class certification is, at times, effectively the final decision in the action. Denial leaves the representatives unable to litigate the claim, while grant forces the defendant to settle.

The suggestion that a modest amendment should be made to signal the availability of class actions in mass tort cases should be resisted. Class action treatment is desirable only for settlement, not for litigation.

It would be good to create a discretionary power to deny opt-outs in (b)(3) classes, particularly for settlement. There should be a presumption against opting out of (b)(1) and (b)(2) classes, and in favor of opting out in (b)(3) classes.

The basic notice scheme should be preserved, but the district court should be given discretion to reduce the extent of notice required in (b)(3) class actions.

Professor McGovern spoke next. He noted that over the course of many years of experience with class actions, often acting as special master, he has experimented with many different ideas. With accumulating experience, he has become more conservative about the answers to class action questions. Mass torts was his topic for this day.

One observation heard from many experienced class-action observers is that it does not make much difference what Rule 23 says. Judges and lawyers are result-oriented and will achieve the

results they wish without much regard for the fine points of rule text.

Other observers would say that expansion of Rule 23 tort claims will put an end to the tort system as we know it. Claims will become fungible, as so many commodities on an exchange. Administration will become much like social security disability or workers compensation proceedings.

The silicone gel breast implant cases provide a new experience. Asbestos is a "mature" mass tort with lots of accumulated knowledge. Breast implant cases are very immature: perhaps 10 cases have been tried, with results evenly divided between plaintiff and defendant victories. Most of the fact patterns have not been tried. We do not know the extent or nature of common injuries.

The transaction costs of mass tort litigation are huge. In asbestos litigation, Rand has found that less than 30% of the indemnity dollar goes to compensate plaintiffs.

In the breast implant litigation, there are two mandatory classes, a bankruptcy, a double opt-out class, and an opt-in class. One defendant has tried a (b)(1)(B) class; clearly its funds are limited in relation to the claims, and the plaintiffs decided to negotiate it because of a desire to avoid bankruptcy. This defendant was not "milked dry." Whether this was proper is not clear. Another defendant chose the bankruptcy route. Three others decided to lead the way to settlement on terms that could then be extended to others. These three want the "double opt-out" alternative. This desire arises from the immaturity of the thing — no one knows how many women will claim injuries, nor what the injuries will be. The first option is to exit the entire system, up to June 17 — the defendants then can choose to pull out if too many potential plaintiffs have opted out. The second deadline will come after a first round of claims have been processed. That experience will determine whether it is necessary to reduce the compensation "grid" to adjust awards to the available funds; once that is done, both the plaintiffs and the defendants will have a second opportunity to opt out. Foreign claimants can opt out by June 17, but then must register by December 1 if they want to stay in the class: de facto, this becomes an opt-in class. Another defendant will add to the settlement if it can get a (b)(1)(B) class certified by fall.

All of this activity in the breast implant litigation is driven by the immaturity of it. The "tail" of the cases is what gets you in mass torts — those that go on and on. What you need to do is get closure; even a significant number of opt-outs may leave it possible to define and deal with the risk of uncertainty they

represent.

Class action notices have the effect of bringing lots of claims to court. Without a class action, perhaps 10% to 20% of legitimate claims will be filed. Notice brought in lots of claims in the Dalkon Shield litigation. Once $4,000,000 worth of notices are sent out in the breast implant litigation, much the same is likely to happen. But if there are a lot of opt-outs, the defendants will have a real problem. They are taking big risks from fear of the alternatives.

Salvation may lie not in Rule 23 but in something else.

Are class actions good or bad for tort claims? Even ATLA is deeply divided on this. There is a major argument that plaintiffs' lawyers are using Rule 23 to line their own pockets and sell out victims by sweetheart settlements. The other side is that firms who make much money representing the sickest of the sick are simply looking to protect their own positions.

John Frank finished the panel presentation. He began with a history of present Rule 23, noting that it is a product of the rebirth of the civil rules process in 1960. It also was a product of the civil rights movement of the 1960s. Subdivision (b)(2) was imperative; without it, the committee might not have touched Rule 23 at all. The changes were undertaken at the apogee of the Great Society. The litigation explosion had not yet come. The mass tort was wholly outside the rulesmakers' ken.

In this setting, (b)(1) was made broader than before. (b)(2) was broadened to ensure effective civil rights enforcement. And (b)(3) was broadened in the most radical act of rulemaking since the Rule 2 "one form of action" merger of law and equity.

Whether to have (b)(3) at all was a real concern. A significant fear was that big tort defendants might rig a "patsy" plaintiff class, beguiling courts into selling res judicata at a bargain price. Big business, at the time, had little stock of public trust. And there was intense sensitivity to individual rights. James W. Moore gave a circus fire as an example in which a class action would go against the grain of individual control of individual litigation. Judge Wyzanski developed the opt-out mechanism in a stroke of genius. The opt-out preserved individual autonomy, at least in the setting of small and manageable cases that the committee contemplated. It was assumed that opting out would represent the conscious choice of a person with a meaningful alternative in an individual action. Professor Kaplan, as reporter, raised the possiblity of classes involving many plaintiffs; Judge Wyzanski was firm on the principle that notice should reach all class members, and also believed that the

impracticability of attempting notice would defeat certification of classes involving thousands of plaintiffs.

Subsequent history has been a story of expansion and excesses. The number of Rule 23 filings has ranged from 600 to over 1,000 in each of the last six years. More than 2,000 are pending as of 1993. The number closed has declined each year since 1988.

There have been Rule 23 successes. The comments from informal circulation of the pending Rule 23 draft show that many people are satisfied with the rule as it is. The most dramatic fact, however, is that they do not list specific successes. The number of noteworthy successes praised in the literature is small. What we hear is substantially anecdotal. The scholarly work to get beyond the anecdotal "just isn't there."

The fear that defendants would rig plaintiff classes has not materialized. They have not had to. The "take-a-dive" class has been arranged by plaintiff attorneys who settle out class claims for liberal fee recovery. As a matter of anecdotal experience, such things do indeed exist. Professor Coffey writes that Rule 23 is uniquely vulnerable to collusive settlements. The hazard is increased by the Jeff D. case. Up to then, attorney fees were separate from settlement; Jeff D. holds they can come at the same time. Professor Kane has observed that the court cannot rely on full adversary presentation on fee issues. There is no clear analysis available on the often grotesque relation between return to lawyers and return to the class.

The value of minimal recovery for class members is not established. One response has been "fluid recovery" that does not directly benefit any individual class member.

In developing Rule 23, class representation was assumed. It has become a fiction. The representative is simply one anecdotal example of the claim, a decorative figurehead. All the planning is done by class counsel.

One major problem is the "race for the gold," the competition by attorneys to grab the first class claim. The ashes of the fire — and the bodies — are still warm when the first suit is filed. These attorneys are the "parachutists."

A significant part of the pressure to do something about Rule 23 arises from the impulse to have judges take more and more control of cases.

The pressure to reduce individual notice faces constitutional questions.

There has been frequent departure from the requirement that a class certification decision be made as soon as practicable. Often a settlement is arranged and the request for certification and approval of the settlement is presented as a package. This gives class members an opportunity to "peek" before deciding whether to opt out. In turn this leads to efforts to recruit class members to rival but parallel actions, with promises that a different class action will produce results better than the first proposed settlement.

These presentations were followed by a period of discussion.

The first question went to the practical consequences of collapsing subdivisions (b)(1), (2), and (3) into mere factors to be considered in determining whether a class action is superior. The consequences tie, in part, to the decision to expand discretion in determining whether to permit opting out, an issue that itself has stirred recent litigation. Mr. Wachtell said he would leave the present structure alone. Combination of the present categories would just cause uncertainty. But he would give the court the right to deny opt-out rights when that is constitutionally permissible. Professor McGovern expressed similar concerns. The collapse would create more opportunity to decide whether a mandatory class is a good idea, a matter that will generate real concern and real resistance. Mr. Wachtell observed further that the problem with Rule 23 as a mass tort device is the huge oppression of the defendant even if there is an opt out. In litigation, as contrasted to settlement, Rule 23 maximizes the importance of disparate issues in mass tort claims. Increased use for settlement, however, is desirable and should include the power to deny opt-outs. The Shutts decision does not speak to the constitutionality of mandatory classes for federal courts, at least as to plaintiffs in the United States.

A related observation was that some of the concerns might be a function of aggregation more than class action certification, that large numbers of marginal cases can have a real nuisance potential. Mr. Wachtell responded that yes, there is a force that makes the merits irrelevant. Professor McGovern noted that he acted as special master in one litigation with 4,000 consolidated cases in which the plaintiffs refused class treatment. The cases settled — and were promptly followed by 26,000 more related cases. Mr. Wachtell added that at some point defendants are prepared to put an end to all claims, meritorious and nonmeritorious, by settlement. Notice and opportunity to be heard is enough without allowing opt-outs. There is a real problem of developing a mechanism to get rid of these mass cases. The rule should not be more restrictive than due process limits.

The next question went to the means of drafting a class action

rule that distinguishes between settlement and litigation of the class claims. Mr. Wachtell responded that it is not difficult. The court need certify only on settlement. It is a good thing to arrange the terms of settlement before deciding whether to certify. The decision whether to opt out is better-informed then. All that needs be done to Rule 23 is to add a sentence or two to (b)(3) authorizing denial of opt-out rights in appropriate cases. The text of the rule might even refer to settlement.

Another question was whether the draft Rule 23 would help dispose of mass tort actions. Professor McGovern answered that in large part the proposal simply recognizes what courts are doing now. At the same time, some people will read it to make changes. Mr. Frank added the committee must bear an enormous responsibility on this topic. Someway, somehow, we must have a way to dispose of mass disputes. Rule 23 was not framed for this. We need to go back to the very beginning on this issue. In addition, abuses of Rule 23 are rising. There are hundreds of relatively small class actions that do impose burdens on the court system, and considerable burdens.

Mr. Wachtell observed that he had been involved in a fair share of strike suits, and settlements to get rid of them. It is his strong feeling that the cases in which the attorney gets rich and the class gets little are based on weak claims. But there are success stories. The Washington State power litigation counts as one.

Mr. Frank suggested that the first question is to identify the aggregate litigation that needs to be handled on a mass basis. Then the question is how will we do it. It may be desirable to do something that will ensure real representation of the class independent of the lawyers. And his "most radical belief" is that it is desirable to exclude some kinds of mass claims from class-action treatment — the case should not be there at all unless there are damages of at least $25 or $50 for each class member. There should be some kind of system for aggregating mass cases, perhaps by way of 28 U.S.C. § 1407. The method should be as narrow as it can be.

In response to a question about experience in civil rights cases, Mr. Frank stated that before 1966, (b)(2) certification was at times rejected for civil rights cases. Now it works. Mr. Wachtell added that in many civil rights cases today a defendant class is needed — as for example nonminority employees in an employment discrimination case. He repeated his caution that the draft Rule 23 requirement that there be a "willing" class representative would be a big barrier to this. He also observed that the need for defendant classes is another reason for amending Rule 23 to allow a court to limit the right to opt out.

Turning again to mass tort cases, Mr. Wachtell repeated his view that class treatment is appropriate for settlement. Professor McGovern added that a common-issue trial is an appropriate use for Rule 23, but there is not enough commonality for other issues. He also noted that if a liability class had been certified in the breast implant litigation, it would have made settlement harder. Mr. Wachtell responded that it is important to consider the sequence of cases. Litigating mass claims often is an evolutionary process, with more evidence available after there have been several trials. The ordinary sequence is that plaintiffs win some cases and lose others before things shake out. It would be undesirable to stake everything on a single and first trial.

The final observation was that at least in the Eastern District of Pennsylvania, much has been accomplished without class certification by voluntary reliance on the first litigation of issues as settling common matters.

Following the panel discussion, the committee turned to formal consideration of the pending Rule 23 draft. It began with recognition that all alternatives remain open. The draft has been polished to a form that could be sent forward to the Standing Committee with a recommendation for publication for comment. This Committee is not committed to any amendment of Rule 23, on the other hand, and could conclude that the time is not yet ripe. And the alternative of further study, reconsidering matters once put aside and perhaps considering new approaches, remains open.

Several forces were seen at work in the present pressures surrounding Rule 23. Class actions respond to powerful forces, some of them indirect. Reduction of the barriers to lawyer advertising has facilitated case solicitation. Substantive law is in flux in some areas, particularly products liability. Courts have been willing to accommodate the phenomenon of aggregation that is not a "dispute" in any traditional sense, but a commodification of torts. The claimants are treated not as distinct cases but as fungible units; the process does not change the nature of individual claims, but there is a drastic change in the relationship between counsel and "clients" who are, as individuals, often completely unknown to counsel. The old "equitable" class actions have long been with us, on the other hand, representing principles far older than (b)(3) classes. They provide a reservoir of traditional power that we must not give up. It is a powerful history.

It is not enough simply to decide to "study" the problem. We need a more active approach, a program that focuses on aggregation more generally than Rule 23 categories alone. Scholarship and empirical research can be brought to bear.

With this introduction, it was observed that the real choice is between doing nothing and doing something fairly significant. Some of the significant possibilities lie beyond the reach of the Rules Enabling Act process. Multidistrict consolidation, for example, depends on statute. Admiralty principles -- which seem to work well in a concurso of claims against a fixed fund -- involve matters of substance that can be generalized only by Congress. There are, on the other hand, routine and successful uses of Rule 23 that should not be upset. Rule 23 abuses seem often to be in the role of attorneys; perhaps that can be addressed. And perhaps a set of important structural ideas can be generated. Courts now are cast in the role of filling a vacuum; the question is what alternative procedural, structural, or nonjudicial means might better fill the vacuum.

In the same vein, it was noted that such matters as jurisdictional limits on diversity class actions must be addressed by Congress. This, and related matters, have been extensively considered in the Complex Litigation project of The American Law Institute.

Another observation was that the draft Rule 23 amendments seem pretty good at the level of fairly modest detail. On a larger scale, the ongoing discussion did not seem to show much support for trial of the truly mass problems. These problems may be better suited for an administrative approach, as social security disability is. The present draft might better be changed to require that common factors predominate for any class action -- this would eliminate asbestos, lead paint, and like mass injury cases. Further discussion of the draft suggested that although it may be true that it describes much of what is happening now, it would invite more changes in practice. What is happening now, however, is driven by the strong compulsion to settle, recognizing that there are risks in resting the settlement classes on the present rule. It also was suggested that changes in Rule 23 may make sense even if they are made part of a larger project to reevaluate various forms of consolidation and alternatives to current rules of jurisdiction and even court structure. At the same time, it was noted that rules changes should not be made simply in anticipation of supporting legislation that had not yet been enacted.

In response to these observations, it was asked whether a new rule might be created apart from Rule 23, governing aggregated cases. Such a rule might be aimed at means of achieving and administering settlements, not trials. It was suggested that it would be strange to build a rule that contemplates the elimination of trials -- that an agency for mass justice would be a better means of removing the ill-suited burden of administering mass justice from a court system designed for individual justice. A different kind of court also was suggested, on the theory that a regular

judge swept into massive consolidated litigation would not be able to do anything else.

In the same vein, it was suggested that the problem is in the mass tort area. Single-event disasters are well-suited to class treatment. A recent illustration of events that are not well-suited to class treatment is provided by an attempted class action on behalf of all cigarette smokers who have become addicted.

The aggregation problem, it was noted, often begins with the filing of many individual actions, not class actions. Aggregation of those actions leads to the same problems.

The question of rules designed for settlement arose again. In the present system there is a fear of trial. The fear of trial causes lawyers, not judges, to arrange the settlement. The clients want to achieve certainty and repose, to get out from under. If there is no settlement, some of the cases will go to trial. The transaction costs, however, are enormous.

These reflections led to discussion of the question whether the Civil Rules can establish adequate answers to the problems of aggregating large numbers of related claims. There is little organized information on what is happening. The ALI Complex Litigation project approaches statutory means of consolidation. The procedural devices to be employed after consolidation are not explored. The answers may lie with Congress, or perhaps in devices that require cooperative development involving both Congress and the Enabling Act process. One possibility may be creation of a claims-administration structure that litigants can agree to opt into.

The concluding portions of this discussion turned to the need for further information. It was agreed that more must be known about probable effects before proposing rule changes. An effort should be made to develop a study that will reveal more of what Rule 23 does in its present operations. 28 U.S.C. § 331 requires the Judicial Conference to carry on a continuous study of the operation and effect of the general rules of practice and procedure. Rule 23 is a suitable subject of such study. A subcommittee will be formed to undertake development of a research program, working initially with the Federal Judicial Center.

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Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

OCTOBER 20 and 21, 1994

The Advisory Committee on Civil Rules met on October 20 and 21, 1994, at the Westin La Paloma in Tucson, Arizona. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Carol J. Hansen Fines, Esq., Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq.. Edward H. Cooper was present as Reporter. Judge William O. Bertelsman attended as Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani, a member of the Bankruptcy Rules Advisory Committee, attended. Thomas E. Willging of the Federal Judicial Center was present. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Observers included Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., John P. Frank, Esq., Barry McNeil, Esq., and Fred S. Souk, Esq.

The Chairman introduced the new members of the Committee, Justice Durham and Judge Levi.

The Minutes for the April 28 and 29, 1994 meeting were approved, subject to correction of typographical errors.

Rule 4(m): Suits in Admiralty Act

The Suits in Admiralty Act, 46 U.S.C. § 742, requires that the libelant "forthwith serve" the libel on the United States Attorney and the Attorney General of the United States. "Forthwith" has been read to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m). Several courts, moreover, have ruled that Rule 4(m) does not supersede the statute because the service requirement is a condition on the United States's waiver of sovereign immunity. Concerns have been expressed that Rule 4(m), in conjunction with Rule 4(i), has become a trap for the unwary.

The Committee considered this problem at the meeting in April, 1994, and concluded that rather than amend Rule 4 to provide warning of an exception for cases governed by § 742, § 742 should be amended to delete the service requirement. Section 742 was enacted before the Civil Rules were adopted, and there is no reason that justifies a distinctive service procedure for actions brought under the Suits in Admiralty Act. Further discussion reinforced this conclusion. The Maritime Law Association has recommended amendment of § 742 for years. There has not been any indication that the Department of Justice believes there are special reasons

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Rule 23

Rule 23 was discussed briefly at the beginning of the meeting, noting that there is nothing on the agenda for action at this meeting. The Federal Judicial Center is just ready to begin the fieldwork in its Rule 23 study. The topic will be the focus of the agenda for the February, 1995 meeting and an important part of the work to be done in conjunction with the ensuing meeting in April. It was recalled that the current draft was sent to the Standing Committee in June, 1993, but pulled back because of the press of other business. If further information shows that the present rule is working reasonably well, perhaps it would be better to avoid modest amendments that might cause more disruption than improvement. In addition, it has become clear that we need to reexamine Rule 23 in terms more fundamental than those underlying the current draft. The focus of concern is on mass torts.

Mass settlement classes are perhaps the most important unknown factor. Recent developments have brought new practices to our experience, particularly in asbestos and silicone gel breast implant litigations. In both, defendants have initiated class actions in an effort to settle and buy peace. In exploring these problems, it would be a mistake to focus attention on approaches that fall within the reach of the Rules Enabling Act. If a careful view of the whole problem suggests that it is better addressed by other means, it could easily be a mistake to attempt a less satisfactory solution by changing the rules.

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Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

FEBRUARY 16 AND 17, 1995

The Advisory Committee on Civil Rules met at the University of Pennsylvania Law School on February 16 and 17, 1995. The meeting included many participants who were invited by Professor Stephen B. Burbank as host, and sponsored by the University of Pennsylvania Law School. Committee members who attended included Judge Patrick E. Higginbotham, Chair, and Judge David S. Doty, Carol J. Hansen Fines, Esq., Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter. Judge Alicemarie Stotler attended as chair of the Standing Committee on Rules of Pratice and Procedure, as well as Judge William O. Bertelsman as Liaison Member from that committee and Professor Daniel R. Coquillette as Reporter of that committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. Peter G. McCabe, John K. Rabiej, Robert P. Deyling, and Mark D. Shapiro represented the Administrative Office. Judge William W. Schwarzer, William Eldridge, Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic attended from the Federal Judicial Center. Invited participants present were Judge Edward R. Becker, Daniel Berger, Esq., Professor Stephen B. Burbank, host, Elizabeth Joan Cabraser, Esq., Professor Samuel Estreicher, Robert C. Heim, Esq., Phillip D. Parker, Esq., Judge Lowell A. Reed, Jr., Sol Schreiber, Esq., Henry Thumann, Esq., Melvyn Weiss, Esq., and Profesor Stephen C. Yeazell. The observers included Alfred Cortese, Esq., Fred Shoup, Esq., and Professor A. Leo Levin.

The meeting began with welcoming remarks by Dean Colin Diver and Professor Burbank.

Judge Higginbotham introduced the purpose of the meeting as a continuation of the Committee's efforts to gather information about the operation of Civil Rule 23 and the possible opportunities for amending the rule. He noted that the Federal Judicial Center has undertaken a sophisticated and very much welcome effort to gather rigorous empirical data, and observed that it also is important to hear from as many sources of practical experience as possible.

Judge Higginbotham then turned to an outline of the "Contract With America" legislative agenda, and described the more direct ways in which bills growing out of the Contract would – in current form – affect judicial procedure. H.R. 10, the Common Sense Legal Reforms Act of 1995, contains many direct procedural provisions, many of them dealing with topics that are outside the reach of the Rules Enabling Act process. Title I includes provisions for "loser-pays" attorney-fee awards in diversity litigation, amendment of Evidence Rule 702, amendment of Civil Rule 11, and pre-filing notice requirements for civil litigation. Title II, amending the securities laws, contains many procedural provisions that have been studied by a subcommittee as noted below. Senator Heflin has reintroduced a bill that would require that a majority of the members of all rulemaking committees be practicing lawyers. Senator Kohl has again introduced a bill that would require that all protective discovery orders be based on hearings and findings relating to impact on public health and safety; it was noted that the proposed amendment of Civil Rule 26(c) now on the agenda of the Judicial Conference was framed after careful study of this bill in an attempt to respond to the underlying concerns in a more effective manner.

Senator Grassley has introduced a bill that would provide fee-shifting in diversity cases, and that would enact an offer-of-judgment statute. The bill is similar to the proposal made by Judge Schwarzer that prompted Committee consideration of Rule 68. The Committee has continued to hold the topic on the agenda; the Federal Judicial Center has not yet completed its study of actual practice under present Rule 68. Rule 68 was one of the issues discussed at an Institute of Judicial Administration meeting in 1993, where among other matters game theory was used to suggest behavior patterns that are confirmed by trial lawyer diagnoses of the probable impact of the proposed amendment. In the face of continuing Congressional concern, it may prove important to move Rule 68 back to a more central place in Committee deliberations.

Another Senate bill, S. 300, includes another array of provisions that would substantially affect procedure. Other bills include provisions designed to control or reduce litigation brought by prisoners. The rather limited present provisions for requiring exhaustion of prison remedies would be expanded substantially.

Professor Rowe commented on the diversity fee-shifting provision in H.R. 10. As intended, and as apparently drafted, fee-shifting would apply only if the action were first filed in federal court, and would not apply if the action were brought to federal court by removal. In any state that follows the "American Rule," the result would be pro-plaintiff: a plaintiff who has any significant fear of losing can avoid fee-shifting by filing in state court, while a plaintiff who believes that recovery is certain can win attorney fees simply by electing to file in federal court. In response to a question, he noted that apparently the center of attention has been on individual plaintiff litigation, not litigation between large business firms that may react quite differently to the prospect of fee shifting. Some House Committee members seem concerned about the deterrent impact of fee shifting on plaintiffs, but for the moment it is difficult to measure the extent of this concern. Fees are not defined as an element of "costs," so there is no Rule 68 consequence; there is no indication that the supporters have given any thought to the possibility of integrating this provision with offer-of-judgment provisions. One of the participants observed that the insurance industry is studying creation of policies to indemnify plaintiffs against fee liability; it was suggested that since policies that indemnify defendants have long been accepted, such insurance would not be found contrary to public policy. Another participant suggested that the bill was designed to deter "frivolous" litigation, and asked whether there is any understanding of the actual impact of such a rule on risk-averse litigants, either plaintiffs or defendants. It was responded that there seems to be some awareness of the problem, but that again it is difficult to get much sense of the depth of understanding. It also was asked whether any thought has been given to requiring attorneys to file periodic statements as fees accumulate, so each side will know what its exposure is; the simple answer was "no." It was suggested that the bill may not be particularly pro-plaintiff -- that there are not many "sure-fire" claims in the world of litigation, nor many plaintiffs so confident as to believe they have one. Finally, it was pointed out that the rule has the strange character that it is overwhelming for plaintiffs who are, although poorly, able to respond to a fee award in at least some measure, while it has no effect against an impecunious plaintiff who is unable to respond at all. This effect is often encountered in England.

Further discussion noted that Rule 11 is specifically targeted in a number of bills that seek to undo many provisions of the 1993 amendment, although at least most bills seem to preserve the "safe harbor" provision. Much of the concern with "abusive" litigation is focused on product-liability actions, arising not so much from claims that are unfounded under current law as from dissatisfaction with current law. Since product liability rules also are a topic of close congressional attention, the focus could change. At any event, it may prove important to begin gathering information about the actual impact of the 1993 amendments. On an anecdotal level, we know — or think we know — that the level of "satellite" Rule 11 litigation has dropped dramatically. But it may be responded that this is because Rule 11 has been gutted, not because there is any reduction in abusive litigation. One of the most important questions will be to study the operation of the safe harbor provision. It is possible that the provision is working well — that service of Rule 11 motions before filing has the desired effect of causing frivolous assertions to be dropped, and might even prove more effective than the earlier practice because it encourages cost-free abandonment rather than dig-in defensiveness. Both the Federal Judicial Center and the American Judicature Society would like to do studies of the impact of the 1993 amendment if funding can be found. It was suggested that many grass-roots efforts may be having an impact on frivolous and abusive practices as well, growing out of recent concerns for civility in litigation, Civil Justice Reform Act plans, and the like.

Discussion by the participants suggested a variety of views on the ways in which the Advisory Committee might respond to legislative proposals that affect rules of procedure. One view was that the Committee should not be unduly reserved, that Congress truly wants neutral advice on troubling policy issues. Even on this view, the when, where, and how questions remain difficult. Another suggestion was that other groups, such as the American Bar Association Litigation Section and the Association of the Bar of the City of New York, have found it effective to create position papers that are made available to all participants in the legislative process. The Committee was reminded that many of these legislative proposals are — or are closely tied to — substantive matters that the Committee cannot comment on. The Committee is limited in its role and what it can say.

Thomas Willging then presented a preliminary phase of the Federal Judicial Center study of class actions, based on analysis of the class actions in the most recent FJC "time study." The study is being conducted chiefly by Willging, Laural Hooper, and Robert Niemic, with the guidance of William Eldridge.

The first lesson learned in the FJC study was that the Administrative Office data on class action filings are hopelessly incomplete. The preliminary report based on analysis of those findings, presented to the Civil Rules Committee at the meeting in October, 1994, has been retracted. This sad lesson was learned while beginning the intensive study of all class actions terminated in the Eastern District of Pennsylvania from July 1, 1992 to June 30, 1994. They found many class actions that had not been reported to the Administrative Office: Administrative Office figures showed 38 terminated actions, while an additional 99 were found. These numbers are conservative counts – if, for example, ten actions were brought against one defendant, they were counted as one action. That means that 72% of the filings were missed by the Administrative Office figures. All prior studies and reports of Rule 23 actions based on Administrative Office figures accordingly are suspect. And there are no reliable national data on class-action filings. It is difficult to guess at the causes or nature of the underreporting. One possibility, for example, is that there is a greater tendency not to report such actions as prisoner filings that simply include a boilerplate reference to action "on behalf of all other persons similarly situated." The Administrative Office recognizes the problem, and efforts are under way to correct the data gathering. Even prompt corrections, however, will mean that it still will take several years to accumulata data that can support studies of trends over time.

There was substantial general discussion of the difficulty of making a complete count of class action activity, even by such means as computer searches of clerk's records for the word "class." Many participants believed that there are class actions, particularly in the "civil rights" fields, that never come to the surface.

The Time Study data are quite different. They involve a purely random national sample of all cases filed during selected brief periods between November 1987 and January 1990. A total of

8,320 cases were included; 51 of these were class actions. They give a "small but clear picture," but there is no way to know whether the picture is representative. A few of the more interesting aspects of these cases were noted briefly. 24% of the cases arose under the securities laws. Civil rights cases — prisoner, employment, and "other" — together accounted for 36% of the total. Only 2 of the 51 asserted diversity jurisdiction, a pattern paralleled in the data gathered in the Northern District of California and the Eastern District of Pennsylvania; the restrictive jurisdiction doctrines have had the expected impact. Only half of the cases had "class activity" after the Rule 23 assertions in the complaint. There were no defendant classes. There was relatively little debate about which type of class, (b)(1), (b)(2), or (b)(3), should be certified. Motions under Rule 12(b)(6) and Rule 56 were frequently made and decided before a decision whether to certify a class. Cases that were certified had a much higher rate of in-court settlement. There was a wide range in the ratio between class recovery and attorney fees; although the data are sparse, there tended to be an inverse relationship between the amount recovered and the ratio, with fees falling to a smaller proportion of recovery as recovery increased. Cases filed as class actions took more judge time, and those certified as class actions took much more judge time than the "average" civil action.

During discussion, it was stated that the ongoing study is noting whether settlement is announced simultaneously with the motion for class certification. Identity of counsel also is noted, to determine whether class actions commonly are brought by the same repeat counsel, or instead are often brought by counsel with little class-action experience. One comment was that there is lots of litigation over the distinction between (b)(1), (2), and (3) classes in mass torts, even though there is not so much dispute in other subject areas. It was observed that in districts with local rules requiring that a class certification motion be made within a defined time after filing, there is a strong pressure against pre-certification disposition of Rule 12(b)(6) and 56 motions even though there is no requirement that there be a prompt ruling once the certification motion is made. It also was observed that there are cases like Exxon Valdez and the Chicago drug antitrust cases where class actions are tried simultaneously with large numbers of individual actions.

Judge Scirica and Professor Rowe then presented the report of a subcommittee on pending securities litigation legislation. The subcommittee also included Committee members Doty, Vinson, and Wittmann. Judge Scirica served as chair, and Professor Rowe as reporter. From the perspective of the Advisory Committee, the central question posed by these bills is whether securities litigation is so unique that it needs special procedural rules, displacing the authority of the trial judge to work out the best answer under the more general and flexible authority of current procedure. The Committee cannot undertake to advise Congress on the substantive provisions of the bills, and must recognize that the procedural provisions are closely affected by the substantive provisions.

The rapid evolution of the legislative process complicates the task of determining whether the Committee can provide any helpful advice to Congress on the procedural aspects of the securities litigation reform bills, and if so how the advice might be provided. Much of the attention so far has focused on H.R. 10. Earlier versions of the bill required that class representatives have specified minimum shareholdings; that has been dropped. Another approach to reform, primarily substantive, has been to make it harder to win on the merits — that approach too is evolving, as shown by initial elimination of recovery for recklessness, followed by substitution of gradually expanding definitions of recklessness. The shifting approach to "fraud on the market" theories of liability provides another substantive illustration. Loser-pays attorney fee provisions also are undergoing change, gradually increasing the prospects that a losing party may avoid fee liability.

One directly procedural approach is to adopt heightened pleading requirements, demanding very detailed pleading of scienter, limiting the plaintiff to one amendment of the complaint, and staying discovery during the pleading stage (subject to exceptions).

The statement and testimony of Chairman Levitt of the SEC was praised as a very good identification of abuses and possible solutions. The central point of the statement is that private rights of action are essential means of policing the private securities markets, a vital supplement to SEC enforcement. There

are a number of specific SEC recommendations that will be seriously considered by Congress. One recommendation is that Congress should ask the Advisory Committee to study Rule 9(b) pleading standards, and to address the Circuit split on application of the specificity standard for pleading fraud. The SEC strongly favors creation of safe-harbor rules for forward-looking statements; liability for recklessness; and private liability for aiding and abetting violations. The SEC also is undertaking to develop a program for filing amicus curiae briefs on dispositive motions in private litigation, and also on fee applications. The SEC likes joint and several liability on a proportionate basis, but only for cases of recklessness rather than actual intent. The SEC endorses legislative proposals to limit races to the courthouse, and to prohibit disproportionate recoveries by representative plaintiffs. It is skeptical about proposals to increase oversight of class counsel by guardians or plaintiff steering committees.

Provisions that have disappeared, at least for the moment, include those that would include the power to adopt rules governing court procedure in the SEC's rulemaking authority for safe-harbor protections, and provisions for appointing a guardian ad litem for a plaintiff class. In addition to the specific pleading provisions, provisions for a plaintiff class steering committee would establish a unique and complicated substitute for the ordinary class representatives recognized under Rule 23. The purpose of the steering committee proposal seems to be to establish a "real client" for class counsel; because it is difficult to know how this scheme would work, it is equally difficult to know what alternative means might be found as a general revision of Rule 23 to accomplish the same ends.

Discussion of the Rule 23 aspects of the securities litigation bills included a comment on the practice adopted by some judges of soliciting bids by competing firms to become class counsel. This procedure was said to add an undesirable layer of complexity to getting class actions initiated. The next observation was that there are no problems in class actions in the securities field of any particular importance. With a possible exception for attorney fees, the institution is not out of order and does not need fixing. It also was suggested that opt-in classes might prove useful, and even that a blend of opt-in and opt-out features might be used in a single case; relying on opt-out for smaller investors and opt-in

for larger investors who might realistically bring independent actions. A rejoinder was that institutional investors like things as they stand: by failing to become representative parties they can avoid the burdens of discovery, remain in the background, and still participate in the recovery. Again, it was suggested that if some version of the securities litigation legislation should be adopted, the Advisory Committee should consider adopting a new Rule 23 version in some form that incorporates the legislative procedures so as to avoid the confusion that could arise from attempts to integrate the statutory procedures with the procedures that still are governed by the rules.

A quick summary was provided of other procedural provisions in the securities litigation portion of H.R. 10, including: disclosure of settlement terms; security for payment of costs (including attorney and expert fees) in class actions; the time for seeking attorney fees, set differently than Rule 54(d)(2)(B); discovery sanctions; a limitation on dismissal or withdrawal that clearly would affect Rule 41, and might affect such matters as the opt-out feature of Rule 23(b)(3); jury interrogatories on demand as to the scienter of any defendant; and, again, the specific pleading requirements. It was observed that dismissal for failure to meet specific pleading requirements would be followed by a new action, brought by different counsel, improving on the lessons learned from the first action, and so on until a plaintiff managed to meet the requirements and go on with the litigation.

In conclusion, it was repeated that the focus of the Committee must be on what, if anything, can be done in the rulemaking process to respond to the concerns reflected in these legislative proposals. Congress believes that there are serious procedural problems, and it is important for the Committee to seek to learn as much as can be about the nature of Congressional concerns and the underlying realities. Coordinated and sympathetic study and response are called for.

Friday morning began with a presentation by Professors Cooper and Rowe on the Rule 23 draft that has been developed by the Committee over the last several years. Much of the discussion explored the likely workings of the draft if it were adopted in its present form, and the assumptions that seem to underlie its provisions. Several of the participants observed that their own

experience reflected the lesson of the FJC analysis of the time study data -- there is seldom much dispute about the choice between a (b)(1), (2), or (3) class. At times, however, the choice is vigorously litigated, particularly in the emerging uses of class actions to manage mass tort claims. The litigation in these cases may be very much concerned with the impact of the category of the class chosen on notice requirements and the opportunity to opt out of the class. This phenomenon was thought compatible with the observation that class action practice has matured with respect to many fields, in which lawyers and courts generally know whether a class should be certified and what type of class is appropriate, while practice is less certain in other fields.

It was noted that the distinctions between (b)(1), (2), and (3) classes need not be dissolved to pursue changes in notice and opt-out requirements. Specific provisions addressing notice in (b)(1) and (2) classes can be added, and the demanding provisions for notice in (b)(3) classes can be tamed,directly. In like fashion, the lack of any provision for opting out of (b)(1) or (2) classes, the requirement that members be allowed to opt out of (b)(3) classes, and the lack of any opt-in alternative, can be addressed directly. Some participants believed that it is better to maintain the now "traditional" division among different forms of classes, in part because the different classes have markedly different histories and purposes. The (b)(1) class has an ancient lineage that helps to legitimate class practice in general; (b)(2) classes reflect the proud civil rights heritage of the 1960's; and (b)(3) classes represent both the dramatic expansion of remedies for small claims that could not profitably be pursued in individual actions and the growing efforts to aggregate claims that are (or would be) brought in individual actions.

There was some moderate but inconclusive discussion of the value of opt-in classes. Such classes could address some of the difficulties encountered with particular forms of class actions, most obviously defendant classes. They also could be useful in mass tort cases, not only to assuage concern about individual control of individual claims but also to obviate concerns about the inconvenience of litigation in a distant forum and the difficulty of working through choice-of-law problems. A plaintiff who opts into a class that is certified to apply a particular body of law in a particular forum has not been coerced on either score.

Notice also was discussed. There was some sentiment in favor of adopting more pointed provisions detailing the content of notices. One suggestion was that it might help to draft an illustrative notice to be included in the Appendix of Forms. No particularized suggestions as to content were made.

Substantial concern was expressed about the impact of the "willing" representative requirement on class actions. It was noted that defendant class actions are useful in suing large accounting firms that are organized as partnerships and in suing securities underwriters who are organized in ways that do not allow for entity treatment. Another illustration of useful defendant classes is provided by actions involving multiple insurers, commonly involving state law claims. This was one of the settings in which it was urged that Rule 23 is a model for state practice, and that it is appropriate to consider state uses in considering amendments. At the same time, it was recognized that the position of the representative defendant can be very complicated. Defending on behalf of others carries fiduciary obligations to the class, and forecloses the opportunity to settle freely. Because the stakes are increased, good-faith representation may seem to require a proportional increase in defense effort. Many actions may generate conflicts of interest between the representative defendant and other members of the class, perhaps obvious and perhaps subtle. The attempt to respond to these problems by requiring a willing representative may not be satisfactory, but alternative responses will require careful thought.

Another portion of the draft Rule 23(a)(4) that drew comment was the reference to fiduciary duty. No one doubts that those who seek to represent a class bear fiduciary duties to the class from the moment they assert representative status. This almost casual reference to fiduciary duty, tied only to recognition of the power to relieve representatives or class counsel from their assignments, does not clarify anything. In part for that very reason, it may cause confusion. Some courts, for example, have thought it appropriate in some circumstances to approve a greater recovery for class representatives than for other class members, reflecting the work (and perhaps risks) undertaken by the representatives on behalf of the class. There is no reason why a brief reference to fiduciary duty in the text of the rule should of itself change this result, but it would provide a text to anchor new arguments. This

revision was held up as a model of the well-intentioned changes that should not be undertaken without a better focused purpose and more clearly expressed implementation of that purpose.

The focus of the draft amendments on issues classes was discussed briefly. It was recognized that the changes do no more than underscore options that are available under the rule as it stands. And some skepticism was expressed about the desirability of certifying classes for a single issue – resolution of one issue of liability in a dispersed tort, for example, would simply leave all remaining issues to be resolved in the ordinary course.

This discussion initiated discussion of a topic that recurred repeatedly throughout the day – whether the problems of mass tort actions are so distinctive that a separate rule should be developed. One advantage might be the opportunity to address the problem of "futures" claimants that seem to be unique to this setting, involving people who have been exposed to an injury-causing agency but who have not yet experienced the injurious consequences, or do not know of the consequences, or do not even know of the exposure. Doubts were raised in response. A specific mass torts rule may seem so laden with substantive overtones as to raise legitimate doubts about the wisdom of invoking regular rulemaking procedures. And experience is in a stage so embryonic as to provide very little foundation for drafting a rule with any real hope of avoiding dramatic unintended consequences.

The proposal for permissive appeal from orders granting or denying class certification also was discussed. Many participants believed that the opportunity for appeal, controlled in the discretion of the court of appeals, is highly desirable. The decision on class certification can have overwhelming importance. A defendant may feel forced to settle by certification, while a plaintiff may feel forced to abandon the claim by denial of certification. Some, on the other hand, expressed doubts. It was suggested that defendants resist certification only when they believe they are liable; they should not be given the opportunity to prolong the litigation and add to the plaintiff's burdens by appealing a certification order.

The next part of the program was a panel discussion led by Judge Schwarzer as to settlement classes, Judge Reed as to

"futures" classes, and Judge Becker as to mandatory classes.

Addressing settlement classes, Judge Schwarzer began with the observation that settlement classes seem susceptible to abuse, and certainly have given rise to perceptions of abuse. At the same time, there is no careful empirical evidence on these problems.

A settlement class is one in which class certification is addressed as part and parcel of a settlement: certification is sought at the same time as the parties announce their settlement and seek approval of it through the class action procedure. This phenomenon is developing in mass tort cases. It does not seem likely that those who drafted current Rule 23 ever thought of this. To the contrary, they most likely expected that class definition and notice would be determined by adversary contest, providing information to the court and protecting the interests of class members. In the settlement class, the judge stands alone, dependent for information on one-time adversaries who have joined in a nonadversary request. The judge still is obliged both to decide on class certification and, if certification is granted, on approval of the settlement. How can the judge properly discharge these responsibilities?

This introduction was followed by a list of questions addressed to settlement classes: (1) Should settlement classes be allowed at all? They do have value, but is it enough, on balance, to legitimate the device? (2) If settlement classes are permitted, should Rule 23 be amended to address related problems? The only opportunity the judge has to address the requirements of subdivisions (a), (b), and (c) is provided by the subdivision (e) proceeding for approval of the settlement. How is the judge to get behind the parties' agreement on these issues? (3) So, is it clear that Rule 23(e) should require compliance with (a) and (b) for settlement classes, and provide notice under (c)? What is the burden, what the benefit? (4) If Rule 23 is not adequate, how should it be changed? There are no standards for approval in (e). Appellate decisions discuss factors to be considered, but it does not seem likely that they constitute a comprehensive, guiding body of law. Matters to be considered if amendment is undertaken include: [A] Revision should be trans-substantive, not only for mass torts; the fundamental issues likely are the same across all categories of actions. [B] Changes should be neutral, not

targeting any substantive ethical rules and principles. [C] Methods should be devised to ensure that the judge gets adequate information; it would be a start to require findings. [D] So too, methods should be devised to ensure that the judge can consider all affected interests. (5) If procedures can be devised to protect all interests, can a settlement class be made mandatory, to ensure a global settlement? Substantial opt-outs weaken the purpose. Under the present rule, availability of a mandatory class turns on (b)(1) and an assessment of the assets of the defendant as a potentially "limited fund" in relation to the claims; this may be upside down of a more desirable system that seeks to preserve the defendant as an ongoing, contributing social institution.

Judge Reed then addressed futures classes, again seeking to raise questions rather than provide answers. He invited consideration of his opinion at 157 F.R.D. 246 as one illustration of the problems and tentative solutions. A "futures class" involves persons who have been exposed to a product or property, who have not or may not have manifested disability or actual loss, but are aware of a potential for injury. They do not get anything on settlement, but remain eligible for relief in the future. It is very difficult to define such a "late-maturing class" for certification. Indeed, the class may include fact dilemmas beyond the person who knows of exposure but does not know of injury — there are those who may have forgotten about exposure, or may not even know of exposure.

Futures classes pose difficult questions of standing and "case or controversy" requirements. Is there an "injury-in-fact" simply because of exposure? Judge Reed said yes, but the answer may be shaped by the mature science relating to asbestos.

Due process notice questions also are difficult. Notice is critical to the opportunity to opt out under Rule 23(c)(2), and the opportunity to opt out is critical to an assertion of nationwide personal jurisdiction. See 1993 Westlaw 472812 (October 28). The Manual for Complex Litigation talks about the rule that you do not have to have actual notice. Opportunities for direct and collateral attack are based on notice. The notice must say in bold that the persons addressed are in the class, even if not sick. And it must list the benefits from being in the class.

There are ethical issues facing counsel who represent both present and futures classes: do they need separate counsel? What can the court do about this question when a settlement is presented?

Resolution of futures claims commonly requires a structure for monitoring the class members and for assertion of claims as they mature. These must be communicated to the class.

Attention must be given to notifying the class so that objectors can become informed and make their views known. It is necessary to address such questions as the right of objectors to intervene or demand discovery.

Judge Becker addressed mandatory classes. They are classes not certified under (b)(3). The mandatory classes come with a lot of baggage, of legal background. There are not many problems with (b)(1)(A) or (b)(2) classes. The problem arises from (b)(1)(B) limited fund classes. If there is a truly limited fund, class treatment again makes sense. "Punitive damages overkill" arising from multiple demands for punitive damages in independent actions is a particular problem. There may be a due process violation at some point in a sequence of multiple punitive awards; a mandatory class seems a good resolution. Of course this becomes involved with the substantive law. It worked in Agent Orange in the Second Circuit, but was denied in the Skywalk litigation in the Eighth Circuit and Dalkon Shield litigation in the Ninth Circuit.

The decision in Phillips Petroleum v. Shutts may be a problem, perhaps implying that mandatory classes may violate due process, or at least may violate due process unless there is consent or contact with the forum. The rationale of the Shutts decision must be determined: is it that plaintiffs must retain some control of litigation that disposes of their claims? The "Ticor" case in the Third Circuit involved certification under (b)(1) and (2); later litigation was allowed to proceed on the theory that there were substantial damage claims, giving a right to opt out. The Supreme Court managed to avoid decision of these issues when they came up by way of the Ninth Circuit.

The policy issues surrounding mandatory classes include: (1) efficiency – this is cheaper than processing multiple individual

actions. (2) Fairness – it may be cheap, but is it fair? How far does fairness depend on the distance of the forum from class members? (3) Autonomy, individual control of litigation affecting individual claims, is important. Is a lawsuit the business of the parties, or the public? (4) Federalism – particularly, what should be made of state class actions, if claimants are allowed to opt out of any federal class?

One approach would be to make (b)(3) classes mandatory, across the board or in some measure. Another would be to discard any bright-line rule based on the nature of the class, and allow a flexible approach in which opting out may be allowed – or denied – in any form of class; the draft Rule 23 already prepared by the Committee illustrates this approach. A decision must be made whether to "push the edge of the envelope" in the mass tort area, where we trench on substantive law and constitutional issues. And, at the very beginning, it must be determined whether it is worth undertaking any revision of Rule 23 when it is not possible to frame firm answers to many of the important questions.

Discussion of the panel's questions ensued. The first question raised was whether there should be a specific provision, perhaps in Rule 23(e), for settlement classes. Judge Schwarzer responded that the rules should be trans-substantive. Mass torts should not be specifically addressed. The idea of a settlement class may be contrary to Rule 23, which contemplates adversary presentation on the issues of certification, notice, and opting out. Perhaps subdivision (e) could be restructured to illustrate the matters the court should consider when confronted with a proposed class and class settlement.

It was observed that there is a large body of caselaw on approving settlement that courts know and follow. And it was responded that the findings made through these procedures cannot be treated with great seriousness. The rejoinder was made that defendants are not interested in unsupported findings that subdivision (a) and (b) requirements have been met, leaving them without protection against future litigation. When defendants contest class definition, they seek a narrow class to reduce the scope and expense of the litigation; but when they get to settlement, they want a broad class to protect against future litigation. This participant tells class representatives at the

beginning that they will be stuck with the litigated class definition – that he will not undertake to settle for a broader class.

It was asked how the rule can be structured so there is a true case-or-controversy on the Rule 23(e) presentation? What will work, as a practical matter? If the rule cannot make it happen, it can create a process. It is not uncommon to have a case filed with settlement and class certification presented at the same time. As a matter of economic reality, these are defendant-driven settlements. Defendants want global settlement and mandatory classes, but do not want to set up a class action framework that will invite claims until they know the claims can be settled. All parties are under enormous pressures to settle – emanating in part from the court. Defendants must have total peace.

Another participant praised Judge Schwarzer's presentation. It is troubling that lawyers for present claimants also represented the futures class in the Georgine settlement. Judge Weinstein has twice appointed separate counsel for future claimants. Maybe there should be opt-out rights too. No one knows who these future claimants are, how many they are, what their injuries will be: present victim counsel will try to get the most that can be got for the present victim clients. The independent representation theme was echoed by another participant, who suggested that it might be helpful to provide in Rule 23 for independent counsel for subclasses.

In similar vein, it was stated that there is an adequacy of representation problem. Class counsel is trying to resolve too many claims; the court should appoint counsel for at least one subclass to decide "whether the pot is big enough, and whether it is being divided fairly." It is important to distinguish between creating the fund and dividing it. Rule 23(e) should not be drafted in a way that interferes with this. And it would be good to put the fund immediately under the control of the plaintiff class or subclasses, so that they can reap the earnings while division is being accomplished.

It was suggested by another participant that the key lies in defining what the judicial role is: a rule cannot specify on a trans-substantive basis what must be considered. Most settlements

occur after there has been some adversary contest on such matters as class certification. An enumeration of factors in Rule 23(e) would help; most circuits have enumerated such factors. The Manual for Complex Litigation is a big help, specifying a process that begins with preliminary approval, and so on. This process seems to be universally used, even though it is not in Rule 23. In a related vein, it was observed that Rule 23 should not itself spell out a formalized settlement administration procedure — that the expense and delay would be overwhelming. Another observation was that the sophistication of the trial judge is an important factor in ensuring sound results.

Still another stated that the level of scrutiny of a settlement class varied markedly depending on whether there has been a prior contested certification: if so, there is a framework. If not, there is more scrutiny of the issues.

One of the judges suggested that it should be made clear in Rule 23 that if the certification question first arises at settlement, the lawyers must show the factors that support certification. And a practitioner reverted to the earlier theme in response: there is a change in behavior upon settlement, which deprives the court of the information sources it needs.

It was asked whether interpleader might be used once a fund is set. One reply was that interpleader might be turned into a claims resolution facility of some value. Another was that Rules 22, 23, and 24 work well together. Again, the Complex Litigation Manual shows how they interlock. Rule 22 has been used by insurers for bankrupt clients; Rule 24 has been used for intervention by a class. It is always possible to comply with the forms.

Another participant noted surprise at the concern expressed about supervision of settlement — in his experience, there is a lot of effective supervision.

The possibility of using special masters to participate in the process of approving settlements was raised, drawing from the Committee's current Rule 23 draft. One participant noted that he had played a master-like role in evaluating confidential information and making recommendations that did not reveal the information to the judge. The possibility of more active

investigation on behalf of the court was noted, but not pursued. It was suggested that the need to provide representation for the unrepresented is greater than the need to have the court substitute in some more open-ended and not adversarial role.

Then it was suggested that it is premature to deal with these settlement questions in Rule 23, that settlement classes should be dealt with in the Manual for Complex Litigation. Recent asbestos settlement classes involved negotiated prefiling settlements that worked because all the lawyers involved were very experienced and had large portfolios of cases. There seemed to be no real conflicts of interest. The lawyers feared that if they filed first, an activist judge would have forced them to be recalcitrant or to be bound in a shotgun marriage. They need to know the settlement terms with certainty before they can approach class certification and actual settlement. The problem of future classes is at times referred to as "unk-unks": unknown numbers of claimants who will have claims of unknown size. Severity of injury commonly covers a wide range, from mildly irritating symptoms to death. The uncertainty is extreme. Both plaintiffs and defendants are frightened by the prospect of bankruptcy as an alternative claims-administration system. The plaintiff lawyers in these asbestos futures settlements were the best lawyers in the country on the subject; they knew and cared about what they were doing. The framework of settlement is shaped by the reality of the transaction costs encountered in past methods of resolving asbestos claims. Historically, $1 has been spent on defense for every $1 paid to claimants; the result is that claimants, after paying their own lawyers, have received one-third of the money devoted to the litigation. It is in the defense interest to maintain this ratio if they cannot achieve global settlement. These vast wasted costs make it desirable to attempt a different resolution, to run the risks involved in establishing private diagnostic systems, monitoring, and claims processing facilities. The inability to predict which person will suffer which consequences of what severity forces this mode. But it is probably impossible to attempt to generalize in a rule about the circumstances that make this possible and desirable.

A provisional summary of the issues raised for the Committee by this discussion was then attempted: The Manual for Complex Litigation must be considered as a supplemental device, an

alternative to amending Rule 23. That does not answer all of the questions whether Rule 23 should be changed in some ways, or whether other rules should. Congressional remedies may not be possible, as demonstrated by the asbestos experience.

Whether Rule 23 changes are needed at all remains uncertain. The mass tort phenomenon seems to be driving the process. If that is so, it must be asked whether asbestos and breast implant litigation are an isolated phenomenon — and perhaps, when more is known, may be quite different from each other. The breast implant defendants are haunted by what happened in asbestos, perhaps failing to see the fundamental differences. In the implant litigation there is a definable universe of claimants. The manufacture of implants is a discrete event, occurring over a relatively few years. Traditional Rule 23 approaches can work better here than in asbestos. So is all of this discussion an attempt to design a system for asbestos? And isn't that foolish, in part because too late? The science of asbestos is relatively mature, particularly in comparison to the science as to silicone gel breast implants. And there has been ample experience with the ways in which asbestos cases actually try out; there is much more limited experience with actual trial of breast implant cases.

Taking a broader perspective, it can be said that what is happening in mass cases is not that courts have been finding a way to resolve cases. Instead, the effort to find ways to resolve vast numbers of related cases has developed a procedure that produces a mass courts are not equipped to handle. The result is a mass, not a case. The parties, driven by self-interest, then create a claims processing facility that resembles legislatively created administrative systems. Even as administrative and executive claims agencies seem to be moving ever closer to judicial models, these arrangements move courts away from judicial procedure and toward an administrative role foreign to their history, tradition, and special attributes. "The circle closes."

It was asked whether a blanket prohibition on punitive damages would help process these cases. An answer was offered that it might make things worse, creating an incentive to litigate causation in each individual case.

More open-ended discussion raised a variety of additional

issues. One was whether a choice-of-law statute might help; it was observed that in the school asbestos litigation, the Third Circuit found that the law of most states was quite similar. Another was whether Congress might be able to dispense with jury trial in favor of an alternative system of administration: what form might the administration take? One system might be to pick up on the forms being developed by settlements -- to establish defendant-funded systems that allow individual future claims to mature, resolve questions of actual injury, identify the products that caused injury, and provide compensation according to a grid. These speculations were cut short by the suggestion that reliance on action by Congress is a long-shot. The rulemaking process must tend to its own responsibilities on the assumption that Congress will not act.

It was suggested that a court can certify a class sua sponte for purposes of case management, appoint masters to design a claims facility, and so on. If defendants perceive a crisis is in the making, they can anticipate this.

It was observed that the in terrorem effect of aggregating marginal cases may be unfair. Perhaps aggregation should not be allowed until litigation arising from a particular source of multiple injuries has matured. When it seems clear that there are large numbers of well-founded claims, aggregation may become appropriate. Another participant seconded this observation with the wry comment that some lawyers believe that aggregation deals with claims of de minimis strength and value. Yet another found it horrid to force people into consolidated proceedings, forcing settlement.

The discussion turned to substantive issues with the note that Congress has never addressed the aggregation of small claims, and may address the perceived problems of aggregation -- including aggregation of large individual claims -- by addressing substantive law more than procedure. Current interest in federal products liability legislation is an indication of this possibility. But if substantive law is the problem, it was asked, why should the rulemaking committees write procedural rules to address the problem?

The American Law Institute Complex Litigation project was

noted next. It focuses on bringing litigation into one court, and seems to assume that federal courts will inherit most of the work, and will be able to do it well. This may be an overly sanguine assumption; most lawyers and courts may not be up to the task. In response, it was asked what is the measure of comparison? If we look to state courts, the view is mixed. Many states are reluctant to consolidate multiple actions even on a county-by-county basis. And if settlement is thought so horrid, we must ask whether the courts are ready to try them as an alternative. Settlement is a contract. Settlement can work, despite questions about fairness. Consolidation can be viewed as a default rule reserved for cases that fail to settle, admitting that case-by-case trial is the nominal mode but recognizing that it is not possible.

Careful consolidation was supported as a device that can accomplish a lot. Courts can develop ways to try cases by samples so carefully selected that parties will go along. Additional incentives can be offered to join, as accelerated trials and the promise of reduced discovery burdens. It may be that plaintiffs will be willing to waive punitive damages for other advantages — the parties agree not as settlement of the claims but as establishing a procedural framework for resolving the claims. The "Ahearn" settlement, before turning to the futures class, resolved more than 50,000 cases and present claims pending in many different courts; this sort of result can be achieved even without consolidation. It was defendants who set all of this in motion. In the early days of the Bendectin litigation, after an approved settlement was reversed, trial was consolidated on a basis that was mandatory for the Ohio cases but optional for all others; the finding of no causation effectively resolved many cases. A response was that there is a big risk in having a consolidated trial, just as in having a class trial, before the science is mature. (And, after all these years, there still may be some question whether Bendectin will be found a teratogen.)

The other side of consolidation is that plaintiffs may find it forces trial, by leading defendants not to settle. And at the same time, it may build up expectations of those who have marginal claims or no claim at all. Trial level percolation has a value; a few trials make people realistic, and should occur before consolidation is undertaken. Massive repetition of massive discovery need not be a problem, even without consolidation; after

the first few cases have unearthed all of the unearthable liability information, it can be shared – protective orders should not be a problem. (The pending Rule 26(c) amendments would make doubly certain of this.)

But there is a lot of pressure on all parties to settle. Perhaps the Manual on Complex Litigation should teach judges to provide lawyers the means to reach agreement before mass consolidation occurs.

Consolidation and class actions were described as "apples and oranges"; consolidation is not the same as class certification. The Cimeno litigation had the consent of the parties to consolidate.

The final portion of the meeting was devoted to brief summary reactions from the invited participants who had been able to remain to the very end.

Professor Yeazell said that Rule 23 should be revised. Notice should be "delinked" from the (b)(1), (2), and (3) classifications. It is far better that revisions be made by the Advisory Committee and the rest of the Enabling Act process, not by Congress.

Mr. Berger expressed equivocal feelings about amending Rule 23. Amendments might make the rule worse, not better. If any changes are made, they should be incremental. The only hope for achieving a rational product is to follow the Enabling Act procedure. Attention should focus on areas where law and practice are not yet well settled. Courts could use guidance in such emerging areas as toxic torts. It is unclear whether (b)(1) needs attention. (b)(2) is being used in mass torts for compensatory relief. (b)(3) has no workable definition of predominance. The Committee Notes should not be cryptic; they should be designed to help bench and bar. Policies should be stated, recognizing counterpolicies. The chief policy of Rule 23 is accomplishing effective relief.

Ms. Cabraser believes that Rule 23 should be amended. The draft of Rule 23(a) is good, apart from the requirement that a class representative be "willing." The draft is benign in clearly setting out the purpose of Rule 23 and the changes. The only part

of the draft that is not helpful is the provision for permissive appeals in subdivision (f). Subdivision (e) would be much improved by incorporating guidelines based on Judge Schwarzer's suggestions. The use of masters or magistrate judges acting as masters could be improved by using the master before the settlement proposal is made to the court for approval. Involvement of a master in helping the parties formulate the proposal could be one of the factors considered in evaluating the settlement; once a proposal comes to the point of submission for approval, it is too difficult to make changes in the proposal. The coverage of settlement approval procedures in the Manual for Complex Litigation should be expanded, or perhaps a separate manual could be prepared for this topic.

Professor Hazard advised that the significance of the (b)(1), (2) and (3) categories should be reduced, but in a way that preserves the old learning. Topics that deserve attention include notice, opt-out, defendant classes, and predominance. There may not be much more that can be said about predominance, although it may be possible to mark the distinctive nature of claims that cannot economically stand alone -- such claims should almost automatically be certifiable. Adequacy of representation is more important than the adequacy of the formal representative. Remember that the representatives of the income and principal beneficiaries in the Mullane case were not members of either class, but strangers appointed to represent their interests.

Mr. Heim suggested that some changes in Rule 23 would be desirable to restore adversarial balance, and reduce implicit economic terrorism. Rule 12(b)(6) and 56 motions should precede certification, reducing the force for prompt certification. Draft Rule 23(f) strikes the right balance on appeal rights. The opportunity to appeal grant or denial of class certification may impede pressure for settlement, but that is a good thing. Rule 23(c)(2) notice provisions can easily be improved. "Settlement classes" may deserve special treatment if there has not been earlier consideration of certification.

Judge Becker advised that draft Rule 23(f), creating a permissive appeal opportunity, is good. Early Rule 12(b)(6) and 56 motions are good. Some actions have class allegations as mere throw-aways; this should not be enough to invoke all of Rule 26(e).

The draft Rule 23 cleans up a lot of things; much of it is good. Perhaps the dual requirements of typicality and commonality should be abandoned -- the requirement of typicality adds little to the requirement of commonality. More has to be done on notice. There should be some better provision to care for the class member who does not get notice of the need to file an individual claim to participate in a recovery; the most workable procedure may be to impose an obligation on class counsel to make inquiries when a known significant claimant fails to file a claim.

Judge Reed expressed approval of Judge Schwarzer's criteria for approving settlement. He is very much concerned about the settlement class, which increases ethical burdens on lawyers. The draft Rule 23(f) appeal provision is a good idea, but care must be taken to be sure that it is appropriately limited.

Judge Schwarzer advised that expectations for improving Rule 23 should be set at a reasonably low level. The real problem of mass torts is federalism: federal proposals do not reach state courts. It is not clear that there is any pressing need to amend Rule 23, although the draft is elegant. There is some argument for amending subdivision (e). He would drop the 23(f) appeal proposal; entry of final judgments under Rule 54(b) and permissive interlocutory appeals seem adequate to bring important certification questions to the courts of appeals. Committee notes can provide a lot of guidance.

Mr. Weiss stated that Rule 23 is resilient, and grows to meet new social needs. It is still growing. Any significant change will stir up years of uncertainty and doubt. The Committee should wait ten years, and then revisit the questions of mass torts.

Mr. Schreiber likes Judge Schwarzer's Rule 23(e) suggestions. He observed that some problems arise when the Judicial Panel on Multidistrict Litigation sends complex toxic tort cases to tyro judges -- although there is an understandable need to increase the pool of judges experienced in handling complex consolidated proceedings, it may be wise to arrange the growth of experience in more sensible stages. Some of the more practical problems that should be considered include the need for multiple counsel to represent subclasses or class members with conflicting interests; the practice of "claims made" settlement funds; calculation of

counsel fees, whether by lodestar or fraction of the amount recovered for the class; and mass torts – including the question of relying on statistical projection to resolve individual damages issues, as Judge Real has just done in a case involving 10,000 claimants.

Mr. Thumann urged that at most minor amendments should be made to Rule 23. The Committee draft improves the language of the rule, but does not make any significant change. Why bother? The change he would most favor would be adoption of the draft Rule 23(f) appeal procedure, which provides an opportunity to get out from the in terrorem effect of an improvidently certified class.

These summaries left almost no time for comment. It was suggested that eliminating the typicality requirement might not cause much loss, but also noted that Rule 23 has emerged from a long background of interest-group litigation.

Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 20, 1995

The Advisory Committee on Civil Rules met on April 20, 1995, at New York University School of Law. The meeting was held in conjunction with the April 21 and 22 Research Conference on Class Actions and Related Issues in Complex Litigation, held by the Institute of Judicial Administration at New York University School of Law. Members of the Advisory Committee also attended the Conference. The Advisory Committee meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, and Judge C. Roger Vinson. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. John K. Rabiej and Mark D. Shapiro represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Observers included Professor Linda Silberman and Professor Samuel Estreicher, Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., Fred S. Souk, Esq., Laura S. Unger, Esq., and H. Thomas Wells, Jr., Esq.

Professor Silberman welcomed the Committee to the NYU School of Law and to the Conference; the welcome was later repeated by Professor Estreicher.

The Committee approved the draft Minutes for the meetings of October 20 and 21, 1994, and February 16 and 17, 1995.

Judge Higginbotham opened the meeting by noting that this is the last in a series of meetings designed to increase the Committee's knowledge of class actions. The history of the 1993 draft was recalled: the Committee had approved it with a recommendation that the Standing Committee approve publication for public comment. During the meeting of the Standing Committee, however, it was decided that the public agenda of civil rules was so full that it might be better to defer action on Rule 23 for a while; particular concern was felt about the impact of the discovery and disclosure amendments then awaiting study and

approval by Congress. Since then, rapid developments in the use of Rule 23 to address dispersed mass tort litigation have provided the occasion for further consideration of Rule 23. The settlement plans worked out in different asbestos actions and the silicone gel breast implant action are examples of these developments that have not yet fully played out. Rule 23 was the subject of active study at the Advisory Committee meetings in April, 1994, and February, 1995. Many members of the Committee also attended the March, 1995 Conference on the Federal Rules of Civil Procedure sponsored by Southern Methodist University School of Law and the Southwestern Legal Foundation in Dallas. Research help has been sought from the Federal Judicial Center.

Congress has been examining the large social problems that give rise to a substantial share of the litigation brought as class actions. Although the Committee hopes to be able to coordinate with Congress, and to inform its work just as the work of Congress informs the Committee's efforts, Congress operates on a different time line than the Committee. The Committee, moreover, must maintain its independence and credibility – work on Rule 23 might easily be perceived as arising from particular positions or viewpoints on the larger substantive and social problems, and everything possible must be done to defuse any such perceptions. It is also important to continue to find ways to defeat the common perception that Committee processes are closed to the public; the widespread circulation of the current Rule 23 draft and the efforts to bring experienced class action lawyers into Committee deliberations have provided a beginning. The repeated focus on the current draft at the Institute of Judicial Administration conference also should help.

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Rule 23 Study

Thomas Willging provided a brief report on the progress of the Federal Judicial Center study of Rule 23 to supplement the partial draft report that was provided with the Committee materials and the presentation to be made at the IJA Conference the following day. He noted that data collection in the Northern District of Illinois and the Southern District of Florida will be completed in May and June. They hope to have a final report by the end of summer. Among the preliminary findings of experience in the Northern District of California and the Eastern District of Pennsylvania, he noted that class certification is granted in only about half of the cases brought on for certification, and that defendants often are successful in winning partial or complete dismissal under Rule 12(b)(6) or by summary judgment.

Legislative Activity

A report was provided by the subcommittee of Committee members Doty, Vinson, and Wittmann, chaired by Scirica and reported by Rowe, dealing with the procedural aspects of pending securities legislation. It was suggested that the central issue at the outset will be whether Congress shares the view of the SEC that private actions are essential to protect the integrity of the securities markets. If Congress disagrees with this view, it is likely to make many substantive changes and blend procedural changes in with them. If Congress shares this view, on the other hand, it may find less sweeping means of addressing any abuses that it may find in present patterns of private enforcement. At least some of the problems that Congress is addressing deal with matters within the reach of the Rules Enabling Act. The Committee can provide for such matters as a threshold showing on the merits as a prerequisite to class certification; permissive interlocutory appeal from certification rulings; means of regulating races to file class actions; and perhaps the specific pleading standards of Rule 9(b). As to such matters, and others within the Committee's reach, it will be important to discover whether the Committee and Congress can and should find means of working together.

Laura S. Unger described several of the concerns of Congress, with particular emphasis on the perspectives of the Senate, where she works. It does not seem likely that Congress will want to defer to the SEC and the rules committees, but the committees of Congress would like to be able to gain the advantage of rules committee knowlege and experience just as they gain much advantage from working with the SEC. There is considerable frustration with lax pleading, races to the courthouse, and the cost of discovery while motions to dismiss remain pending unresolved. There is a desire to find a way to force institutional investors, who typically have the largest stakes, to opt in or out of securities class actions. Such a system likely would encourage the institutions to opt out of weak actions, greatly reducing the incentives to bring weak actions. At the same time, it would encourage the institutions to opt into strong actions, preventing them from getting a free ride on the efforts of others and perhaps contributing valuable information to the progress of the action.

This concern with weak actions was echoed in the Committee. It was noted that the problem is with actions that pass the hurdles of Rule 11 frivolousness, motions to dismiss for failure to state a claim, and motions for summary judgment, but that nonetheless are quite weak.

Miscellaneous Rules

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Rule 23(e). A suggestion that Rule 23(e) should be amended to develop further the court's responsibilities in approving class action settlements was met with the conclusion that this topic is one of the central matters being studied in the ongoing study of Rule 23. It will continue to be a major topic in developing

possible revisions of Rule 23.

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Next Meeting

Rule 23 revisions will form the major item for discussion at the fall meeting. The meeting probably will be set in October. The period from October 19 to 21 has been ruled out. Every effort

will be made to select the dates that create as few conflicts as possible for presently known schedules of Committee members. The site will be Tuscaloosa, Alabama.

In preparing for discussion of Rule 23, the Committee should work throughout the summer in exchanges that focus on gradually more specific proposals. This process will help to decide whether any revision should be attempted, whether drastic changes are desirable, or whether modest reforms are worthwhile and the limit of prudent proposals. A docket of proposals will be prepared by the Reporter, beginning with lists of topics that seem certain to warrant further discussion and other topics that will warrant further discussion only if Committee members believe that is desirable. Some of the "no-discussion" items may include suggested amendments that can be considered at the October meeting without further correspondence over the summer. Once a list of topics for summer discussion is created, more specific questions will be framed for continued collegial exchange, for a self-study process that will not attempt to reach any specific decisions. The thought is that focusing for the first time on a detailed draft at a meeting, without advance preparation, will not provide a solid foundation for effective progress. Although it is hoped that a detailed draft rule can be provided for consideration, perhaps even for recommendation by the end of the meeting to the Standing Committee for publication, the draft itself will be intended to focus the results of the summer exchanges, not to preempt further

detailed discussion and revision. Detailed language will facilitate discussion, without freezing it.

Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

NOVEMBER 9 and 10, 1995

The Advisory Committee on Civil Rules met on November 9 and 10, 1995, at The University of Alabama School of Law. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former Committee Chair Chief Judge Sam C. Pointer Jr., and former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette attended as Reporter, and Sol Schreiber, Esq. attended as a member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej, along with Karen Kremer, represented the Administrative Office of the United States Courts. Thomas E. Willging and Robert J. Niemic represented the Federal Judicial Center. Professor Francis E. McGovern attended as an invited speaker on experience with state-court class actions. Observers included Frank Bainbridge, Esq., Sheila Birnbaum Esq., Robert S. Campbell, Jr., Esq. (liaison, American College of Trial Lawyers), Alfred W. Cortese, Jr., Esq., Robert Heim, Esq., Professor Deborah R. Hensler, Robert Klein, Esq., Barry McNeil, Esq. (Chair-elect, ABA Litigation Section), Professor Linda S. Mullenix, Fred Nisko, Esq., Professor Carol M. Rice, Evan Schwab, Esq., Fred S. Souk, Esq., Melvin Spaeth, Esq., and H. Thomas Wells Jr., Esq. (liaison, ABA Litigation Section).

Judge Higginbotham opened the meeting by welcoming the Committee and observers to Tuscaloosa and the Law School.

The Minutes of the April 20, 1995 meeting were approved.

Judge Higginbotham reported on the September meeting of the Judicial Conference of the United States. Shortly before the meeting, the proposals to publish for comment revised jury voir

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Rule 23

Civil Rule 23 formed the central focus of the meeting. The materials with the discussion draft suggested that four major proposals should be discussed first: (1) The new Rule 23(f) provision for permissive interlocutory appeals; (2) that Rule 23(b)(3) be modified to require that a class action be "necessary" for the fair and efficient adjudication of the controversy; (3) that Rule 23(b)(3) require consideration of the probable success of the class claim on the merits, and of the significance of even probable success; and (4) that Rule 23 be modified – most likely with respect to (b)(3) classes only – to make clear the appropriateness of "settlement" classes. The meeting provided opportunity for full discussion of each of these four proposals, and tentative decisions were reached as to the first three. No time was available to discuss the more detailed changes that also were proposed in the discussion draft. The discussion draft posed two separate issues with respect to these changes. The first issue is whether it is wise to propose a number of significant changes in tandem with a set of major changes. The choices to be made will not be easy. If the Committee finds several aspects of Rule 23 that bear useful improvements, it seems undesirable to defer these matters for a period that is likely to extend several years into the future. On the other hand, consideration of even two or three fundamental changes will continue to require careful attention and much hard work. If the Standing Committee, members of the bench and bar, Judicial Conference, Supreme Court, and Congress are asked to consider fundamental changes, there may be a risk that other significant changes will not receive the attention required to ensure the best possible revisions. The second issue really is all the other changes. None can be advanced without careful Committee review. If it is decided that they should be considered on the merits with an eye to determining which merit a recommendation for publication, the Committee must review them to support appropriate determinations.

Rule 23(f): Permissive Interlocutory Appeals

Draft Rule 23(f) would provide for permissive interlocutory appeal from a district court order granting or denying class certification. The draft is closely modeled on the language of 28 U.S.C. § 1292(b), in an effort to invoke familiar concepts that will ease application of a new rule. It departs from § 1292(b), however, in important respects. First, it does not require

permission to appeal from the district court, nor even an initial request to the district court for permission. Second, it does not incorporate any of the limiting § 1292(b) requirements that have limited use of § 1292(b) in the class certification context – that there be "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although § 1292(b) has provided a useful opportunity for appeal with respect to various Rule 23 rulings, the draft is intended to make appeals more readily available. The opportunity for more frequent review may be particularly important if other substantial changes are made in Rule 23. Particularly during the early years of any new Rule 23 provisions, the opportunity for appellate guidance by interlocutory appeal can be invaluable.

The limits built into the draft were noted repeatedly throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. District court proceedings are stayed only if a stay is ordered by the district judge or the court of appeals – the stay provision is modeled on § 1292(b) to ensure there is no confusion of meaning. The district-court-first analogy to Appellate Rule 8(a) also was noted repeatedly. The Advisory Committee Note to this provision should observe that ordinarily an application to stay district court proceedings should be made first to the district court. The question was raised whether the rule should provide a presumptive stay of discovery when a court of appeals grants permission to appeal. It was agreed that it is better to adhere to the general provisions of the § 1292(b) model; such problems seem to be worked out well in practice under § 1292(b), and creation of a presumption might distort the stay decision.

The first question addressed to the nature of the permissive appeal was whether there should be an opportunity to appeal as of right, even broader than the former "death-knell" theory that was used by some courts to permit appeal when a denial of class certification seemed to threaten the practical termination of litigation that could not be pursued to vindicate individual claims alone. The discretionary opportunity provided by the draft was thought to be illusory. It was observed that at least in some

circuits, certification for appeal under § 1292(b) frequently fails because the court of appeals denies permission to appeal; eliminating the need for district-court certification does not ensure that the court of appeals will grant permission.

The response to the fear that a discretionary system of interlocutory appeal would prove illusory was the fear that a right to appeal would lead to abuse. The Federal Judicial Center study confirms the belief that there are many "routine" class certification decisions. Appeals in such cases are likely to do little more than increase delay and expense. Yet there will be strong temptations to appeal certification decisions; defendants will be particularly tempted to appeal orders that grant certification. Perhaps worse, the right to appeal certification decisions might lead a party to contest a certification that otherwise would be accepted by stipulation. It is anticipated — and the Advisory Committee Note would make clear — that permission to appeal, although discretionary in the court of appeals, will rarely be given.

It was further urged that the draft provides significantly greater protection against improvident certification decisions than § 1292(b) now provides. Removing the power of the district court to defeat any opportunity to appeal is a significant change. A grant or denial of certification can "make or break" the litigation, and the need for review at times will be greatest in situations that are least likely to lead to district-court certification. And the danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.

An argument was advanced for restoring the requirement of district court permission to appeal, drawing from the observation that a class certification decision may be provisional. When a judge has reached a reasonably firm decision as to certification, appellate review often will be welcome, particularly in cases that present uncertain questions of law. There is little reason to fear that necessary appeals will be thwarted by district court intransigence. And if the district judge has no voice in the appeal decision, there will be a tendency to defer certification

rulings. These arguments were later renewed, with the added suggestion that district-court discretion is particularly important in cases that have generated lengthy records on the certification question. The district court's familiarity with the record will support a better evaluation of the value of appeal. The response was renewed also, this time with the added observations that certification for appeal might be inappropriately denied by a judge bent on pursuing settlement following a grant of class certification designed to encourage settlement, or that certification for appeal might be inappropriately denied by a judge who has denied class certification because of distaste for the underlying claim.

Discussion returned to the fear that the draft rule would encourage too many efforts to appeal; it was suggested that appeals would be attempted in the overwhelming majority of cases. It was rejoined, however, that this prediction rested on experience with the most complex and contentious of class actions. More routine actions are not likely to involve such persistent efforts. The explicit invocation of court of appeals discretion, moreover, is a significant safeguard against feckless attempts to appeal. Although adding "in its discretion" to an openly permissive appeal provision may seem redundant, it is valuable as an explicit reaffirmation of the sweep of appellate discretion. The phrase is lifted bodily from § 1292(b); the Committee Note should state that the scope of appellate discretion is as broad under proposed Rule 23(f) as it is under § 1292(b). Invoking this familiar concept should allay concerns about the risks of improvident and disruptive appeal attempts. It is expected, moreover, that most certification decisions will depend heavily on specific case circumstances. There will be little reason to grant appeal in such cases; the major impetus for appeal will come in cases presenting unsettled questions of law.

Further discussion led to the conclusion that the Committee Note should discuss the possible importance of district court contributions to the decision whether to permit interlocutory appeal. District courts should be encouraged to offer advice on the desirability of appeal at the time of making certification decisions. The advice would not be a condition of appeal, but would be more or less persuasive according to the reasons offered by the district court and the extent to which certification turns

on case-specific facts developed at length in the district court. District courts can be quite helplful in "separating the wheat from the chaff" of intended appeals. District court advice may help the parties as well as the court of appeals; a cogent statement of reasons for refusing appeal may often discourage a party who otherwise would attempt an appeal.

It also was asked whether an appeal provision could reasonably be discussed before deciding whether to propose any other changes in Rule 23. Until the Committee has concluded its deliberations on Rule 23, it will not be possible to know what the Rule will be. The scope of appeal, the nature of the issues that may be advanced, and the frequency or infrequency of "routine" certification decisions, all depend on the nature of the rule itself. It was responded that the Committee may decide to urge only the appeal amendment. But it was further agreed that a decision to propose an appeal provision may appropriately be revisited, at the behest of any Committee member, at the conclusion of the Rule 23 deliberations.

A motion to approve proposed Rule 23(f) passed, 11 for and 1 opposed as to particular (unspecified) features of the draft.

CERTIFICATION "NECESSARY"

The discussion draft proposed that to certify a Rule 23(b)(3) class, a district court must find that certification is "necessary" for the fair and efficient adjudication of the controversy, not merely superior to other available methods:

> **(3)** the court finds * * * that a class action is ~~superior to other available methods~~ <u>necessary</u> for the fair and efficient adjudication of the controversy. * * *

The background of this proposal was described as the great level of interest and concern that have come to surround use of Rule 23 to address mass torts, and particularly dispersed mass torts. The Committee has heard many views on this set of problems through its activities focused on Rule 23. There has been a strong sense that much of the difficulty has been due to the substantive law, a difficulty beyond the reach of this Committee. There also

has been much concern that certification of a class can give artifical strength to claims that individually lack any significant merit. The greatest concern focuses on claims that, if valid, would generate substantial individual damage awards. Although many of the claims may be brought as individual actions, the defendants would defeat most. If all are aggregated in a single action, however, even a relatively small risk of losing on the merits must be weighed by the defendants against the crushing liability that would be imposed by a loss on the merits. This calculation may be further affected by a fear that the sheer weight of the responsibility of denying any recovery to all members of a class may increase the prospect that the class will win on an aggregate claim that would be lost far more often if pursued in individual litigation. The result is a great pressure to settle. The pressure to settle also may be enhanced by the transaction costs of litigating individual claims – if a defendant can purchase "global peace" by settlement, much of the settlement cost may be offset by saving the expense of individual litigations.

On the other side of the equation is the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation. Consolidation of actions in the same court under Civil Rule 42, and aggregation of actions in different courts under 28 U.S.C. §§ 1404, 1406, and 1407 is not a particularly effective means of addressing this problem, even recognizing that the efficiencies of consolidated proceedings may make it possible to pursue claims that would not bear the risks and expenses of separate adjudication. Class actions in such circumstances do far more than merely achieve efficiency. The proposal is not designed to deter consolidations, but only to limit class certification to settings in which individual litigation is not a realistic alternative.

Changing this criterion of Rule 23(b)(3) certification from superiority to necessity could emphasize the role of class actions in addressing claims that do not bear the costs of individual litigation. For such claims, class certification is necessary. Certification is not necessary for claims that could reasonably be pursued in individual actions. It may be that a single event or set of events will give rise to claims of both types because some victims suffer substantial injury, while many other victims suffer only relatively minor injuries.

Such is the purpose of the proposal. It is limited to (b)(3) classes. The questions the Committee addressed began with the central issues: is the change desirable? What might it mean in practice – is there force to the concern that "necessary" might mean a lower threshold, not a higher threshold? Should the change be broadened to include (b)(1) or (b)(2) classes?

The first response was that the proposal was a mere cosmetic change that is not adequate to address any of the real problems of Rule 23.

The next response was that indeed the change seemed to lower the standard, making it easier to achieve certification. The annotations to the proposal say that the test of necessity is a practical test, not an absolute one; is this something that can safely be left to the Committee Note, or should it somehow be worked into the language of the Rule? Another view of this question was that there is no meaningful difference between superiority and necessity; unless we can find and express a difference, we should not amend the language of the present rule. In any event, the concept of necessity is ambiguous.

And then the proposal was championed as a good thing. The only way to effect change is to modify the language of the rule. The problems indeed are clustered around (b)(3) and the "freeway" effect it has in generating claims that, but for class certification, would not ever develop into litigation. If it were possible to find the equivalent in formal drafting language, the rule should caution against "willy-nilly" certification. The Note should say this. A clear and convincing preponderance of the factors conducing to certification should be required.

The opposing view conceded that necessity implies a higher standard than superiority, and argued that a higher standard is undesirable. To find that a class action is superior is to find that it is a better means of proceeding. To change the standard is to require that a court deny certification even though a class action would be better than – superior to – the realistically available alternative methods of proceeding. The change may seem to be loading the rule too much in favor of defendants. The perceived problems would be better addressed through the proposed factors that look to the probability and social benefits of success

on the merits of the class claim.

Another concern about the necessity standard was expressed in relation to employment discrimination claims. The statutory amendments that have added damages remedies now bring these cases into the ambit of (b)(3) classes. Class certification may be necessary to ensure that all affected individuals recover damages; a rule that emphasizes necessity may lead to certification of a class that will generate many practical problems, and that would not be "superior" to other available methods that often would not be invoked. This result may be a good thing, but we need to think about the problem before deciding on a language change.

The concern about the ambiguous relationship between the superiority and necessity standards led to the suggestion that the rule retain the superiority requirement and add necessity as an additional requirement. This should make it clear that the standard is being ratcheted up. This proposal was in fact adopted after much further discussion.

Attention then moved to the element of this requirement that focuses on the "fair and efficient adjudication of the controversy." It was observed that the meaning of this phrase depends on the "controversy" that it refers to. If the controversy includes claims that grow out of a common fact setting but that would not give rise to individual litigation, the concepts of fairness and efficiency may diverge. A class action may be superior and indeed necessary precisely because there is no viable alternative means of adjudication. It is more fair if the claim deserves to be enforced. At the same time, class proceedings may be "efficient" only in the sense that the alternatives are so inefficient as to be unavailable. For that matter, certification also may not be "fair" in light of the prospect that an aggregation of worthless small claims may gain leverage that forces settlement to avoid the costs of class litigation and the risk of a mistaken judgment on the merits. This discussion did not lead to any proposal for amending any of the three terms involved.

Another suggestion was that as a matter of drafting, factor (C) should be reframed. "Desirability" somehow duplicates the inquiry into superiority or necessity; it would be better to refer to the consequences of concentrating the litigation in the

particular forum. This suggestion was met, however, with the concern that the longstanding language of Rule 23 should be changed only when a change of meaning is intended. Any substitute for desirability must be explained in the Note as a styling change, not a change of meaning, and even then there would be a risk that the Note would be overlooked and some change of meaning read into the change of language.

These concerns provoked the observation that before addressing matters of language, it is most important to determine what policy should be embodied in the rule. Should we maintain present policy, or is it desirable to suggest some change?

One broad policy issue was found in the question whether adoption of a higher standard for (b)(3) class certification would be, or would be perceived to be, a pro-defendant choice. The response was that the change cannot meaningfully be seen in that light. The purpose of this change is not to address the classes that aggregate numerous small claims; if anything is do be done about such classes, it will be through other proposals. Instead, it addresses the classes that include plaintiffs who have substantial individual claims and who could pursue individual litigation. In the last few years, defendants have often sought certification of such classes. The interests of the defendants, often spurred by liability insurers, are to achieve a global settlement that avoids the costs and uncertainties of individual litigation. Making certification more difficult in these cases could at least as easily be seen as a pro-plaintiff change. As an additional complication, the interests of the defendants may overlap with the interests of some members of the plaintiff class because a class adjudication can effect a more orderly and uniform distribution of the assets available to satisfy the claims of all plaintiffs. A carefully structured class disposition can ensure that all persons injured by a common course of conduct share in the judgment, not simply those who got the earlier judgments. The purpose is not so much to favor plaintiffs or defendants as to find a procedure that most effectively recognizes the interests of all.

The Committee then was admonished that this proposal reflects rulemaking at its worst. The Rules were, in the beginning, relatively simple. People could understand them. They have become complex. The cognoscenti understand them still. But there are

800,000 lawyers who may need to understand them, and it is counterproductive to continue along a course of trivial changes that generate confusion far out of proportion to any incremental benefit that might be achieved.

The policy issues were brought back into the discussion with an illustration of a "single event" mass tort. An airplane crash might generate 150 claims. Each claim could be tried separately. A joint class proceeding may be more efficient, but is not necessary. This is a real situation that causes real difficulty. Individual actions in the federal courts can be consolidated without difficulty, given the array of consolidation devices. The Note should comment on this alternative to certification. This change is important. This argument was met by the contrary view that class certification is suitable for the single-event mass disaster. And in return it was accepted that perhaps in some single-event settings a class action is necessary because consolidation will not accomplish all the appropriate results. Class certification, for example, might help address settings in which individual state-court actions cannot be consolidated with a mass of federal actions.

A different perspective was opened by the observation that the proposed necessity standard seems calculated to underscore a preference for individual litigation where individual litigation is possible. It was answered that this is indeed the purpose, that many lawyers believe there is too much emphasis on moving cases, getting rid of them, even though individual actions would be better. This is the policy that should be addressed before language is chosen.

This policy was then underscored by referring to the decision in Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). It was suggested that the result in the Rhone-Poulenc case is right, and that Rule 23(b)(3) should be amended to make it easier to support similar results in future cases. We need to find a way to make it easier to refuse certification. This view was echoed in the statement that the issue is whether Rule 23(b)(3) should be amended to discourage class certification.

The earlier suggestion was renewed by a motion that the superiority language should be retained, and supplemented by adding

a requirement of necessity. There would be no change in the "fair and efficient language," which refers to matters that depend heavily on the context of specific cases. This change may indeed encourage certification of small-claims classes; whether there may be offsetting changes that may discourage certification depends on the additional proposals still to be discussed.

The virtues of this proposal were urged to be twofold. The existing body of doctrine that elaborates the superiority requirement will be retained, providing a familiar first step of analysis. The additional necessity requirement need be addressed only if superiority is found. Necessity then will provide an additional and higher requirement that will require further evaluation of the same factors that bore on the superiority determination.

The objection was made that it seems undesirable to require this two-step process. The proposal seems to be that necessity is a higher standard that always embraces superiority, and always requires something more. The finding of superiority will be necessary in all cases, but never sufficient for certification. Why not focus on necessity alone, explaining it as well as can be, without retaining both requirements?

The motion to retain the superiority requirement and add a necessity requirement passed by vote of 8 to 4. This portion of Rule (b)(3) would read:

> **(3)** the court finds * * * that a class action is superior to other available methods <u>and necessary</u> for the fair and efficient adjudication of the controversy. * * *

State Class Actions

Professor Frances McGovern then addressed the Committee on current experience with class actions in state courts. He spoke from extensive experience with state-court class actions, including experience as a special master charged with facilitating coordination between state courts and the federal court supervising the consolidated federal cases arising out of claims concerning silicone gel breast implants. He has worked extensively with the

MTLC committee established by the Conference of Chief Justices.

There has been an explosion in state class actions. Many of them involve claims that are framed as "fraud" claims arising out of the terms of various kinds of insurance and loan transactions. The volume is remarkable. The procedures also are remarkable; state judges achieve much greater uniformity of procedure than federal judges, largely by adhering closely to the recommendations made in the Manual for Complex Litigation. There are some major problems.

Polybutelene pipe cases illustrate one type of state actions. Chlorine attacks the pipe joints, causing them to leak. State law governs, and individual claims ordinarily are too small to meet the amount-in-controversy requirement for diversity jurisdiction. Some individual claims have been tried to judgment. The defendants want to settle. A Texas state judge refused to certify a nationwide class for a $750,000,000 settlement. A federal judge denied jurisdiction of an attempted class action. The result was that class actions were filed in three states. A California judge took on the task of persuading judges from the other state to go to California to work out a settlement. When that did not work, he conducted a settlement conference that came very close to a settlement. The lawyers have been "sent back" to the other state courts to attempt to conclude the settlement of all actions in all states. It may work.

For some time, class actions have provided the "end game" after a number of individual actions have been tried to judgment, establishing a framework of information that facilitates just and reasonable settlement on a class basis. But recently some lawyers are attempting to bypass this process, putting the class action "up front" before there have been many individual adjudications.

State judges increasingly are turning down "sweetheart" settlements that establish res judicata for the defendants in return for deals that benefit the class lawyers more than the class.

State class actions have become very important. And federal Rule 23 is very important to what the state courts do. Most states follow Rule 23, although there are variations in the extent of its

adoption.

Deborah Hensler then stated that Rand is trying to put together a project to get a good view on the frequency and diversity of class actions. The methodology would be different than that used by the Federal Judicial Center study, aiming at generating complementary information. A survey of potential plaintiffs would be an important element in the study. A series of case studies, based on data collection from sources outside court files, would be attempted as the basis for a systematic measure of the costs and benefits of class actions for plaintiffs and defendants. This is a very ambitious proposal, which will require substantial independent funding. It may not be possible to mount as ambitious a project as would be desirable. Although it takes a while to make sure that the cases studied are fairly representative, not "eccentric," results could be available in time to inform this Committee's ongoing consideration of Rule 23.

PROBABILITY OF SUCCESS

Over the course of the past year, it has been urged that Rule 23 should incorporate a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification. The discussion draft included this feature in two – perhaps redundant – ways, dealing only with (b)(3) classes:

> **(3)** the court finds * * * that the probability of success on the merits of the claim [by or against members of the class] warrants the burdens of certification, and that a class action is superior * * *. The matters pertinent to the findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses.

Discussion began by framing the general issues: should any consideration of the merits be required? If so, what should be the means of calibrating the strength of the claims to the certification decision? Should the preliminary injunction analogy be used, or does it suggest an unnecessarily elevated standard of success? How would this approach affect the relationship between the certification decision and other proceedings – would it require

substantially increased opportunity for discovery on the merits, delay the certification decision, create difficulty for certification of settlement classes, increase the occasions for interlocutory appeal? Although the provision may seem a boon for defendants, may it generate offsetting problems by elevating the stakes at an early stage of the litigation for fear that a preliminary finding of probable success may increase settlement pressure and even affect a defendant's standing with the financial community? So, in the end, is this an approach that may help plaintiffs in cases that lead to a favorable preliminary appraisal of the merits, and may harm plaintiffs when the preliminary appraisal is unfavorable?

It was suggested that perhaps it would be more appropriate to rely on analogy to temporary restraining order practice rather than preliminary injunction practice. The difficulty with preliminary injunction procedure was thought to be that it may be akin to trying the case before certification. Civil Rule 65, indeed, authorizes the court to combine the preliminary injunction hearing with trial on the merits. A temporary restraining order often issues only after a hearing, but the hearing is expedited and there is little or no discovery. The key is to find an abbreviated procedure, a matter that invokes the procedural distinctions between temporary restraining orders and preliminary injunctions, not any supposed difference in the standards for preliminary relief.

It was observed that with preliminary consideration of the merits, lawyers inevitably will demand an opportunity for discovery to support well-informed presentations on the merits. And, once discovery is opened up, it will be difficult to limit its scope. It will be difficult to resist this pressure, and it will be difficult to keep the focus of discovery narrow. If the purpose is to separate out claims that gain settlement power by certification despite scant prospect of success at trial on the merits, an abbreviated procedure will not do the job. During the delay, it may happen that some individual claims are tried; that is not necessarily an undesirable thing.

The fear that a probable success requirement would impede certification of classes for the purpose of settlement was stated to be a real problem. It also was noted that defendants often push

for certification of a plaintiff class if they believe they have strong cases, and that the probable success requirement could prove adverse to defendants in this way as well.

Concern with the effects on settlement classes was met by the suggestion that a probable success requirement could be viewed from the perspective of settlement. If certification is made to support future efforts to settle, the requirement means only that there is a reasonable prospect that settlement will be achieved, since settlement will count as success on the merits. If certification is made to support a settlement already reached, the measurement of success on the merits becomes one with the proceedings to determine whether to approve the settlement. The defendant wants certification, the plaintiff wants certification, and a probable success element should not be a problem if the rule is properly drafted.

The probable success factor was urged to be a good token of the broader problems of class actions today. Some class actions are very good, as shown by the wide array of opinions gathered by the Committee's efforts to reach out to the bench and bar for advice. Other class actions are simply means by which complaisant plaintiffs' lawyers offer res judicata for sale at bargain rates to intimidated defendants. The Federal Judicial Center study shows that individual recoveries are small in most class actions. Account should be taken both of the prospects of meaningful recovery for anyone, and whether there is enough real good in any recovery to justify the burden of class proceedings. Although the Rhone-Poulenc decision in the Seventh Circuit does not say so expressly, it turns in part on an estimate of the probable merits of the class claim, and also on the costs to the system even if the class claim succeeds. The history of plaintiff failures at trial generated a particular fear that a single class proceeding might reach a wrong result. Even if a right result should be achieved, great difficulties would be encountered in further proceedings to translate the class judgment into individual judgments. Other cases involving minuscule individual recoveries, administered and distributed at great cost, impose quite different burdens. "Fluid" class recovery in such cases involves elements of social policy that should be beyond the reach of the Rules Enabling Act process.

It was asked whether success on the merits should be measured

by the representative parties' claims or by the class claim. The response was that it is the class claim that is important, but that the plaintiffs' individual claims may be strong evidence of the strength of the class claim. The question is how many class members have claims sufficiently similar to the individual representatives' claims to warrant certification.

This discussion led to more pointed suggestions as to the nature of the showing that might be required. Rather than a thorough appraisal of the merits, it was suggested that a "first look" might be sufficient, or that the effort should be only to ensure that the claims are not "bogus."

The first look approach was resisted on the ground that the certification decision is very important. If the merits are to be considered, it should not be done on the basis of half-a-dozen affidavits. If there is to be discretionary consideration of the merits at the certification stage, it should not be so open-ended.

The "bogus" claim approach met the response that few cases involve bogus claims. Most contemporary criticism of Rule 23 arises from dispersed mass-tort cases, and these cases do not involve bogus claims.

These observations returned the discussion to the opening point. The class device should facilitate prosecution of strong claims, but should not be misused to add strength to weak claims. Many experienced lawyers say that, despite the difficulties of making a rigorous empirical demonstration, a significant share of class actions involve coercive use of the class device to force settlement of claims that have little chance of success on the merits but that promise overwhelming liability should the slender prospect of success on the merits mature into reality.

The quest for alternative formulations led to additional suggestions looking to a "significant probability of success," or "sufficient merit to warrant certification." These and other formulas led to the suggestion that before further drafting efforts were made, the Committee should determine the general question whether any consideration of the merits might be appropriate.

A motion to add to the (b)(3) certification some consideration

of the probable merits passed by 11 to 1.

Robert Heim, an observer, then told the Committee that although he had been an early proponent of the preliminary injunction probability-of-success analogy, the Committee discussions had persuaded him that this approach might impose an undue burden on plaintiffs. The burden would be particularly troubling if appraisal of the probable outcome were to be made early in the litigation. Defendants too may have cause to fear this approach, particularly as the preliminary appraisal might come to influence such subsequent matters as settlement negotiations, summary judgment, or even attitudes at trial. It would be better simply to adopt a low threshold that gives the court discretion to look at the merits without embarking on an extended inquiry. This result could be accomplished by adopting a new element in the Rule 23(b)(3) calculus, requiring the court to find that the issues presented by the facts and the law are not insubstantial [and have been sufficiently well developed through prior judicial experience].

Immediate response to this suggestion was that perhaps this inquiry should be reduced from an element of the certification decision to a mere place in the list of factors that bear on the elements of certification – the most obvious fit would be with the determination that certification is superior and necessary for the fair and efficient adjudication of the controversy. The question is one of weeding out weak cases, and a simple role as one factor in the certification process will accomplish that task. It was suggested that if this look at the merits should become only a factor, a balancing element should be incorporated, so that a greater prospect of success on the merits would be required when the burdens of certification are greater. Treating the inquiry as a mere factor in the certification determinations was urged to reduce the risk of untoward consequences. Indeed, it was urged that as a mere factor, this inquiry could actually help plaintiffs win certification of classes on strong small claims, reducing the concern that preliminary consideration of the merits may seem an unfairly pro-defendant provision. (And it was responded that perhaps the bilateral impact of this approach is enhanced if it is made an element of certification, not a mere factor.)

Another response was that it is dangerous to require prior

judicial experience with the underlying claims. This element seems to reflect concern with dispersed mass torts. There is no reason to insist that there have been earlier litigation of related claims before determining whether to certify claims that arise out of a single transaction -- securities fraud actions offer a common example. It was responded that the concern really goes to the newness of the kind of claim. Securities litigation often presents issues of a kind made familiar by much earlier litigation that arises out of distinct events but invokes common principles. So of other kinds of class actions. But some class actions present issues that are new and unfamiliar; it takes time for the claims to mature through individual adjudication before courts can safely consider class litigation. Premature class certification can create many claims that otherwise "would not be."

The balancing approach reappeared, with the suggestion that a "not insubstantial" test standing alone would not have much effect. Insubstantial claims should be dismissed without regard to attempted class certification. It also was urged that "not insubstantial" has a double-negative ring that is not well-suited to rule drafting. The effort to sort out claims that can proceed as individual claims but not as class claims also seems to intrinsically involve balancing. What is sought is a sufficient prospect of success by the members of the class to justify the incremental costs, delays, risks, and settlement pressures that flow from certification. Why not say this openly, recognizing that the adverse consequences of certification vary from case to case, and allowing only relatively strong claims to support a certification that imposes relatively onerous burdens?

The difficulty of making a cogent appraisal of the likely outcome returned to the discussion. A "determination" of probable merits should not be required, but only a preliminary assessment. But there is a danger that in many cases the assessment will not in fact be preliminary. Any requirement in this dimension will put real pressure on the judge. Findings will be made. Discovery will be had. The determination may be tied to, or sequenced with, summary judgment.

A separate question was raised about the risk that an adverse ruling on the probable success factor might spur a plaintiff to mount a second action. The same representative plaintiff might

allow the first action to meander along without certification, but seek certification of the same class in another court with another opportunity to persuade a different judge on the probable success issue. It would be a nice question whether the first determination should preclude relitigation by the same plaintiff, particularly if there is no final judgment in the first action. And the problems would become much more tangled if the same lawyers simply found a different representative plaintiff to maintain a second action. Certification and defeat of the class claim brings some measure of finality. Denial of certification is less likely to do so. These questions were met with the response that if there is a need to make certification more difficult, the need should not be put aside because of the prospect that a plaintiff who once fails to make the required showing may try a second time to make the same required showing.

Comparisons with present practice also were noted. One comparison is the finding in the Federal Judicial Center study that in a majority of the class actions studied, motions to dismiss or for summary judgment were made before a ruling on certification. Another was that evidentiary hearings now are required on only a small fraction of class certifications, and that the hearings that are had typically run from two hours to perhaps a single day.

Discussion of the probability-of-success factor resumed after an overnight break. It was suggested at the beginning of the morning session that it would be difficult to be achieve a final formula, with confidence, at this meeting. There will be many opportunities for review, aided by comment, before the present discussion draft can be transformed into a new rule. The Committee should seek to do the best it can for the moment, recognizing that the time has not yet come to take a proposal to the Standing Committee with a recommendation for publication and comment. Instead, the draft that emerges from this meeting can be reported to the Standing Committee as an information item at its January meeting, seeking their views as support for further consideration at the April meeting of this Committee. If a proposal for publication can be reached at the April meeting, and is approved by the Standing Committee in early summer, it would go out for public comment at the same time as a proposal presented to the Standing Committee in January.

Turning to the actual approach to be taken, it was observed that the "not insubstantial" claim approach involves a double negative in one sense, but it reflects a common recognition that goes beyond the surface logic of words. Lawyers understand that however precise a line we might imagine between "substantial" and "insubstantial," there is a big difference between requiring that a claim be substantial and requiring that a claim be not insubstantial. Earlier discussion has shown many difficulties with a balancing test. It seems more attractive to adopt a test that allows a first look at the merits, but that often can be met without a need for extensive discovery or formal hearings. The test would be designed to screen out claims so weak on the merits as to gain potential strength only by class certification. Even at that, the certification decision will be a major event, just as it often is now. If the rule requires only a finding that the claims are not insubstantial, it will be far different from requiring that a means be found to weigh different measures of probable success on the merits against different levels of certification-induced burdens, risks, and pressures to settle. There even is a virtue in the negative reference to "not insubstantial," moving away from the dangers of early factfinding.

Initial discussion settled on a draft that incorporates the "not insubstantial" requirement among the findings required for certification of a (b)(3) class, and that adds "on the merits" to make it clear that insubstantiality does not refer to the dollar amount of individual or aggregate claims. The draft would add this element to (b)(3):

> **(3)** the court finds * * * that the class claims, issues, or defenses are not insubstantial on the merits, * * *. The matters pertinent to ~~the~~ these findings include * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

This approach was contrasted with the balancing approach that dominated much of the earlier discussion. The balancing approach continued to find support, particularly if the rule were to identify explicitly the continuing concern that certification of a class can impose not only great expense but also a coercive pressure to settle in face of a very small probability that a weak

claim may result in liability for large damages. This alternative was offered as a proper matter for further discussion at future meetings. Indeed, the Committee may wish to provide an alternative discussion draft in its informational report to the Standing Committee.

This point of uncertainty was the occasion for one of the frequent observations anticipating the later discussion whether the burdens of class proceedings may be so important as to justify refusal to certify claims that are likely to succeed on the merits. It was suggested that although this question is conceptually distinct from the probability-of-success question, it affords an alternative approach to the concern that class proceedings may at times be much ado about too little.

These uncertainties also provoked one of several discussions of the frustration that inheres in a process of surveying many possible changes, large and small, before finally determining what path to take. The Committee has not finally determined whether to propose any changes at all – the only commitment is to make thorough use of the information that has been gathered. If changes are to be proposed, there is no determination whether there will be only a few small changes, a major overhaul of the rule, or a substantial set that includes some important changes and a number of smaller improvements. The frustration, however, is a necessary price to be paid for carefully reviewing each of many possibilities, suspending judgment until all have been considered.

Returning to the probable-success issue, it was moved that the Committee present two alternatives to the Standing Committee for information and advice. One alternative would be the "not insubstantial on the merits" version set out at pages 19 to 20. The second alternative would not for the moment refer expressly to the effect of certification in creating pressure to settle, but would include an explicit balancing requirement and raise a higher threshold than the "not insubstantial on the merits" version. This alternative would read:

> **(3)** the court finds * * * <u>that the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification</u> * * *. The

matters pertinent to ~~the~~ these findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

Retaining both versions for purposes of further discussion will provide the opportunity for further consideration. They are intended to be quite distinct.

The motion to present both alternatives passed 11 to 1.

Benefits and Costs of Class Victory

The next topic was a proposal, drawn from various state law models, that a court have discretion to refuse certification of a (b)(3) class if the benefits gained by success on the merits would not be sufficient to justify the costs of administering the class action and distributing individual recoveries. This proposal is distinct from the probability-of-success question because it can be applied by assuming that the class will prevail on the merits. In pure form, it would be administered by assuming that the class will prevail and asking whether the victory will justify the costs entailed in reaching the merits and implementing the judgment.

The discussion draft shaped this issue by adding a new item to the list of factors to be considered in determining whether a class action is superior and necessary to the fair and efficient adjudication of the controversy:

(F) the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation;

The first observation was that it is logically difficult to fit this drafting form into the list of findings required in the initial paragraph of (b)(3). It clearly does not bear on predominance of common issues, or probable success. It fits, if at all, only with the determination whether a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. This factor is likely to be relevant only when individual claims are too small to justify the cost of nonclass adjudication, so that a class action is necessary

if the controversy is to be adjudicated, and so that it is difficult to deny that a class action is superior to alternatives that will not lead to any adjudication of the controversy. There may be a better drafting solution if this factor is to be adopted.

In support of some such approach, it was urged that this issue is a major matter. Although the Federal Judicial Center study shows median individual recoveries in class actions across a range from $300 to $500, there are many illustrations of far smaller recoveries. The "two dollar" individual recovery is trivial, and is responsible more than anything else for the "bad name" of class actions. The courts are asked to shoulder a considerable burden, to conscientiously administer cases that mean little or nothing to individual class members but enrich class counsel.

Of course the contrary argument will be made that what is important is not the perhaps trivial individual recovery but enforcement of the social policies embodied in the legal rules that support the recovery. The malefactors must not be allowed to retain their ill-gotten gains because they have managed to profit from small wrongs inflicted on many people, and because public enforcement resources are not adequate to the task assumed by the class-action bar. But courts must pay the price of administering this form of justice, and the price is paid at the expense of litigants who present individually important claims that also rest on important social policies. The question whether to devise means to punish all wrongdoers is a question of political and social policy that should be left to other agencies of government. They should find the means to reach a proper level of enforcement, not civil rules adopted through the Rules Enabling Act process.

The median individual recovery figures of the Federal Judicial Center study were again advanced to show that although the typical figures are far below the level needed to support individual litigation, the figures are not trivial. Across the four districts in the study, median individual recoveries ranged from $315 to $528.

It was proposed that all of these concerns might better be addressed by a more thorough revision of factors (D), (E), and (F) in the Rule 23(b) calculus:

(D) the likely difficulties, expenses, and burdens if the controversy is resolved by class adjudication rather than by separate individual actions;

(E) the likely benefits to individual class members if the controversy is resolved by class adjudication rather than by separate individual actions; and

(F) the public interest, if any, in having the controversy resolved by class adjudication rather than by separate individual actions

(F) {alternative} whether the predominant motivation for class certification is counsel's interest in fees rather than the benefits sought for class members

It was agreed that if there is to be a factor F, and if it is to have the force suggested, its structure and placement are important. Various committee members had attempted to combine factors (E) and (F) of the draft version, and encountered difficulty. These efforts commonly wound up in the direction of asking whether the probable relief to individual class members is sufficient to justify the costs and burdens of class litigation, or more simply whether the probable relief is worth the effort. One difficulty arises from the meaning of the relatively neutral but open-ended reference in the draft to the "significance" of the public and private values of class relief. Identification of public and private values, and particularly of "public values," involves a wide-open element of discretion that may be too broad.

Turning to the cost and effort dimension, the Committee asked for a review of the attorney fee awards found in the Federal Judicial Center study. The response was that median gross monetary recoveries ranged in the four different courts from $2,000,000 to $5,000,000; attorney fees ranged from 20% to 40% of class recoveries, and the higher percentages ordinarily were associated with smaller gross recoveries.

Attention then focused on the issue that many believed to lie at the core of the F-factor issue. There are significant problems in administering class actions that yield only trivial individual recoveries — the "$2 recovery" became the symbol of this

phenomenon. But there is a deterrence value in enforcing existing social policy as captured in current law. The F factor seeks to incorporate this value by focusing on the public value of the probable relief, but may not capture the importance of deterrence and forcing disgorgement of ill-gotten gains. The very elasticity of the public value concept, indeed, virtually ensures that very good judges will reach different results in cases that seem indistinguishable. A focus solely on the insignificance of private relief, however, leaves out the deterrence function.

The need to pursue deterrence through privately instituted class litigation was challenged. Congress can, if it wishes, create a bounty system to encourage private enforcement of public values. Qui tam actions embody precisely such a system. The question is whether Rule 23 should continue to play a comparable role. This function has been absorbed by Rule 23(b)(3) over many years in which it was adapted to functions that never were anticipated by its authors. There was no imperative command that the rule be adopted. There was none that it be adapted as it has been. It should be possible to reexamine the question whether it must continue to function as an incentive to lawyers who at best can pursue the public interest only by means of the inefficient, costly, and pressure-ridden device of artificially aggregating vast numbers of individually trivial claims. Why not cut back on this outgrowth, leaving it to Congress to devise better means of enforcement in the public interest where better means really are desirable? Even the class action represents litigation with parties. It began life simply as a procedural device to facilitate effective determination of individual claims. It becomes quite a different procedural device – and perhaps more a substantive tool than a procedural device – when it is abused by fee-inspired lawyers in the name of social policy. It is brought on behalf of the constituent members of the class, and it is they who are bound by the judgment. It cannot be brought without defining a class of real people or legal entities. Why not focus solely on the benefits to the class members, as parties? If there is meaningful individual relief, class litigation makes sense. Lawyers who bring such class actions will be rewarded, and the public interest is served. But there are actions in which individual benefits are trivial or nonexistent. Why should class actions be the means of enforcing public values in such settings?

Quite apart from the direct costs of achieving public enforcement by aggregating trivial individual claims, it was observed that this device has contributed to a public sense of cynicism about courts, lawyers, and the law.

A first rejoinder was that the image of the $2 recovery is misleading. There are few such cases. What of a case with 20,000 claimants with $25 individual recoveries: is $500,000 too trivial to ignore? How will a judge decide whether $25, or $200, is important enough — whether the calculation also includes public values, or is limited to private values?

A second part of the response was that whatever may have been intended when the 1966 amendments were adopted, the social-enforcement function has become part of Rule 23. It is, in a real sense, woven into the fabric of social justice. The idea is to deter the conduct, in a manner somewhat analogous to punitive damages. If the costs of administering individual remedies are untoward, the answer may lie in substituted relief in the models often characterized as "fluid" or "cy pres" recovery.

Sheila Birnbaum was then asked to address the committee. She began by noting that many practitioners are exposed to class actions across the full national scene. They are proliferating. One new field of growing activity involves state-law attacks on the drafting failures of insurance policies, loan forms, and the like, framed as fraud claims but in fact involving highly technical matters. There are no statistics, but actions like this are common. And they enforce no meaningful social policies at all. Anticipating the later discussion, she also addressed the use of settlement classes. They often are proper; disagreement with the result in one or another prominent case should not disguise the importance of settlement as a means of resolving problems that otherwise may be intractable. Choice-of-law problems provide one illustration of the reasons that may support use of a settlement class where a litigation class would not be possible. It is not clear that the Rule 23 draft does enough to support settlement classes.

Further doubts were expressed about allowing courts to turn a certification decision on assessment of the public values to be served by a class victory. Rule 23 is what it has become. It is

troubling. But the fact is that public enforcement agencies simply do not have the resources to achieve comprehensive enforcement of all our public laws against all significant violations. Rule 23 enforcement has become a major feature of the enforcement system, and only political judgments can justify substantial alteration. In addressing securities class actions, for example, pending legislation seeks simply to address specific perceived abuses, not to retrench the central role of class actions in vindicating individually small claims for violations that, in the aggregate, have inflicted sufficient total injury to repay the private costs of class-action enforcement. These problems are too much political to be addressed through the Enabling Act process. Congress is the agency to correct them.

These doubts were repeated in a different voice. Discretion needs anchors, it needs guidelines. Members of the Committee have expressed quite different views as to the proper interpretation of the draft (F) factor. It will be very difficult for district judges to administer, and the difficulty will generate costly uncertainty. This approach almost invites the troubling response that class actions are being trimmed to the "just-the-right-size" formula: if the problems are too small, or too large, Rule 23 assistance will be denied. When suit is filed, the parties and lawyers do not agree that it is a "$2" case. If attorney fees are the problem, the Committee should address that problem directly.

Another problem was seen in the feature of the draft that limits consideration of the burdens of certification to (b)(3) classes. Various illustrations offered in the Committee discussion have included (b)(2) classes in which injunctive or declaratory relief seemed to offer trivial benefits to individual class members. And in any event, it does not seem practicable to separate consideration of the probability of success from the importance of success. As with the approach sketched on page 22, it would be better to restructure factors (D), (E), and (F) together. It also might be better to incorporate a direct reference to cases in which attorney fees seem to be the motivating factor behind the litigation.

The suggested direct focus on attorney-fee motivation spurred the observation that the private attorney general aspect of class actions is not of itself untoward. It is accepted in actions that

yield significant benefits to individual class members. The question is whether it should be accepted in actions that do not yield significant individual benefits. Private enforcement can be wise; the question is whether it is desirable absent significant individual benefits. The antitrust laws, for example, encourage private enforcement by treble damages and attorney-fee awards, but provide these encouragements only to people who can prove antitrust injury.

So, it was suggested, the draft F factor may be too general. How might it be narrowed, reducing concerns about open-ended discretion and avoiding even the appearance of trespass on areas of social-political policy? Would it help to seek something simpler than a factor that bears on the also discretionary (b)(3) determination whether a class action is superior and necessary? The questions are first, what is the proper role of the committee in reconsidering the ways in which Rule 23(b)(3) has evolved over three decades of judicial interpretation? Second, what direction should be taken? And, third, what language will best effect the intended changes?

One approach would be to attempt to distinguish between the deterrence that arises from a meaningfully compensatory remedy and the deterrence that arises from the in terrorem function of aggregating trivial claims. Not all deterrence is desirable, particularly if it arises from the disproportionate burdens and risks of pursuing judgment on the merits. Focus on the public interest may legitimately recognize that there may be no public interest in a particular proposed means of enforcement – the rule even could be drafted to focus on "the public interest, if any * * *." This leaves substantive concerns to substantive law, not the mode of relief. This approach, however, does not directly address the difficulty of understanding just what public values are involved in any particular proposed class action. It must be remembered that all of this discussion addresses a situation in which there is a strong claim on the merits but small individual damages. What is the public interest then?

The difficulty of the values concept was finally addressed by a proposal that the factor be redrafted in terms of public interest and private benefit. On motion, the Committee cast 11 votes, with no dissent, to adopt the following language as a working draft:

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

The Committee Note to this factor would explain that the burdens of litigation include not only the costs of class litigation and the complexity of the issues, but also the in terrorem effect of certification.

Settlement Classes

Discussion of settlement classes began with the reminder that this topic has come in for renewed attention in conjunction with dispersed mass tort actions. In re General Motors Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) has surveyed the terrain. Two asbestos cases are approaching appellate arguments in the Third and Fifth Circuit. The issues are open for debate and the law is in flux. The first question is whether the Committee should attempt to deal with these issues while the litigation cauldron is boiling. This question does not imply that the Committee should not consider the problem; to the contrary, the Committee already has begun the process, and should make a deliberate decision whether anything useful can yet be done. But it may be the course of wisdom to decide that the time for action is not ripe. The risks of defendant-created plaintiff classes are not new. But the risks are much affected by the way in which the class is structured. An opt-out class is less threatening; consent is very important. An opportunity to opt-out knowing the actual terms of a proposed settlement can be particularly useful to ensure individual fairness. Other questions include the basic question whether it makes sense to certify a class for settlement purposes when the same class would not – and often could not – be certified for litigation, and whether it is proper to permit a class that is first proposed for certification at the same time as a proposed settlement is presented for approval. Settlements that seek to include "futures" claimants who do not yet have enforceable claims present quite different issues. Great savings in transaction costs can be achieved by means of settlement classes. And they may facilitate claims administration structures that achieve a measure of equality in the treatment of different claimants that could not be achieved by any other means.

The questions are large. The drafting chore may not be difficult once the questions are answered. But finding the answers remains difficult. The Committee has elected not to press forward with the draft that would have collapsed the categorical distinctions between (b)(1), (b)(2), and (b)(3) classes, recognizing the special origins and legitimacy of (b)(1) and (b)(2) classes and the risk of losing this history. Is the tie to litigation equally important to the legitimacy of class certification, or can the real-world importance of settlement be recognized in the text of the Rule? Notice and adequate representation will remain crucial. The opportunity to opt out, perhaps at the time of settlement as well as at the time of certification, may remain equally important.

The gravity of these questions led to the suggestion that perhaps settlement classes should not be treated simply as a factor subsumed in the (b)(3) certification process, but should become a new and separate Rule 23.3. The rejoinder was that any new rule would have to duplicate many provisions of Rule 23; there should be a way to make settlement classes a separate part of Rule 23.

It was urged that the decision whether to act now should not turn on anticipation of the guidance to be provided by pending cases. These cases will be controlled by the current language and structure of Rule 23, and by the specific settlement events in those cases. The first issue is whether the rule should address settlement classes as a separate phenomenon; the mechanics should be deferred until that decision is made. The question is whether it is proper to view the requirements for certification differently when certification is sought solely for purposes of settlement, not for litigation. The Rule or the Note can emphasize the distinctive importance of notice and adequacy of representation in settlement classes.

One ground for resisting settlement classes is the danger of sloppy thinking about the class definition. Another danger is presented by cases in which the settlement is worked out before the request for certification. Two parties negotiate a prepackaged complaint, certification, and settlement, and then present it for approval by a process that lacks any of the safeguards provided by a true adversary proceeding. It is not really clear whether there is an Article III case or controversy in this setting. There is

some force to the view that the court is simply being asked to peddle res judicata through the group of plaintiffs' lawyers who made the lowest and most attractive bid to the defendants. How can a court ensure that there was genuine adversariness in negotiating the settlement? And how can it ensure that there was no disqualifying conflict of interests among different people who are lumped together in a single supposed class? There is a great practical value in settlement classes, but also a great strain on the system. How can adequate representation of class members be ensured, and by whom? Perhaps the impending Third and Fifth Circuit decisions will provide helpful guidance.

From a somewhat different perspective, it was urged that there should not be any need to amend Rule 23 to support settlement class certifications. All of the requirements for certification must be met. But the question whether the requirements have been met can be addressed from the perspective of settlement, not the problems of adjudication. The Third Circuit General Motors Pickup decision can be read to reject this view, and to insist that certification is permissible only if the Rule 23 requirements would be met for purposes of litigation. If the opinion is read that way and is followed, then Rule 23 should be amended to restore the meaning that should be found in its present text. The purpose of certifying a settlement class is to provide benefits for class members — present claimants — and to reduce the risks and transaction costs for all parties. The court has an important role to play by administering settlement through Rule 23; without this judicial supervision, defendants in the dispersed mass tort cases may attempt to establish nonjudicial claims-administration procedures that settle individual claims by means that do not inform claimants as well, and that do not protect individual interests as well. Most settlements in these cases occur after there have been individual judgments in individual actions; the terms of settlement are informed by the results of actual adjudications, and the exercise of judicial review is similarly informed.

This defense of settlement classes focused attention on Rule 23(e). It was observed that it is difficult enough to provide effective judicial review of settlements reached in actions certified for class adjudication, in substantial part because the parties cease to be adversaries when they join in seeking approval

of a settlement, and suggested that these problems may be exacerbated with settlement classes. The fairness hearing, urged by some as adequate protection, does not do the job. The best lawyers and best judges can work together to fashion a fair settlement, present the alternatives effectively, and accomplish an effective review. But not all can get it right. Once a settlement is proposed, moreover, other class-action lawyers can undertake a campaign to encourage opt-outs, promising to get a better deal.

The case-or-controversy theme returned to the discussion, with the statement that it is essential that there be a bona fide dispute between real parties. There is no authority in the Enabling Act or Constitution to provide for settings that do not involve a valid dispute presented for actual decision. A settlement class divorced from a litigation class is illegitimate. Courts may be doing it, but it should be off-limits.

This view of the "real dispute" issue was met by the observation that many cases come to court this way. At the very least, there are nonclass individual actions pending, ordinarily many of them. Some of the individual actions may be consolidated by nonclass means. A settlement class is sought because everyone involved wants a global resolution, and for good reason. The proposed settlement reflects many antecedent real disputes. It should be enough that the settlement class meets Rule 23 requirements as applied to settlement, not litigation. And there are objectors — there is always someone who comes forward to challenge the settlement. Some settlement classes involve large claims, some involve small claims. Settlement classes will continue to occur unless the Committee acts to prohibit the use of Rule 23 in dispersed mass torts. The settlement terminates claims that were real cases or controversies; it simply moves them into a class context.

The case-or-controversy discussion led to the question whether a settlement class can be used to expand jurisdiction, reaching people who could not be forced into an adjudicated class. It was suggested that "force" is not proper, nor even an opt-out approach, but that an opt-in class should be proper.

The praises of settlement classes were then sung by reference to the silicone gel breast implant cases. They could not be tried

as a class. Choice-of-law problems would be insurmountable. In addition, differences in the facts relevant to different defendants would defeat a single action against all defendants. The critical thing is to get understandable notice to plaintiffs who demonstrate understanding by making informed choices. There are now thousands of individual actions outside the class, and thousands more are being filed every month. Asbestos litigation may provide even more persuasive justifications. There are large numbers of plaintiffs with clearly "real" claims. Manageability is very different for settlement than for litigation. If individuals consent, the settlement class should be appropriate.

Robert Heim observed that it is easy to be distracted by the common concern for the settlement class action that first comes to court as a prepackaged complaint, certification-by-consent, and settlement. The fear of collusion is genuine, and it is fair to worry whether courts can provide effective protection in the process of reviewing the settlement. But defendants who face massive litigation want to resolve the many problems that arise from dispersed actions. It should not be controlling whether the negotiations occur before or after the comprehensive class action is filed. The court can gain help in reviewing the settlement by making sure that effective notice is provided to class members. In addition, there is a whole new group of class-action lawyers who represent objectors, providing the adversary elements that otherwise would be missing. Beyond that, it would be desirable to appoint a guardian ad litem to provide independent representation for the class; if it is congenial to achieve this function by relying on the "master" label, that should be helpful.

The view was repeated that even prepackaged settlements come to court as the fruit of much earlier litigation.

It also was suggested that more thought should be given to adding to Rule 23(e) more detailed guidance on the process for reviewing and approving proposed settlements. The Manual for Complex Litigation provides guidance now. But perhaps Rule 23(e) should be elaborated along the lines recently developed by Judge Schwarzer.

The focus of the settlement discussion on dispersed mass torts led to the question whether Rule 23 should be used to make it

easier to resolve these problems. The easier it is to resolve claims, the more claims there will be, and the more mass-tort class actions.

The prospect that ready access to settlement-class litigation may increase the volume of litigation was discounted by the observation that at least in asbestos litigation, the focus on the detailed manageability of class litigation blinks the reality that the alternative is no more individual than a class action. There are lawyers with hundreds or even thousands of clients, whose relationship with their clients is no more real than the relationship between class lawyers and nonrepresentative class members. And they too are said to be settling cases in batches, by group settlements that focus on a total sum that, as a practical matter, is allocated among clients by the lawyer who represents them.

The settlement-class topic was left unresolved. The Committee is anxious to hear specific proposals that go beyond the tentative beginnings in the discussion draft. The topic will remain on the agenda for the April, 1996 meeting.

Federal Judicial Center Study

The Federal Judicial Center study of class actions was referred to throughout the class-action discussion. Committee members had the nearly-final version of the report that was prepared for this meeting. A brief summary of the report was provided by Thomas Willging, and as to the appeal portion by Robert Niemic. The study, conducted in four districts, examined all actions that involved a class allegation and that were terminated between July 1, 1992 and June 30, 1994. The districts, chosen for believed high levels of class action activity and geographic dispersion, were the Northern District of California, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Southern District of Florida. The total number of cases with class allegations was 418. The data are representative only for those courts over the study period.

The first summary observation was that the study shows that class actions are commonly necessary means of enforcing the claims that they involve. Among the four districts in the study, the

highest individual recovery figure was $5,331, an amount too small to support individual litigation. (By way of contrast, a study of litigation in the 75 largest counties by the National Center for State Courts showed average recoveries of $52,000 in personal injury actions, and $57,000 in fraud actions.)

The next observation was that despite the modest amount of individual recoveries, the aggregate recoveries showed that class litigation is an effective deterrent instrument. After deducting attorney fees, the median net settlements in certified Rule 23(b)(3) class actions ranged from $800,000 to $2,800,000 in the four courts; the median class sizes ranged from 3,000 to 15,000.

The entire study included 13 certified (b)(2) classes with no net monetary distribution. Some had nonmonetary distributions such as rebate coupons that could not be valued by the study. It seems likely that if the court had been able to foresee the results in the cases that did not involve significant injunctive relief, the classes would not have been certified.

It is not possible to use the study to predict what effects would follow from a requirement that the certification decision consider the probable outcome on the merits. The present system strongly discourages any consideration of the merits. But the study does show that through motions to dismiss or for summary judgment, judges commonly do look at the merits before certification. A majority of the cases in all districts had a ruling on dismissal before or at the same time as the certification ruling, and many had summary judgment rulings.

The study found 28 cases, 18% of the total certified classes, that involved simultaneous certification and settlement. A substantial share of the classes were certified for settlement only.

The class actions endured far longer than average litigation in the same courts.

Turning to appeals, 15% to 34% of the study cases had at least one appeal. There was a higher rate of appeal in the cases that were not certified as class actions than in the certified cases. There was a dramatically increased rate of appeal in the cases that

went to trial – appeals on trial-related issues were taken in 12 of these 18 cases, a very high rate for civil actions. The appeals led to affirmance in about 50% of the cases, to reversal and remand in about 15%, and to dismissal of the appeals in the remainder.

Few appeals dealt with class certification issues. The study cases involved one § 1292(a)(1) appeal. The only attempt to win mandamus review involved an attempt to remove the trial judge.

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Respectfully submitted,

Edward H. Cooper, Reporter

MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 18 and 19, 1996

The Civil Rules Advisory Committee met on April 18 and 19, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure; Professor Daniel Coquillette attended as Reporter, And Sol Schreiber, Esq., attended as liaison member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. John K. Rabiej and Mark D. Shapiro represented the Rules Committee Support Office, and Karen Kremer of the Administrative Office of the United States Courts also attended. Thomas E. Willging represented the Federal Judicial Center. Other observers and participants are named in the appendix.

Judge Higginbotham welcomed the members of the Committee, other participants, and observers.

The Minutes of the November, 1995 meeting were approved.

RULES PUBLISHED FOR COMMENT IN 1995

Amendments of four rules were published for comment in 1995. Rules 9(h), 26(c), 47(a), and 48 drew substantial written comments. Hearings were held in Oakland, California; Atlanta, Georgia; and New Orleans, Louisiana. All members of the Committee had the complete written comments and transcripts of the hearings. Summaries of the written comments and the hearing testimony also were provided. Action on these proposals came first on the Committee agenda.

Rule 9(h)

The proposal to amend Rule 9(h) would remove an ambiguity in the present rule provision relating to interlocutory appeals in admiralty. It is not clear whether appeal can be taken under § 1292(a)(3) when, in a case that includes both an admiralty claim and a nonadmiralty claim, the court acts on a nonadmiralty claim by an order that would qualify for § 1292(a)(3) appeal if it had involved an admiralty claim. The proposal resolves the ambiguity by permitting appeal. Public comment was sparse, but was approving. The Committee voted

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Rule 23

Discussion of Rule 23 began with an invitation to consider the draft by asking what can be achieved by (b)(3) class actions that cannot be achieved by consolidation and other tools. The 1966 version of Rule 23 came into being as the Advisory Committee worked through concerns about civil rights injunction class actions. What would the world look like if (b)(3) were abrogated? Is (b)(3) desirable for single event disasters, such as airplane crashes? What of the securities field, where private enforcement often takes the form of a (b)(3) class action? And what of other fields of litigation that amass large numbers of small claims into a (b)(3) class?

One of the changes that emerged from the November, 1995 meeting was an addition to (b)(3) of a required finding that a class action be "necessary" for the fair and efficient adjudication of the controversy. The purpose was to serve a heuristic function by encouraging courts to look beyond "efficiency," to emphasize the fairness of trying individual traditional cases in traditional ways. The combination of "necessary" with "superior" is awkward, however, seeming to require denial of certification for want of necessity, even though a class action might seem superior. In informational discussion with the Standing Committee in January, 1996, moreover, some concern was expressed about the tangled history of "necessary" parties in Rule 19. The present draft suggests elimination of "necessary" from the required (b)(3) findings, and substitution of a new subparagrah (A) that requires consideration of the need for certification as one factor bearing on the findings of predominance and superiority.

Another of the November changes led to alternative provisions requiring consideration of the probable outcome on the merits as part of the required (b)(3) findings. Increasing concerns have been expressed about the impact of this requirement. One concern arises from the prospect that a prediction of the merits must be supported by extensive discovery, protracting the certification determination and adding great expense. Another concern arises from the effects of the finding; however tentatively and subordinately it may be expressed, the prediction of the merits may affect all future proceedings in the case and may have real-world consequences as well. Impact on market evaluation of a company's stock was one frequently offered illustration. Various responses are suggested by the new drafts — to require a finding of probable merit only

if requested by a party opposing class certification; to eliminate the requirement that there be a finding, but to leave the probable outcome on the merits as one of the factors bearing on predominance and superiority; to consider probable outcome on the merits only as part of an evaluation of the value of "probable class relief"; or to adhere to present practice that, at least nominally, prohibits consideration of the merits in determining whether to certify a class.

The November changes also included in the (b)(3) factors consideration whether the public interest and private benefits of probable relief to individual class members justify the burdens of the litigation. Class actions have become an important element of private attorney-general enforcement of many statutes. In considering the problem of class actions that yield little benefit to class members, the problem is cynicism about the process that generates such remedies as "coupons" that may provide more benefit to the defendants and class lawyers than to class members. Yet there may be indirect benefits to the public at large in deterring wrongdoing, and in some cases it may be desirable to force disgorgement of wrongful profits without regard to individual benefits. The question is in part whether it is wise to rely on private enforcement through Rule 23 rather than specific Congressionally mandated private enforcement devices — and whether the question is different as to statutes enacted before Rule 23 enforcement had become well recognized than as to more recent statutes.

Settlement classes were discussed extensively in November, but without reaching even tentative conclusions that could be embodied in a revised draft. One of the most difficult questions is whether it is possible to provide meaningful guidance on the use of "futures" classes of people who have not yet instituted litigation, may not realize they have been injured, and indeed may not yet have experienced any of the latent injuries that eventually will arise from past events. Classes of future claimants can achieve orderly systems for administering remedies that avoid the risk that present claimants will deplete or exhaust defense resources — including liability insurance — and preempt any effective remedy for the future claimants. There are serious questions that remain to be resolved, however, and that will be addressed in actions now pending on appeal.

Rule 23(f): Interlocutory Appeals

Specific discussion of the multiple drafts provided in the agenda turned first to the interlocutory appeal provision in the "minimum changes" draft, Rule 23(f). This provision has endured with no meaningful changes through several drafts, and has encountered little meaningful opposition. Initial concerns about expanding the opportunities for discretionary interlocutory appeals have tended to fade on close study of the limits built into the draft.

The most commonly expressed reservations were revisited. Courts of appeals have actively used mandamus review in several recent cases, providing the needed safety valve for improvident class certifications. If an explicit interlocutory appeal provision is added, every case will generate an attempted appeal. A heavy burden will be placed on appellate courts. The cost

and delay will be substantial. No lawyer worthy of pursuing a class action will let pass an opportunity to appeal.

The common responses also were revisited. The extraordinary writs should not be subject to the pressures generated by Rule 23 certification decisions. Mandamus should remain a special instrument. The burden of applications for permissive appeals under § 1292(b) is not heavy; court of appeals screening procedures are effective. Motions for leave to appeal will be handled in the same way as other motions. And early review is desirable.

It was noted that the Appellate Rules Advisory Committee is engaged in drafting an Appellate Rule that would implement proposed Civil Rule 23(f). The initial proposal would have amended Appellate Rule 5.1 to include Rule 23(f) appeals as well as appeals from district court review of final magistrate-judge decisions. On consideration, the Appellate Rules Committee determined that it should attempt to collapse present Rule 5.1 into Rule 5, so that there will be one single Appellate Rule that includes all varieties of appeals by permission, present and perhaps future. It is hoped that the product will be available for consideration by the Standing Committee at the same time as Rule 23(f).

One modest drafting change was suggested. The most recent draft refers to appeal from an order "granting or denying a request for class action certification." Deletion of "a request for" was suggested on the ground that it might be redundant, or alternatively might effect an unwise restriction by failing to provide for appeal in the particularly sensitive situation in which a trial court has acted on its own motion to grant or deny class certification. The deletion was approved unanimously.

As revised, new subdivision (f) was approved unanimously.

Benefits and Burdens of Class Action

The next portion of the minimum changes draft to be discussed was (b)(3) subparagraph (F). This draft simplifies the draft that emerged from the November meeting. The November meeting generated a subparagraph (G): "whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation[.]" The minimum changes draft renumbers this factor as subparagraph F, and eliminates any explicit reference to the public interest: "whether the probable relief to individual class members justifies the costs and burdens of class litigation." In this form, the factor emphasizes the importance of the relief to individual class members — even a significant aggregate sum, when divided among a large number of plaintiffs, may provide such trivial benefit that the justification for class litigation must be on grounds other than the benefits to individual class members.

The origin of the probable relief factor lies in concern that Rule 23(b)(3) is an aggregation

device that, separate from the special concerns reflected in (b)(1) and (b)(2) class actions, should focus on the individual claims being aggregated. The traditional focus and justification for individual private litigation is individual remedial benefit. Most private wrongs go without redress. Class treatment can provide meaningful redress for wrongs that otherwise would not be righted, and the value of the individual relief can be important. But class actions should not stray far from this source of legitimacy. Public enforcement concerns should enter primarily when Congress creates explicit private enforcement procedures. As the note to one of the drafts articulated this view, "we should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers." Focus should hold steady on the objective cash value and subjective intrinsic value of the relief available to actual class members.

The "corrective justice" and "deterrent" elements of small-claims class actions were noted repeatedly as a supplement to the focus on private remedies. It was urged that consideration of the value of probable relief to individual class members does not foreclose consideration of these elements as well. But it also was urged that indeed this factor should focus only on the value of private relief. Any other view would put courts in the position of weighing the public importance of different statutory policies, and perhaps the relative importance of "minor" or "technical" violations as compared to flagrant or intentional violations.

Discussion immediately turned to the two central elements of the formulation. How is a court to predict the probable relief? And what are the costs and benefits invoked?

One suggestion was that attention should focus in part on a determination whether the motivating force of the class action is a desire for attorney fees.

"Probable relief" in the (b)(3) context is damages. The example that was used in much of the ensuing discussion was an overcharge of a 2¢ a month imposed by a telephone company for 12 months on 2,000,000 customers. The aggregate damages of $480,000 are not trivial. But it is not clear that such a class should be certified.

Discussion also wove around the question whether assessment of "probable relief" includes a prediction whether the class claim will prevail on the merits. In the November discussion, the probable relief factor was held separate from consideration of the merits. The calculation was to be made on the assumption that the class position would prevail on the merits. If direct consideration of the probable outcome on the merits is eliminated, however, it is possible to incorporate a prediction of the outcome on the merits in measuring the "probable relief." Language reflecting that possibility is included in the note that accompanies the draft that eliminates the more direct references to outcome on the merits.

Consideration of the substantive merits of the underlying claims through this factor, not as an independent matter, led to the oft-discussed fear that consideration of the merits would lead

to expanded discovery surrounding the certification decision. The comparison to preliminary injunction proceedings was noted — they may entail much or little discovery — but found not helpful because of the special factors that affect preliminary injunction decisions. A preliminary injunction decision may be converted to trial on the merits when circumstances permit full information to be assembled and presented before the need to restrain. It may rest on a small fraction of the information needed for trial on the merits. The driving force is the need to preserve the capacity to grant effective relief on the merits, not the calculus of class certification.

It also was asked whether the present rule that certification decisions must be made without reference to the merits is, in practice, a fiction. Explicit recognition of what many feel is a common practice, left unspoken because consideration of the merits is supposed to be forbidden, might lead to wiser reliance on the probable merits.

One effort to bring this role of the merits to a point was made by asking whether the rule should refer to the probable value of the "requested" or "demanded" relief, so as to focus only on the relief, not the merits. This suggestion was quickly rejected.

Alternatives to considering the merits at the certification stage were suggested. One was to require particularized pleading of the elements of each claim offered for class treatment.

Cases with multiple claims were discussed. If one version of a class claim would afford substantial relief, that should be sufficient at least for initial certification. Recognizing that the question of class definition is interdependent with the questions posed by multiple claims, it was understood that the probable relief on all claims suitable to a single class could appropriately be considered and weighed against the costs and burdens entailed by class treatment. At least conceptually, it may be that certification is proper as to some class claims but not another claim that would add greater costs and burdens than the probable relief on that claim.

The problem of weighing returned, with the question whether individual claims averaging a few hundred dollars would justify class treatment. It was noted that the median individual recovery ranges reported by the Federal Judicial Center study ran from something more than $300 to something more than $500. What is to be weighed against the predicted recovery? "Every possible argument will be made." Class proponents will argue public enforcement values.

John Frank addressed the Committee, urging that trivial claims class actions are a major problem, providing token recoveries for class members and big rewards for attorneys. "This Committee is not the avenging angel of social policy." Congress can create enforcement remedies, some administrative, some judicial, pursued by public or private enforcers.

Further Committee discussion suggested, first, that class actions are not filed on claims that, as pleaded at the outset, would yield only trivial relief. The Federal Judicial Center Study,

covering two years in four districts, found 9 cases out of 150 certified classes in which the individual recoveries were less than $100; only 3 of them involved individual recoveries less than $25, with the lowest figure $16. But it was responded that very small claim cases do in fact exist. At least in some parts of the country, very small claims classes are filed in state courts and removed. These cases require enormous administrative work. And they breed cynicism about the courts.

The question of claim size also led to the question whether the initial certification decision should be subject to review as progress in the case provides clearer evidence of the probable relief. Initially plausible demands for significant relief may become increasingly implausible as a case progresses. It was agreed that if there is quick and undemanding certification, the certification decision should be open to reconsideration and subclassing or decertification when it appears that the probable relief fails to justify the remaining costs and burdens of class treatment.

A motion to adhere to the language of the "minimum change" draft passed by vote of 9 to 3. The question whether subparagraph (F) should include consideration of the merits in assessing the probable value of individual relief was discussed further during the later deliberations that voted to discard the explicit consideration of probable merits that was adopted by the November draft.

Need For Class Action

The November 1995 draft added a requirement to subdivision (b)(3) that a class action be "necessary" as well as superior for the fair and efficient adjudication of the controversy. For the reasons noted in the introduction, this concept has been difficult to explain. The draft considered at this meeting suggested replacement of the "necessary" finding by adding a new subparagraph (A) and rewording subparagraph (B). Proposed subparagraph (A) would add as a factor in determining superiority "the need for class certification to accomplish effective enforcement of individual claims." Proposed subparagraph (B) would refer to "the practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions."

The first question was whether factor A is antithetical to factor F as just approved. Factor A suggests that class certification is necessary if claims are too small to support individual enforcement. Factor F suggests that class certification is undesirable if claims are too small. The answer was that the two provisions are complementary. Factor A cuts in two directions. If individual class member claims are so substantial as to support individual litigation, certification may be inappropriate. If class member claims are too small to support individual litigation, certification may be needed to provide meaningful individual relief. But if the individual relief

that can be afforded by a class action does not justify the costs and burdens of class litigation, certification should be denied.

The relationship between (A) and (B) also was questioned; in many ways, they seem redundant of each other. The emphasis on the need for class certification for effective enforcement, however, can go beyond the practical ability of individual class members to pursue their claims without certification. Separate actions will not be brought by all members of a class who seem practically able to do so, whether because individual actions in fact are not practicable or because of inertia. Even if separate actions are brought, they may not prove as effective as a class action that pools resources to mount a more effective showing. Class actions also may prove more "effective" for reasons that are more questionable, such as pressure to settle even weak claims that are aggregated into the class. These values of class actions were defended as the heart of (b)(3), the touchstone purpose of aggregation. But it was noted that small-claims (b)(3) class actions have fared quite well since 1966 without any explicit element like proposed factor (A).

The distinction between practical individual enforcement and efficient class enforcement in some ways reflects the distinction between opt-in and opt-out classes. Even with individually substantial claims, there is little reason to believe that the number of participating class members will be the same if the class is certified only for those who opt in as if the class is certified for all but those who opt out. (b)(3) exerts a pressure toward compulsory joinder by requiring an election to opt out of the class. Factors (A) and (B), together with factor (C), allow explicit consideration of the desirability of this inertial pressure to remain in a class for group litigation.

A motion to delete proposed factor (A) passed, 8 to 5. A motion to separate proposed factor (B) into two parts passed unanimously. As restructured, factors (A) and (B) would read: "(A) the practical ability of individual class members to pursue their claims without class certification; (B) class members' interests in maintaining or defending separate actions;".

The discussion noted that the practical ability to pursue individual actions remains a two-edged factor. It weighs in favor of class certification, all else remaining equal, if individual actions are not practicable. It weighs against class certification, all else remaining equal, if individual actions are practicable.

Another drafting change from present factor (B) also was noted. The 1966 rule refers to the interest "in individually controlling" separate actions. The proposed language refers to the interest in maintaining or defending separate actions. This language better reflects the full range of alternatives that must be considered. An alternative to a proposed class action may be a different class action, or a number of different class actions. Other alternatives may include intervention in pending actions, actions initially framed by voluntary joinder, consolidation of individual actions — including consolidation for pretrial purposes by the Judicial Panel on

Multidistrict Litigation or transfers from separate districts for consolidated trial in a single court or limited number of courts, and stand-alone individual actions. Individual members of a proposed class may not "control" many of these alternatives in any meaningful sense, but the alternatives must be considered nonetheless.

Melvin Weiss then addressed the Committee. He has been litigating class actions from a time before adoption of the 1966 amendments. Plaintiff class lawyers were taught then that they were to play the role of private attorney general. That role is confirmed by the adoption of (b)(3) classes. The size of individual class member recoveries was not thought important. The need for private-attorney-general classes is growing. Government enforcement resources are shrinking absolutely, and are shrinking even more in relation to the level of conduct that needs to be corrected. Telemarketing fraud abounds. 900 telephone numers are an illustration. Suppose most members of a class are hit with $10 or $20 charges for calls to a 900 number, with only a few whose bills run much higher. The government may eventually put a stop to a particular operation, but that provides no redress for the victims. Class-action lawyers do that. It is hard work. It is risky work. Of course class counsel deserve to be paid. If the Committee wants to say that a $2 individual recovery is trivial, it should say so. The matter should not be left to open-ended discretion and open hostility to class enforcement. In one action, the class won $60,000,000 of free long-distance telephone services; this is a "coupon" settlement, but provides a real benefit to class members. Class-action attorneys protect victims. Some even are forced to borrow to finance a class action. These social services should be recognized and appreciated. It would be ironic to cut back on class actions at a time when the rest of the world is admiring American experience and seeking to emulate it.

Peter Lockwood addressed the Committee, observing that factors (A) and (F) do not provide any standards. (A) seems to say the porridge is too hot, (F) that the porridge is too cold, and the whole rule seems to say that courts should seek a nice serving temperature. It is difficult to suppose that a Committee Note could say that a $200 individual recovery is sufficient to justify a class action. This proposal is dangerously close to the limits of the Enabling Act, trespassing on substantive grounds. The purpose of Rule 23 is to enforce small claims that are legally justified. There cannot be any effective appellate review of trial-court application of these discretionary factors. Anecdotal views of frivolous suits, settled by supine defendants, do not justify an unguided discretion to reject class certification. Factor (F) should be reconsidered.

Beverly Moore observed that factor (F) allows refusal to certify a class if individual claims are small, even though aggregate class relief would be substantial and the costs of administration are low. But certification should remain available if in fact efficient administration is possible. If a defendant has a continuing relationship with class members, for example, it may be possible to effect individual notice at very low cost by including it with a regular monthly mailing. Distribution of individual recoveries may be accomplished in a similar manner. Note should be made of this possibility.

Committee discussions returned to the relationships between factor (A), the practical ability of class members to pursue individual actions, and factor (F), the value of the probable relief to individual members. It was noted that factor (F) involves balancing the complexity of the litigation and the costs of administration in relation to individual benefits. Even the 24¢ individual recovery might qualify for class treatment if it is possible to resolve the merits and administer the remedy at low cost. The practical ability factor encourages certification of small-claims classes, just as the probable individual relief factor at times will limit certification of small-claims classes. If it is apparent at the time of certification that the individual value of the probable class relief is small, the certification decision must weigh the costs and burdens of a class proceeding. There is no specific dollar threshold. Individual recoveries of $50 in a "laydown" or summary judgment case may easily justify certification. Claims for $200 or $300 may not justify certification in a setting that requires resolution of very complex fact issues or difficult and uncertain law issues. This approach means that an initial decision to grant certification, relying on substantial apparent value or apparent ease of resolution and administration of the remedy, remains constantly open to reconsideration and decertification if the probable relief diminishes or the burdens of resolution and administration increase.

Prediction of the Merits

The November 1995 draft added a requirement that in certifying a (b)(3) class the court make a finding on the probable outcome on the merits. Two alternatives were carried forward. One would require only a showing that the class claims, issues, or defenses are not insubstantial on the merits. The other would adopt a balancing test, requiring a finding that the prospect of success on the merits is sufficient to justify the costs and burdens imposed by certification. Either required finding would be bolstered by a separate factor requiring consideration of the probable success on the merits of the class claims, issues, or defenses. Many observers, representing both plaintiff and defendant interests, reacted to these alternatives with the concerns noted during the first parts of this meeting. These concerns were addressed in the most recent draft by limiting the requirement to cases in which an evaluation of the probable merits is requested by a party opposing class certification.

It was urged that some form of explicit consideration of the probable merits should be retained as part of a (b)(3) certification decision. A preliminary injunction decision requires consideration of the probable merits in addition to the impact on the parties of granting or denying injunctive relief. The public interest often is considered as well. There is a substantial body of learning surrounding this practice in the preliminary injunction setting that can illuminate the class-action setting. It is appropriate to require a forecast of the ultimate judgment before unleashing a class action. There is much at stake; in some cases, the very existence of a defendant is in jeopardy. The prospect that defendants may not want preliminary inquiry into the merits of a plaintiff class claim can be met by requiring the proponent of certification to make a demonstration on the merits, but allowing the opponent of certification to waive the requirement.

Further support for required consideration of the merits was found by John Frank in recent cases, such as In re Rhone-Poulenc Rorer Inc., 7th Cir.1995, 51 F.3d 1293, which emphasized the fact that plaintiffs had lost 12 of the 13 individual actions that had been pursued to judgment at the time of the class certification. The coercive settlement pressure arising from certification even in face of such litigation results also was emphasized by the court. He urged that it is a false terror to be concerned that stock market disaster will follow a finding of sufficient probable success to warrant certification. We should find a way to junk bad cases early.

Discussion of the Rhone-Poulenc decision led to the observation that the defendants had just now offered $600,000,000 to settle all of the pending individual actions all around the country. This offer shows that the class claims were far from weak. Courts may go too fast about the task if consideration of the probable merits is approved.

Discovery concerns continued to be expressed. Consideration of the merits will lead to merits discovery as part of the certification process, and it will be difficult to limit discovery in ways that do not defeat the desire to avoid the burdens that would flow from actual certification.

Beyond the difficulties engendered by probable success predictions, the Federal Judicial Center study shows that ample protection is provided by motions to dismiss or for summary judgment. Consideration of factor (F), the individual value of probable class relief, will further aid in avoiding trivial actions. If there is any need for added protection, it can be met by making it clear that a court can act on Rule 12 and 56 motions before deciding whether to certify a class.

Without formal motion, it was concluded that the Committee had decided by acquiescence to delete the November draft provisions requiring a finding of probable merit and including probable success on the merits as a factor pertinent to the (b)(3) certification decision.

Attention then turned to the alternative of incorporating consideration of the probable outcome on the merits in the factor (F) balancing of the individual value of probable class relief against the costs and burdens of class litigation. The Committee materials included the suggestion that this result might be achieved by including in the Committee Note to factor (F) language something like this: "In an appropriate case, assessment of the probable relief to individual class members can go beyond consideration of the relief likely to be awarded should the class win a complete victory. The probability of class success also can be considered if there are strong reasons to doubt success. It is appropriate to consider the probability of success only if the appraisal can be made without extended proceedings and without prejudicing subsequent proceedings. This factor should not become the occasion for extensive discovery that otherwise would not be justified at this stage of the litigation. Neither should reliance on this factor be expressed in terms that threaten to increase the influence that a certification decision inevitably has on other pretrial proceedings, trial, or settlement."

Support was expressed for this approach, with the reservation that the draft focused only on the negative. It should be integrated with the statement, agreed upon earlier, that certification may be justified for small claims when there is a very strong prospect of success. Further support was found in the continuing concern that aggregation of large numbers of individually weak claims can create a coercive pressure to settle. Certification often is a major event, even a critical event.

Consideration of the merits in this fashion also was supported on the ground that the certification decision in a (b)(3) proceeding must look ahead to the ways in which the case probably will be tried. The predominance of common issues and the superiority of class treatment depend heavily on the trial that will follow.

This "commentary-in-the-Note" strategy was opposed on the ground that it would whittle down the trial judge's discretion. Even without any discussion in the Note, lawyers and judges will seize on the idea that the value of probable relief depends not only on the amount that will be awarded upon success on the merits, but also upon the probability of success. Factor (F) can be used in this way, and can be found to support departure from the Eisen rule that forbids consideration of probable merits at the certification stage.

Opposition also was expressed on the ground that the initial discussion of factor (F) had assumed that it focused solely on the amount of probable relief, not the probability of defeat on the merits. The problems persist whatever the level of emphasis in the text of the Rule or the Note. Consideration of the merits will entail discovery on the merits, and an expression evaluating the probable merits for certification purposes will carry forward to affect all subsequent stages of the litigation. Even if the Note were to say that this process should not justify any discovery on the merits, nefarious results would remain.

Consideration of the merits, moreover, suggests that certification can be denied because of doubts on the merits even though the case cannot be dismissed under Rule 12 or resolved by summary judgment. Courts in fact require particularized pleading of class claims at a level that supports vigorous use of Rule 12.

It also was suggested that the proposed Note language is not a "soft" compromise of a difficult debate. The Committee should decide what it wants to do, and be explicit in the text of the Rule.

Sheila Birnbaum urged that the suggested Note is a balanced attempt to go beyond the limits of Rules 12 and 56, in a way that focuses on the extraordinary case. There should not be discovery, but the merits should be open to consideration with factor (F).

Beverly Moore suggested that every defense lawyer will want to get into the merits at the

certification stage in every case. The Draft Note reflects empirically invalid assumptions that there are many frivolous cases and coercive settlements. That is not so.

Peter Lockwood observed that the draft Note fragment can only address cases that cannot be resolved by summary judgment. He asked how is a court to determine that a case that is strong enough to go to trial on a Rule 56 measure still is not strong enough to certify.

Robert Heim, who had initially supported consideration of the merits, but has moved away from the November 1995 draft proposals, supported the proposed Note on factor (F). The concern with discovery is overstated; there is substantial discovery on certification issues now. And there are cases that are very weak. Judges have felt hamstrung by the Eisen prohibition of merits review. The draft authorizes a "preliminary peek."

Alfred Cortese also supported the proposed note. Some claims justifiably earn certification under (b)(3) because they have merit but cannot practicably be enforced individually. Others should be weeded out.

The proposition that the draft Note would merely open a small door for consideration of the merits was doubted. Once the door is open, legions will march through.

A motion to reject the draft Note discussion of incorporation of the merits in the factor (F) determination was adopted, 8 votes to 5.

A motion was made to say nothing about consideration of the merits in conjunction with the factor (F) determination. It was suggested that the Note has to say something, because in the face of silence many courts will read factor (F) to support consideration of the probable result on the merits. "Probable relief" intrinsically includes the probability of any relief. The motion to say nothing was adopted, 7 votes to 6.

Settlement Classes

The November draft included in subdivision (b)(3) a new factor (H) that included as a matter pertinent to the predominance and superiority findings:

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

Discussion began with the question whether this factor should be added. It was recalled that the November meeting discussed settlement classes without reaching any conclusions. There are a wide variety of settlement classes. It seemed to be the consensus in November that

not enough is known to support intelligent rulemaking with respect to futures classes. The use of settlement classes under subdivision (b)(1) also seems too complicated for wise rulemaking. But for (b)(3) classes, the Third Circuit decision in the General Motors pickup truck litigation has stirred the question whether a class can be certified only on the hypothesis that certification of that class is appropriate for litigation. Many believe that the Third Circuit opinion permits application of the subdivision (a) prerequisites and the subdivision (b)(3) factors in a way that permits certification of a class for settlement purposes even though the same class would not be certified for trial. Others are uncertain. Settlement classes have been found useful by many courts. The practice has evolved from initial hesitancy to regular adoption as a routine practice. They have worked not only in the exotic cases that attract widespread attention, but also in smaller-scale cases such as a class of 1,200 homeowners seeking post-hurricane insurance benefits. The class probably could not have been certified for trial because there were many individual questions. A class that could not be certified for litigation because of choice-of-law problems, general problems of manageability, the need to explore many individual issues, or the like, may profitably be certified for settlement. Subdivision (H) is the law everywhere, with the possible exception of the Third Circuit. But if Rule 23 remains silent, other courts may be troubled by the uncertainties engendered by some readings of the Third Circuit opinion. On the other hand, it may be argued that courts are in the business of trying cases, not mediating settlements. To certify for settlement a class that the court would not take to litigation is to take courts into the claims-administration business. Just what is properly the stuff of judicial business remains open to dispute.

The first response was that settlement classes are extremely important, for plaintiffs and defendants alike, but that it may not be appropriate to adopt a rule that does not provide a list of factors to help the trial judge. Many settlements, moreover, are important because they provide a means of dealing with future claimants. In some situations settlement may not be possible unless all claimants, present and future, are included. In others, failure to provide for future claimants may mean that by the time future claims ripen there will be no assets left to respond in judgment. Futures classes would be left in the wilderness by this draft.

The next response was an observation by John Frank that settlement classes have been the most offensive part of the current class-action process. They offer a bribe to plaintiffs' counsel to take a dive and sell res judicata. As a moral matter, do we want this in the judicial system? If so, settlement classes should at most be allowed only if the same class would be certified for litigation. And it should be made clear that all requirements of the rule apply to futures classes. There also should be provision for increased judicial scrutiny of any proposed settlement. Professor Jack Coffey's views on this subject are sound. The often-decried "coupon" remedies all have been settlement classes.

The choice was put as a minimalist choice between doing nothing or taking a modest first step. Factor (H) does not speak to the futures settlements now pending on appeal in the Third

and Fifth Circuits. It only says that the fact that a case cannot be tried as a class need not defeat certification for settlement.

Another option was offered, suggesting that perhaps subdivision (e) should be amended to include the list of factors for reviewing settlements recommended by Judge Schwarzer in his Cornell Law Review article. Subdivision (e) also might provide that closer scrutiny is required if a class is certified at the same time as a proposed settlement is presented. The Committee has never explored this prospect beyond preliminary observations. Nor has it considered the question whether independent counsel might be appointed to assist in evaluation of a proposed settlement.

Opposition to factor (H) was expressed on the ground that it might encourage judges to certify classes simply in the hope that a settlement would clear the docket. It is unsavory to certify a class that cannot ultimately be tried. How can we receive and certify a class that would not be tried? A related fear was that the factor would encourage certification of litigation classes in hopes that the certification would spur settlement.

Support for settlement classes was expressed on the ground that settlement can avoid choice-of-law problems that defeat certification of a broad class. Article III requirements and personal jurisdiction standards still must be met. A settlement class can make all the difference in resolving massive disputes. The pending silicone gel breast implant cases and the Georgine asbestos settlements come to mind. These settlement classes also can avoid problems of individual causation that would defeat any attempt at class-based litigation. Certification of a (b)(3) settlement class permits dissatisfied class members to opt out.

The view was suggested that cases that rest on a settlement reached before certification are so different that they should be addressed in a separate rule, perhaps as a new Rule 23.3.

It was suggested that perhaps settlement classes should be put in subdivision (e) by a provision allowing the court to waive the requirements of (b)(3) for purposes of settlement. The response was that the proposal is not that the requirements of (b)(3) be waived, but that these requirements be applied with recognition of the differences presented by the settlement context.

Article III and personal jurisdiction questions were addressed briefly. There is a live controversy between individual class members and the party opposing the class; the only question is how many of these live controversies can be resolved by class treatment. Personal jurisdiction concerns are mollified by the facts of notice and opportunity to opt out. In federal courts, moreover, all class members ordinarily will have sufficient contact with the United States to satisfy all due process requirements.

The opportunity to opt out of a (b)(3) class was again stressed as an important factor in the settlement-class equation. Class members will opt out if the settlement represents a bargain

to sell res judicata on terms favorable to the defendant. If class members choose not to opt out, having notice of the class and the settlement, they are not hurt. If Rule 23(b)(3) is to be used for mass torts, the choice well may lie between permitting settlement classes and adopting the creative devices that have been used by some courts to substitute for litigated resolution of the required elements of individual claims. The Fifth Circuit decision in In re Fibreboard deals with the difficulties of these devices.

Further support for settlement classes was expressed with the view that most settlement classes "are not fixes. There are legitimate uses." Clients are better off, particularly when the defendants have insurance. Settlement also has the advantage of treating alike people who, although similarly situated, would be treated differently in separate actions. Choice-of-law, differences in local courts and procedure, problems of proving individual causation, and the like ensure disparate treatment if class disposition is not available.

Thomas Willging reminded the Committee of the information provided by the Federal Judicial Center study. Of 150 certified classes in the study, 60 were certified only for settlement. 30 of these 60 had consent to a settlement at the time of certification. 25, "mostly (b)(3) classes," did not, and indeed in 8 of these 25 there was opposition to certification. All of the 25 had at least 2 months between the motion and certification.

A motion was made that Rule (b)(3) should not speak in any way to settlement classes. The motion was defeated by vote of 5 for and 8 against.

Turning to the question of what should be said about settlement clases, the suggestion was that a means should be found to say that the court should apply all the prerequisites of subdivision (a) and the requirements of (b)(3) in light of the knowledge that the case was being certified for settlement, not trial. An alternative suggestion was that subdivision (e) be amended to provide that a trial court may, if the parties consent, certify a settlement class even though a class action might not be superior or manageable for litigation.

The next suggestion was that a new subdivision (b)(4) be adopted, providing that if the parties consent a settlement class can be certified even though the (b)(3) requirements are not met. This suggestion met the response that (b)(3) is the right location if settlement bears on application of the predominance and superiority requirements.

Further discussion of the (b)(4) alternative generated several draft proposals. One would have added a new clause in subdivision (b)(3), at the end of the first sentence: "provided, however, that if certification is requested by the parties to a proposed settlement for settlement purposes only, the settlement may be considered in making these findings of predominance and superiority." It was concluded, however, that the prerequisites of subdivision (a) and the requirements of (b)(3) could more clearly be invoked by adoption of a specific settlement class

provision as a new subdivision (b)(4). After various drafting alternatives were considered, discussion focused on a draft reading:

> **(4)** the parties to a settlement request certification under subdivision (b)(3) for purposes of the settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

As a separate paragraph of subdivision (b), paragraph (4) is controlled directly by subdivision (a). Subdivision (a) also is invoked by the first paragraph of subdivision (b), which repeats the requirement that the prerequisites of subdivision (a) must be satisfied. In addition, the provision for "certification under subdivision (b)(3)" means that the predominance and superiority requirements of subdivision (b)(3) must be satisfied, following consideration of the pertinent factors described in (b)(3).

The phrase allowing certification even though the requirements of subdivision (b)(3) might not be met for purposes of trial is intended to make it clear that the prerequisites of (a) and the requirements of (b)(3) must be applied from the perspective of settlement, not trial.

A suggestion to delete the words "for purposes of trial" was rejected as inconsistent with the need to make clear the differences between settlement classes and litigation classes.

The description of "parties to a settlement" is intended to require that there be a complete settlement agreement at the time class certification is requested. It was argued that provision should be made for a "conditional" settlement class certification, to be made in hopes that a settlement might be reached but acknowledging that the class must be decertified if settlement is not reached. This argument was rejected on at least two grounds. The first was that no prudent lawyer would suggest certification of a settlement class unless agreement had already been reached; if there seem to be cases in which certification is ordered before a settlement is presented before approval, it is either because of bad lawyering or because the parties have chosen not to present an agreement actually reached. The second was that there are undue risks that certification of a settlement class before agreement is reached may lead to coercive pressures to settle, reinforced by the threat of taking an untriable class to trial.

A motion to adopt the proposed subdivision (b)(4) was approved unanimously.

A later motion to reconsider proposed (b)(4) to add "proposed," so that it would recognize a request for certification by the parties to "a proposed settlement." It was objected that this change would encourage certifications that could coerce settlement, based in part on the fear that the certification might be carried forward to trial of an unmanageable class. Certification for settlement purposes should not be available merely because the parties "have an idea about a settlement." The motion failed with 2 supporting votes and 11 opposing votes.

Subdivision (e)

The earlier discussions of subdivision (e) were revived with a suggestion that the special master provision in (e)(3) of the November draft should be adopted. The biggest problem with settlements is that they sidestep the adversary process, depriving the court of the reliable information needed to evaluate a settlement. The idea of the draft provision is to ensure independent review. There is evidence that some state-court judges are simply rubber-stamping class settlements. Some means of independent investigation should be required at least for settlement classes. Adversary process is provided only if there are objectors.

It was objected that this seemingly benign provision could have unintended adverse consequences. There is a problem, but this solution may make things worse. If someone else is appointed to investigate the settlement, responsibility may transfer from the judge to the adjunct. The parties, indeed, may agree on the master, who may provide a less probing inquiry than the court would provide. It is better to leave the responsibility squarely on the judge, who will respond with careful inquiry.

It was suggested that instead of incorporation in subdivision (e), the use of special masters might be noted in the Note to the settlement class provisions of new subdivision (b)(4).

Sheila Birnbaum observed that substantial protection is provided by the requirement of notice of settlement. The parties want to ensure that the notice is sufficiently strong to protect the settlement judgment against collateral attack. At the stage of settlement, it is the defendant who pays for the notice; cost is not an obstacle to effective notice.

The key is adequate class representation. Special masters, or for that matter the class guardians who were suggested in earlier discussion, are no better assurance than direct supervision of the named class representatives. The problem, moreover, arises with other class actions. Classes certified for litigation under subdivisions (b)(1), (2), or (3) may settle after certification. The certification itself may result from stipulation.

John Frank spoke in favor of proposed (e)(3) as "better than a band-aid." It would provide some added protection against the fear of class sell-out settlements.

H. Thomas Wells, Jr., suggested that present subdivision (e) settlement procedure is adequate. If there are problems, they arise from inadequate implementation of the procedure.

It is possible to appoint a guardian ad litem for the class, and appointments have been made when the need arises. Settlement classes can come into being quickly, usually after little discovery. They are "packaged." It is hard for a judge to be an independent examiner. There

ought to be an independent voice. But the "guardian" label should be avoided, because many collateral consequences are likely to flow from the label.

Adoption of the draft paragraph (e)(3) was opposed on the ground that courts now have power to rely on masters or magistrate judges, or to appoint guardians or other independent representatives to investigate a settlement. It may be appropriate to comment on these matters in the Note to new subdivision (b)(4), but there is no need for an independent provision.

A motion to add proposed paragraph (e)(3) failed, 5 for and 8 against.

It was observed that hearings are held on subdivision (e) approval motions, and provide the best means of review. There is no explicit hearing requirement in subdivision (e), however. It was moved that an explicit hearing requirement be added. The rule would read: "A class action shall not be dismissed or compromised without hearing and the approval of the court, after notice of the proposed dismissal or compromise ~~shall be~~ has been given * * *." The motion passed with 9 supporting votes.

Maturity

It was moved that subdivision (b)(3) factor C be amended as proposed in the drafts, adding "maturity" of "related" litigation "involving class members." The reasons for adding the maturity factor are those discussed in November, and reflected in the draft Note. The motion carried unanimously.

Subdivision (c)(1)

Subdivision (c)(1) now requires that the determination whether to certify a class must be made "as soon as practicable" after commencement of the action. The draft completely revises (c)(1). The question whether the "as soon as practicable" requirement should be deleted flowed into the question whether it is desirable to propose every possible improvement in Rule 23 at one time. The proposals already adopted will require extensive consideration and will draw much comment during the succeeding steps of the Enabling Act process. There is much to be said for not making the process more complicated than necessary to advance the most important changes. On the other hand, it is not likely that Rule 23 will be revisited for at least another ten years. For the last many months, it has been tacitly assumed that if a few substantial changes are proposed, the many other changes in the draft would fall by the way. We must be careful about the number of changes proposed.

A motion was made to revise subdivision (c)(1) to require determination whether to certify a class "when practicable" after commencement of the action. Substitution of the full draft revision was suggested as an alternative, but put aside because the changes were more stylistic than substantive. The motion was adopted by consensus. It was pointed out that the

substitution of "when practicable" would serve the same function as the proposal to add a new subdivision (d)(1) expressly permitting decision of motions to dismiss or for summary judgment before the certification question is addressed. The Note to revised (c)(1) can point out that the revision removes any support for the minority view that the "as soon as practicable" requirement defeats pre-certification action on such motions.

Subdivision (b)(2)

The draft would revise subdivision (b)(2) to resolve the ambiguity that has led some courts to rule that it does not authorize certification of a defendant class. The motion failed by 2 votes for and 11 votes against.

Subdivision (c)(2): (b)(3) Class Notice

The November draft includes at lines 156 to 161 a provision that would authorize sampling notice in a (b)(3) class if the cost of individual notice is excessive in relation to the generally small value of individual members' claims. A motion to adopt this provision was resisted on the ground that it is inconsistent with the new (b)(3) factor (F) that allows refusal to certify a class when the probable value of individual relief does not justify the costs and burdens of class litigation. It was responded that to the contrary, this notice provision will implement the purposes of factor (F) by reducing the costs and burdens of certification, making it feasible to enforce claims that otherwise might not justify class litigation. Some concerns were expressed about the requirements of due process. The motion failed for want of a second.

It was agreed that the proposed revisions of Rule 23 agreed upon at this meeting should be submitted to the Standing Committee with a recommendation for publication for public comment.

New Business

The American College of Trial Lawyers Federal Rules of Civil Procedure Committee has recommended that the Committee take up the question whether the scope of discovery authorized by Rule 26(b)(1) should be restricted. The recommendation is supported by a detailed chronology of past Committee consideration of the many problems that surround the scope and practice of discovery. This topic will be on the agenda for the fall meeting. Earlier discussion of the proposal to amend Rule 26(c) emphasized the early and recent concerns that have tied the scope of discovery to protective-order practice. The Committee has continually sought to sidestep the fundamental question by attempting more modest approaches. The 1993 adoption of mandatory disclosure in Rule 26(a) is the most recent example. The time has come to consider the central questions once again. And thanks are due to the American College of Trial Lawyers for the careful supporting work they have provided.

Standing Committee Self-Study

The most recent draft Self-Study prepared by the Standing Committee self-study subcommittee was included in the agenda, along with a set of questions framed by the Reporter for this Committee. Professor Coquillette, as Reporter of the Standing Committee, suggested that the several advisory committees need not be concerned that the self-study will stimulate a response that must be anticipated by advisory committee deliberations and advice. This Committee took no action with respect to the draft self-study.

Admiralty Rules

Proposals to amend Supplemental Admiralty Rules B, C, and E were added to the agenda at the last minute. It was concluded that better advance preparation will be required to support informed consideration of these proposals. They are carried forward to the fall agenda.

Next Meeting

It was agreed that the next meeting of the Committee will be held on October 14 and 15.

Judge Higginbotham, as chair, closed the meeting by noting deep appreciation and thanks to John Rabiej and Mark Shapiro for their continuing and excellent support of the Committee. He also expressed thanks to all Committee members for sustained, diligent, and successful work.

Respectfully submitted,

Edward H. Cooper, Reporter

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 17 and 18, 1996

Note: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by members Judge Paul V. Niemeyer, chair, Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Lee H. Rosenthal, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Judge Patrick E. Higginbotham, outgoing chair, also attended. Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure, was present. Sol Schreiber, Esq., attended as liaison member of the Committee on Rules of Practice and Procedure, and Judge Jane A. Restani attended as liaison member of the Bankruptcy Rules Advisory Committee. Judge Jerome B. Simandle attended as representative of the Committee on Court Administration and Case Management. Joseph Spaniol, consultant to the Committee on Rules of Practice and Procedure, attended. Peter McCabe, John K. Rabiej, and Mark D. Shapiro represented the Administrative Office of the United States Courts; Mark Siska and Melanie Gilbert of the Administrative Office also were present. Joe S. Cecil, Donna Stienstra, and Thomas E. Willging represented the Federal Judicial Center. Observers included Alfred W. Cortese, Jr., Steve France, Charles Harvey (liaison, American College of Trial Lawyers), Russell Jackson, Fred S. Souk, H. Thomas Wells, Jr. (liaison, ABA Litigation Section), and Sam Witt.

Judge Niemeyer opened the meeting by welcoming Judge Rosenthal as a new member, and announcing the reappointment of several members.

Judge Higginbotham was greeted with expressions of great praise and deep gratitude for the energy and dedication he brought to leading the committee through several challenging projects during his term as chair, and for the remarkable programs he put together to reach out to all parts of the bench and bar in taking the Committee's class action study through to publication of recommended revisions in Civil Rule 23.

The Minutes of the April, 1996 meeting were approved.

CHAIRMAN'S REMARKS

Judge Niemeyer opened the discussion of the Committee's agenda by developing issues of program and structure.

The work of the Committee meetings has been heavy, and promises to continue to be heavy. To make best use of the limited time the Committee can work together, several working committees will be formed to enhance the work that can be done at full

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Rule 23 Report

Judge Niemeyer introduced the current state of the Committee's class-action proposals. The process of studying Rule 23 began in 1991. The elaborate efforts made by the Committee to reach out to concerned constituencies proved enormously beneficial in showing what the issues are. Many of the issues proved to be larger than

the grasp of the Rules Enabling Act process. A taste of these larger issues is provided by Parts I and II of the August 7 memorandum that was written to introduce the proposed changes and included in the agenda materials for this meeting.

Events inevitably continue apace outside the process of amending the rules. One current phenomenon involves increasing resort to state courts with actions on behalf of national classes. The Supreme Court has recently granted review in a case that raises the question whether a state court can recognize a mandatory national class on terms that deny any right to opt out while seeking to bind all members of the class. A direct answer to this question may have dramatic effects on the development of mass tort class actions, settlement classes, and related matters.

Just before the Rule 23 proposals were presented to the Standing Committee, a letter signed by a large group of concerned law professors urged that the Standing Committee not approve the proposals for publication. The concerns raised by the letter are in large part addressed by the Committee Note, which had not been completed — and necessarily had not been made available — when the letter was written. Several of these concerns may have abated, at least with respect to many of the signers, in the wake of actual publication of the proposals and note.

The Rule 23 proposals can be grouped into five categories. First are the modifications of the factors listed in Rule 23(b)(3) as bearing on the superiority of class treatment and the predominance of common issues. These modifications will generate controversy, particularly the balancing of costs and benefits introduced by factor (F). As a group, these changes can be read either to encourage or to discourage small-claim class actions. A more accurate assessment is that they increase trial court flexibility, expanding discretion in ways that will further reduce the scope of effective appellate review. Second is the (b)(4) settlement class. This has been the most misunderstood proposal. In fact it retains all the requirements of subdivision (a), as well as (b)(3), and — as a (b)(3) class — includes the requirements of notice and opportunity to elect exclusion from the class. Third is the change from the requirement that a certification decision be made as soon as practicable to a requirement that it be made when practicable. Fourth is the addition of an explicit requirement that a hearing be held before approving a proposed class settlement. These two changes are not likely to be controversial. Finally is the provision for permissive interlocutory appeal from certification decisions. Although the appeal provision has often engendered doubts when first described, it has not been difficult to demonstrate its virtues.

Public comment is likely to focus on (b)(3) and (b)(4). All Committee members should encourage interested students of Rule 23 to participate in one of the three scheduled public hearings. And as many members as can attend should do so. It is important, in a process that naturally focuses on differences of opinion, to find

out whether there is general support for the proposals, general opposition, or a deep division of opinion.

Judge Higginbotham then described the course of the Rule 23 proposals since the April meeting of this Committee. The first caution is to remember that the proposal package represents a minimalist approach to change. The issues the Committee decided not to address are far more complex, and in many ways more important. There are good reasons for the decisions not to address these larger issues. The proposals do not deal with classes that seek to include and bind future claimants, including those who have not yet even experienced the injuries that eventually will make them members of the class. Early proposals that would have allowed a court to deny the right to be excluded from a (b)(3) class were not pursued. Several letters were written to the Standing Committee to challenge a proposal that this Committee had not made; the misdirection made it easy to respond, but the misdirection also can obscure the real issues. The letter signed by so many academics was prepared without full knowledge of the process, and should not be taken to represent a widespread judgment about the merits of the proposals actually made. Much press attention similarly was devoted to attacking a proposal that the press thought had been made, but was not. And a good part of the initial reactions has come from people concerned with pending litigation, and the impact that the proposals might have on positions important to the litigation. The August 7 memorandum in the agenda materials was written to ensure public understanding of the proposals, protecting against the risk of premature summaries, and to underscore drafting options as well as to note some of the proposals that were put aside. It was not published with the proposals because it had not been before the Standing Committee at the June meeting.

The Standing Committee seemed to understand the message that the amount of attention devoted to the Rule 23 proposals so early in the process reflects the importance of the underlying issues. Attention and controversy should not defeat the proposals. Instead close attention must be paid to all the public comments and challenges. The Committee then must decide what is best, recommend the best, and support it. The (b)(3)(F) proposal will draw a lot of attention and comment. The Committee will benefit from it. And it is important to adhere to the minimalist approach.

It seems likely that the next major developments in class action doctrine will come in substantial part from developments on the constitutional front. The Supreme Court review of the Alabama mandatory class ruling will be an important beginning. It is important to remember that the (b)(4) settlement class proposal retains the right to opt out. The proposal in fact protects the right to opt out better than many classes that are certified for litigation and then settled after expiration of the opt-out period. Under the (b)(4) proposal, the settlement agreement must be reached before certification; the decision whether to opt out can be made with knowledge of the settlement terms. In litigation classes that

settle after expiration of the opt-out period, the right to opt out is protected only if the terms of the settlement provide it.

Discussion of the Rule 23 proposals reflected the minutes of the Standing Committee draft minutes that were included in the agenda materials. It was observed that although the Standing Committee approved the proposals for publication and comment, many members expressed strong reservations about several features of the proposals. It will be important to find ways to make clear the dependence of the (b)(4) settlement class proposal on (b)(3) class status. And it will be even more important to provide information in the Note that will help district judges know what to do with proposed settlement classes. Consumer advocates will be up in arms about the (b)(3)(F) class; many of the objections again can be met by small changes that make it clear that many small-claims classes will remain proper.

The law professors who expressed concern by writing the Standing Committee have been invited to file further comments and to appear at the public hearings. Their suggestions will be important.

It was further suggested that there are three main sets of class action problems today. First are federal-state problems. Plaintiffs are moving more and more to state courts, particularly in the wake of the Supreme Court decision that seems to entrench the full-faith-and-credit effects of state class-action judgments. There are serious questions whether it is desirable to allow a single state to bind all states by certifying a national class. Second are classes involving future claimants. The proposals leave this problem to be worked out in the courts. Third are attorney fees; perhaps proposals should be made to guide judges toward better fee awards.

Further discussion of the federal-state relations problems recognized the need to develop means of cooperation outside the rules. Means of liaison with state judges are important. The Conference of Chief Justices has a Mass Torts Litigation Committee. All the district judges who have been assigned MDL cases meet regularly, and discuss problems of relationships with state courts and state litigation. A special master has been appointed in the federal silicone gel breast implant litigation for the particular purpose of facilitating coordination among state courts and between state courts and federal courts.

The Committee was reminded that it had put aside proposals to amend Rule 23(e) by adding a check-list of factors to be considered in evaluating a proposed settlement.

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If the Committee is to undertake a broad reexamination of discovery, it will be important to follow the model that was used with consideration of Rule 23. At the very outset, means must be found to solicit the views and proposals of organized groups.

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Respectfully submitted,

Edward H. Cooper, Reporter

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

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EVIDENCE RULES

TO: Standing Committee on Rules and Practice*

FROM: Patrick E. Higginbotham
Chair, Advisory Committee on Civil Rules

Professor Edward H. Cooper
Reporter, Advisory Committee on Civil Rules

RE: Comment on Proposed Changes to Rule 23

DATE: August 7, 1996

I

These eight proposed changes in Rule 23 submitted for comment are modest, as measured by an array of changes urged by numerous scholars, practitioners, law teachers, and myriad organizations. They reflect the distilled judgment of the Advisory Committee after five years of study. This study includes participation in national conferences, sponsored by the law schools of N.Y.U., the University of Pennsylvania, and Southern Methodist University, as well as by the Southwestern Legal Foundation. The study included extensive discussion at meetings of the Advisory Committee at the University of Alabama School of Law, the Thurgood Marshall Federal Judiciary Building in Washington, D.C., and other gatherings in New York, San Francisco, and Tucson. Representatives of the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the American Trial Lawyers, and others attended and participated in this dialogue. The Committee also sought the counsel of distinguished lawyers with particular experience with class actions.

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* The report was intended to be included in the *August 1996 Request for Comment* pamphlet, which contained the proposed amendments to Civil Rule 23. But it was not included in the pamphlet, because the report had not been considered by the Standing Rules Committee during its deliberations on whether to publish the proposed amendments to Rule 23. The report will be circulated to the Advisory Committee on Civil Rules and the Standing Rules Committee at their next meetings.

II

We think it useful to describe the sense of the Advisory Committee regarding the present forces for change. Review of the proposal may include an examination of the validity of the Committee's vision of this dynamic.

Rulemaking has, at least since the Enabling Act of 1934, reached for transubstantive application, an elusive goal when the line between substance and procedure is difficult to locate. And the familiar dance of procedure and substance has unique purchase in the operation of Rule 23. The Advisory Committee is persuaded that the law of class actions today is largely a set of legal cultures surrounding distinct areas of substantive law. For example, class actions in private antitrust litigation, securities litigation, employment discrimination, and mass disaster tort litigation have common links but differ fundamentally as each resonates with its own body of substantive law. Bluntly stated, the "law" of class actions is more the child of substance than procedure. The status of the passing on defense in antitrust litigation, of fraud on the market and other reliance theories in securities suits, and of punitive damages in tort law dictate the course of each of these class litigations. In short, the "law" of class actions travels more along substantive than procedural lines, and today is better described as a softly defined legal culture than a coherent body of case law expressed in filed opinions.

Much follows from this reality, but we make only three brief points. First, those who would solve a "problem" with class actions today must first make the case for the relevance of the desired change in the rule, that the illness to be cured is not beyond the grasp of the civil rules, because it is an illness of the underlying substantive law. The current controversy over "mass torts" offers an example. We must ask how much of the difficulty is with the indeterminacy of tort law. The large number of filings in a failed product case, for example, generates pressure to aggregate. Yet as Professor Francis McGovern has taught, the number of cases is often remarkably elastic. Whether this elasticity reflects an underlying uncertainty of tort law and the system's insecure handling of science is not clear. We suspect that legal standards blessing lawyer solicitation and soft rules governing the admissibility of expert testimony are at work. Nor do we yet fully understand the negative effects of consolidating cases before a single MDL transferee judge. Given these uncertainties, including what is sometimes called the expressway effect, it may be that we are too quick to bring to bear the forces of MDL treatment. These are difficult problems and only a sampler. The relevant point is that rules of procedure and the process of rulemaking have a limited ability to solve them. An assessment of these proposals, including whether the Advisory Committee proposes too little or too much, must consider this context, keeping in the forefront the reality that these social issues are beyond the charge of the rulemakers.

Second, the above discussion illustrates that we need to encourage the development of a coherent body of law by making greater use of the appellate courts. The debate over the interaction of substance and procedure will benefit from the knowledge and judgment of these institutions, often cut out of the process by settlement.

Third, rule change ought here to proceed with caution, in increments. We think it unwise to attempt broad changes in Rule 23, given the large uncertainty of cause and effect laced throughout this subject.

We turn to a brief summary of the Advisory Committee deliberations; our summary is designed to elicit comment on the issues that generated much of the Committee debate.

III

Subdivision (b)(3)

Most of the proposed changes affect subdivision (b)(3). Comment on these issues will be helpful, including comments — if any there be — that the Committee has in fact reached the best accommodation. It will be even more helpful to have comment on issues that may have been overlooked.

1

Subparagraph (A) is added to the illustrative list of matters pertinent to the predominance and superiority findings required for certification of a (b)(3) class. This factor emphasizes the practical ability of individual class members to pursue their claims without class certification. It will confirm and encourage the use of class actions to enforce small claims that will not support separate actions, subject to new subparagraph (F). At the same time, it will encourage courts to reflect carefully on the advantages of individual litigation before rushing to certify classes — such as mass tort classes — that include claims that would support separate actions.

2

Closely related are the changes in subparagraph (B), which make it clear that the court should consider not only solo litigation but also aggregation alternatives to a proposed class, alternatives that do not involve "control" by individual class members.

3

Subparagraph (C) is revised, among other things, to include the maturity of related litigation as a factor bearing on certification; this factor has loomed particularly large in the early years of litigating dispersed mass torts.

Together, subparagraphs (A), (B), and (C) are designed to encourage careful reflection on the advantages and disadvantages of class litigation in relation to other modes of proceeding, including later certification of substantially the same class. They do not force any particular conclusion in any specific action. Is this the right balance? Should there be tighter control, or even less?

Subparagraph (F) allows a court to consider as one factor, in the certification decision, the balance between the probable relief to individual class members and the costs and burdens of class litigation. This new factor is not intended to end the common practice of certifying class actions to enforce individual claims that are too small to bear the cost of individual actions. Nor is it intended to require that the amount of relief to any single class member be balanced against the overall costs and burdens of litigating the class action. The aggregation of many small individual recoveries may readily justify aggregate costs that overshadow any single individual recovery. Subparagraph (F) is intended to permit a court to ask whether class litigation is justified when the probable relief to individual class members is insignificant in relation to the costs and burdens of generating that relief. A fair estimate of the costs to the judicial system — and the corresponding opportunity costs to other litigants who seek to use the judicial system — should be included in the calculation.

The Advisory Committee has not been able to develop more precise language to guide district court discretion. The very reason for relying on district court discretion is the inability of the drafting process to imagine and resolve the many different situations that litigants will bring to the courts. Some have suggested that more drafting is needed to ensure the continuing and important role of small claims class action actions. Specific suggestions will be welcome.

Some proposed drafts of subparagraph (F) would have required that "the public interest in * * * the probable relief to individual class members" be included in the balance. The public interest factor was deleted because of concern that it seemed to invite judicial evaluation of the wisdom of the substantive rules that might be invoked in class-action litigation. What are the factors to be weighed and how ought they be captured in the rule?

5

Subdivision (b)(4)

Proposed subdivision (b)(4) deals with settlement classes. In providing for certification of a class "under subdivision (b)(3)," the rule is intended to require that the predominance and superiority requirements of (b)(3) must be satisfied. The purpose of adding subdivision (b)(4) is to make it clear that the fact that certification is proposed only for the purpose of settlement, not for trial, properly influences application of the prerequisites of subdivision (a) and the requirements of subdivision (b)(3). The choice to rely on "under" as better than "pursuant to" was deliberate. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules p. 34 (1996). Early reactions, however, indicate that some lawyers may find it difficult to adjust to this drafting choice. Several alternatives were considered by the Advisory Committee, and deserve comment.

The simplest alternative would be to revise (b)(4) to read:

> the parties to a settlement request certification of a subdivision (b)(3) class for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

A lengthier variation on the same approach would be:

> the parties to a settlement request certification of a subdivision (b)(3) class for purposes of settlement and the requirements of subdivisions (a) and (b)(3) are satisfied for purposes of settlement, even though these requirements might not be met for purposes of trial.

Still another approach would be to incorporate settlement classes directly into subdivision (b)(3), perhaps like this:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> * * *
>
> (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~~ disposition of the controversy. If the parties to a settlement request certification, the court may for the purpose of certifying a settlement class determine that the prerequisites of subdivision (a) are satisfied, and find predominance and superiority, even though the court might not certify the same class or any class for purposes of trial. The matters pertinent to the findings of predominance and superiority include: * * *

The importance of anchoring the settlement class provision in subdivision (b)(3) is enhanced by the need to ensure compliance with the provisions of subdivision (c)(2) governing notice and the right to request exclusion. Proposed (b)(4) applies only to classes certified for settlement under (b)(3); the drafting question is the only question on this score.

Proposed subdivision (b)(4) applies only when certification of a (b)(3) class is requested by the parties to a settlement. It does not apply before a settlement agreement has been reached. This limitation was adopted for several reasons. Certification of a settlement-only class before agreement has been reached might affect the terms of settlement and might even exert untoward pressure to settle because of the class definition and the implicit expectation of settlement. There is some risk that if settlement fails, the class definition will be carried forward for litigation purposes without adequate reconsideration. And the opportunity to opt out is enhanced by the fact that the terms of settlement will be known at the time class members must decide whether to

opt out. Settlement classes are not new. Class certification has followed settlement in a substantial percentage of all class actions. Are these reasons sufficient to justify the limitation, or should a less restricted version be considered?

Concerns are regularly voiced about the difficulties that confront a court faced with the task of evaluating a proposed settlement. Should more specific terms guiding judicial review be added to subdivision (b)(4), subdivision (e), or both?

6

Subdivision (c)

Subdivision (c) is amended by deleting the requirement that the determination whether to certify a class be made "as soon as practicable" after commencement of the action. The change to "when" practicable supports the common practice of deciding motions to dismiss or for summary judgment before addressing the certification question. The change also supports precertification efforts to settle and seek certification of a settlement class. The Federal Judicial Center study and other information suggest that in practice, "as soon as practicable" has come to emphasize practicality in ways that are better reflected by the "when practicable" term. Is there a risk that the change will encourage undue delay in administering class actions?

7

Subdivision (e)

Subdivision (e) is amended to confirm the common understanding that a hearing must be held as part of the process of reviewing and deciding whether to approve dismissal or compromise of a class action. The Committee has not thought of any arguments against this protection; is there some unexpected loss?

8

Subdivision (f)

Subdivision (f), drawing from the power conferred by 28 U.S.C. § 1292(e), proposes a method of permissive interlocutory appeal, in the sole discretion of the court of appeals, from orders granting or denying class certification. Proposed changes to Appellate Rule 5 would establish the procedure for petitioning for leave to appeal. The Committee has repeatedly reconsidered this proposal in light of numerous expressions of concern that any additional opportunity for interlocutory appeal will lead to undue delay and burdens on the courts of appeals. The concern seems to be that one party or another will always seek review, whether for good-faith questions about the certification decision or for less worthy motives. The Committee believes, building on experience with permissive interlocutory appeal practice under 28 U.S.C. § 1292(b), that this fear will be met in several ways. District court proceedings are to continue

unless a stay is expressly ordered. The courts of appeals should be able to decide whether to permit appeal quickly, and at little cost. Responsible practitioners should come to recognize that most certification decisions involve routine matters of discretion that do not warrant application for leave to appeal. Is this confidence misplaced?

IV

Matters Put Aside

The Committee considered many other proposals and put them aside. They are not likely to be revived soon unless comment suggests serious ground for further present consideration.

Broad questions were considered as to the structure of Rule 23. Among them were the desirability of requiring that (b)(1) and (b)(2) classes be found superior to other available methods of adjudication; notice requirements; extending the opportunity to request exclusion to (b)(1) and (b)(2) classes; denying an opportunity to opt out of a (b)(3) class; and creating opt-in classes.

Extended consideration was given to a proposal that the merits of the class claims, issues, or defenses be considered in determining whether to certify a (b)(3) class. Two alternatives were considered. One would require only a showing that the claims, issues, or defenses are not insubstantial on the merits. The other would invoke a balancing test reminiscent of the preliminary-injunction test, asking whether the prospect of success on the merits is sufficient to justify the costs and burdens imposed by class certification. In the end, this proposal was overcome by fears that it would unduly enhance the burdens of litigating the certification question itself, and that a merits finding made at the certification stage would exert undue pressure on all subsequent stages.

Finally, the Advisory Committee declined to treat "futures" classes, unpersuaded that there is as yet sufficient experience with this use of Rule 23 to justify addressing it in the text of the Rule.

[Pages 304 through 310 were intentionally omitted]

REPORTER'S NOTE

March 18, 1997

The following pages summarize the written comments and oral testimony on the proposals to amend Civil Rule 23 that were published in August, 1996. The summaries inevitably are that — an attempt to present the core of the observations. Inevitably there will be lapses of editorial judgment, but the cumulative weight of the summaries should give a very good picture of the information that was provided. There is much repetition; it is important to know that the same observations were shared by many different people. And there is much quoting — the words of the commenters and witnesses convey far better than any translation the living force of the observations.

These summaries are organized around the eight distinct proposals for change: Rule 23(b)(3) factors (A), (B), (C), and (F); 23(b)(4)(the settlement class proposal); 23(c)(1)(the "when" practicable proposal); 23(e)(the hearing requirement); and 23(f)(interlocutory appeal). There are two additional categories: a number of additional proposals for change; and comments on the Rules Enabling Act authority of the Committee and, ultimately, the Supreme Court, to make the proposed changes.

These summaries, organized as they are, do not provide much of a feel for the range of broader-based reactions. There are many who believe that Rule 23 is working well, and that it would be a mistake to undertake any revisions. There also are many who believe that Rule 23 is a disaster, and who support the entire package of proposals only as a modest beginning on a larger task. Many people, spread across many different views of the specific proposals, are concerned that efforts to address the problems of dispersed mass torts through Rule 23 may distort the rule for all of its many other uses. Those views are very important, but also very familiar to the Committee. That they have received relatively short shrift in these summaries is an artifact of the attempt to present the information in a focused way, not in any way an implicit suggestion that the Committee has already devoted enough time and energy to these competing views.

The summaries also may fail to give a full sense of the incredible effort that has been made by members of the practicing bar and of the legal academy to help the Committee. A wealth of experience has been distilled and expressed in ways that reflect great honor on all who have participated in this process. The Committee has been greatly enriched. At times it is fashionable to belittle mere "anecdotal" evidence. The comments and testimony in fact constitute a disorderly but immensely valuable form of empiric information that must rank alongside the finest forms of more formally rigorous empiric inquiry. The Committee owes a great debt to all who have engaged in this process.

Rule 23 Comments: (b)(3)(A): Practical Ability

Alan D. Black, 96CV036: It would be a mistake to adopt (b)(3)(A), (b)(3)(F), or (f).

Together, (b)(3)(A) and (F) may be implemented by denying class certification because the claims of too many members are too large, and also because the claims of too many members are too small. Most classes include a broad spectrum of individual claims and recoveries (with compelling illustrations from antitrust, unlawful taxes, and shabby medical insurance practices). Focus on damages at the certification stage will lead to precertification discovery — often defendants have better information about individual damages than do class representatives. Liability issues also will be joined to the inquiry — in a securities case, for example, the "value line" of damages will depend on determining what the defendant should have disclosed at what time.

(A)'s laudable concern with sweeping in unwilling class members who have large claims is met by opting out and by present (A), or by the proposed (B) variation of present (A). The Committee Note could be enhanced to suggest special need for careful class definition in mass-tort cases, and to emphasize the need to ensure a meaningful opt-out opportunity. If (A) is retained, the Note should make it clear that it is proper to include large-claims members in the class: they may prefer class litigation to reduce costs, or to avoid retribution. If that is rejected, a bright-line test should be adopted looking to whether a majority of class members can practicably pursue individual actions.

Robert N. Kaplan, 96CV038: The statement is made on the basis of experience with antitrust and securities class litigation. (b)(3)(A) and (F) "may unnecessarily dismember classes in antitrust and securities class actions," excluding large and small claims and leaving only the medium-sized claims. No standards are set for too large or too small, nor for assessing the practical probabilities of actual recovery. Defense counsel will engage in extensive discovery on who are class members, what is the size of their claims, and their abilities to pursue litigation without certification. The discovery will extend beyond representatives to "hundreds and thousands of absent class members." The strength of the claims on liability and damages will be assessed. Parades of horribles will be marched around the alleged costs and burdens. Large class members can protect themselves by opting out; this shows the best judgment whether they are practically able to pursue individual litigation. Those who prefer to remain in the class should not be forced to engage in more costly individual litigation. At the end, it must be decided whether a class recovery of $1,000,000 justifies defense costs of $2,000,000; whether a $10,000,000 recovery justifies $5,000,000 defense costs, and so on.

Robert J. Reinstein, 96CV043: (b)(3)(A) should be rejected. Most class recoveries involve amounts that would not support individual litigation. Even when individual litigation is practicable, most claimants will not pursue it. The right to opt out is protection enough.

Public Citizen Litigation Group, 96CV044: Responds to most of the proposals one-by-one.

(b)(3)(A) and (B) are useful in making explicit the need to consider the practical ability of

individual class members to control litigation. But it should be made clear that smaller class actions are among the superior alternatives, and that the interest in a smaller class may be localized so that it should be carved out of an otherwise national class (a carve-out class might be desirable for a single state that has particularly favorable law). Choice-of-law problems may require smaller classes. The text of (B) should conclude "including their interests in maintaining or defending other class litigation."

Jonathan W. Cuneo, 96CV047: Focuses on (b)(3)(A) and (F). First, treating them together: Class actions supplement government enforcement, compensate injured parties, and achieve uniform results. These factors "are less objective and more suggestive than the current factors." They will be used less as guiding considerations and more as threshold tests, and the use will be to deny certification. They will "afford[] any judge who disapproved of a class action not merely a partial, but a sufficient basis upon which to deny certification." The feared "coercion" potential of class actions "is wildly exaggerated." Recent developments in active judicial management reduce any potential for coercion; courts weed out weak cases early.

(b)(3)(A) may be read to defeat any class certification when some members could pursue separate actions; or it may be read simply to exclude them from the class. If there is no class, small-claims members suffer. If the big-claim members are simply excluded, there is duplicate litigation. Courts may be misled to the view that certification is appropriate only for small claims. Large corporations that have ongoing relationships with defendants will negotiate better deals. And there are vagueness problems: how is practical ability to sue separately measured? Will other parties have a say? This distracts attention from what will best resolve the disputes to what is merely possible.

Melvin I. Weiss, 96CV050: Only the (b)(4) settlement class deserves adoption. Otherwise the proposals "significantly shift the balance of advantage to defendants and threaten the viability of class actions for small individual damages."

(b)(3)(A)'s focus on practical ability is unclear: does it invoke the monetary value of the claim, the claimant's net worth, or both? Is an objective test appropriate? Should class members be surveyed? There is no empirical evidence to show a problem that needs to be addressed. Those who need the protection of individual actions can opt out. Subclasses can be fashioned.

Richard A. Lockridge, 96CV051: There is no explanation of "practical ability": does it mean amount of relief? The actual desire to pursue separate litigation? The degree of injury? What about wrongs that inflict disparate injuries — some large injuries, and many small injuries that would not support separate actions? The right to opt out protects the interest in individual litigation. This proposal seems driven by concern with mass torts; it would be better to adopt a specific mass tort rule.

Gerald J. Rodos, 96CV052: The statement is based on experience in antitrust and securities class actions, and is limited to them.

Doubts the need for major changes in Rule 23, but the proposals will make some. (b)(3)(A) is confusing in conjunction with (F). It may mean that the large claimants required by (F) to justify

certification will be excluded, defeating any certification. And it confuses the ability of large claimants to pursue individual actions with their interest in doing so. It also seems to conflict with the 1995 securities legislation, which emphasizes the importance of representation by class members who have large claims.

Edwin C. Schallert, for Committee on Federal Courts, Assn. of Bar City of N.Y., 96CV053: The (b)(3)(A) proposal "is flawed in that it presumes that the size and 'practical ability' for pursuit of a claim correlates with a *desire* to individually pursue the claim." Securities and antitrust classes, for example, frequently include members with large claims and members with small claims; there is little remedy, and much confusion, in inviting a class definition that carves out the large claims that could be opted out in any event. There is a special risk of confluence between this factor and proposed (F): the large claims will be defined out of the class, and the remaining claims will be too trivial to warrant certification.

Max W. Berger, 96CV055: The common law has a genius for getting things right. Class-action practices have matured greatly in recent years. It is better not to interfere with rules amendments now.

(b)(3)(A) is unnecessary. Courts already take account of the individual interest in pursuing individual litigation. The proposal will expand precertification discovery and motion practice aimed at measuring the size of individual claims.

Eugene A. Spector, 96CV057: (b)(3)(A), in conjunction with (F), threatens a Goldilocks rule that allows class certification only if individual claims are "just right," not too big or too small. Courts already consider the ability of individual class members to pursue separate litigation. But they also consider efficiency and the need for uniform decision, concerns that do not appear in (A). The 1995 securities law amendments emphasize the desirability of relying on representation by class members with large claims, not excluding them.

National Association of Securities and Commercial Attorneys, 96CV059: Notes that many of the earlier draft proposals that they had opposed have been deleted.

(b)(3)(A) "overemphasizes a factor to which courts already give consideration." Distinguishing the practical ability to pursue individual litigation from the "interest" in pursuing it may undermine important class-action interests to achieve economy and promote uniformity. A litigant who is able to pursue individual litigation may much prefer the advantages of class litigation. This risk is manifest in securities litigation; large-claim members should not simply be excluded from the class, as the Note suggests — indeed, there is an obvious tension with the purpose of the 1995 securities legislation to entice large-claim members to become class representatives. Large-claim members can protect their interests by opting out if they wish. (And it is not clear why the Note refers to (b)(1) and (b)(2) class definitions.) Problems of adequate representation can be addressed by subclassing. And there is a risk that (A) will join with (F), stripping out all the large claims and leaving only claims too trivial to warrant certification.

Beverly C. Moore, Jr. (Editor, Class Action Reports), 96CV060: (b)(3)(A) "is complete nonsense." Class members who prefer individual actions can opt out; they know how. Those who have high claims but prefer the efficiencies of class action treatment should not be defined out of the class.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): This is desirable and relatively noncontroversial. "Combining large individual claims with the small, marginal claims of most class members has a detrimental averaging effect — it lowers the value of the highest claims while at the same time raising the value of marginal claims." The Note should be changed. It actually encourages small-claims classes; "that concern should not be relevant in the context of subsection (A)." The suggestion that property claims might be split from personal injury claims also is troubling; "[e]xcessive splitting of claims can be just as damaging as excessive aggregation."

Leonard B. Simon, 96CV073: Speaking from experience in securities, antitrust, and consumer cases, the (A) proposal is bad. Virtually every class has some large claimants and some small claimants. Is the whole class to be denied certification? Are the large claimants to be excluded? Large claimants are the ones most likely to receive, read, and respond intelligently to the opt-out notice; they may find real advantages in remaining in the class. The Securities Litigation Reform Act of 1995 creates a presumption that the largest claimant is the best representative; it is contrary to this presumption to force large claimants out of the class.

Stanley M. Chesley, 96CV078: This proposal overlooks the fact that litigants who are able to pursue individual litigation may prefer the advantages of class litigation.

D. Dudley Oldham, 96CV083: The (A) "reformulation properly notes that class actions are not appropriate when individual claims can stand alone."

FRCP Committee, American College of Trial Lawyers, 96CV095: The "practical ability" factor adds "an important element" and "does not tilt the certification process in favor of either the plaintiff or the defendant." (But it does have an awkward interface with factor (F), which is disapproved.)

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: Approves. Ties this to approval and suggested expansions of the "maturity" factor.

Henry B. Alsobrook, 96CV103: Commends this support of "the traditional right of an individual to control their [sic] litigation."

Sheila L. Birnbaum, 96CV107: The Draft Note focuses only on the alternative of "individual" actions; it should reflect the interests that may point toward other alternatives broader than individual cases. [This is discussed in the Note on Factor (B).] Attention also should be paid to other avenues of relief, including state and federal regulatory agencies or public litigation. And account should be taken of a defendant's voluntary efforts to remedy the alleged wrong.

Arthur R. Miller, 96CV111: "The relevant inquiry * * * is not whether class members have the practical ability to pursue their own claims, but rather, whether or not class members have an interest in or desire to litigate individually." Those that do can opt out. Those that prefer group litigation

should not be denied. In addition, it will be difficult to measure the parameters of "practical ability." Does it involve only the size of the claim? The claimant's net worth, ability to retain counsel, sophistication? Will discovery be taken to help identify which class members are which? And this combines with proposed (F) to create "a 'Goldilocks' conundrum." It is particularly puzzling in contrast with the 1995 securities law amendments that seek out the claimant with the largest claim to be class representative.

Miles N. Ruthberg, 96CV112: Described with the (B) provisions; approves the proposal, but wants Note amended.

Robert Dale Klein, 96CV113: (A) and (B) "reaffirm the traditional preference for individual control of litigation by real litigants. The provisions tacitly acknowledge that claims aggregation can devalue substantial claims that could otherwise be tried individually, while adding weight to insubstantial claims * * *." They reinforce the 1966 Committee Note stating that ordinarily (b)(3) is not appropriate for mass torts.

John P. Zaimes, 96CV115(Supp): (A) "will allow a judge to deny certification to class lawyers who are simply attempting to aggregate individual claims to advance their own pecuniary interest, while at the same time devaluing the claims of the individual."

William A. Montgomery (State Farm Ins. Cos.), 96CV122: The rule should be redrafted: "the practical ability of individual class members to pursue their claims or otherwise obtain relief without class certification." This would make it clear that the court should consider the availability of relief through administrative proceedings, other public law-enforcement activities, or through voluntary efforts by the defendant to cure an alleged wrong.

Donn P. Pickett, 96CV128: This is not too vague. It "provides a clear general admonition that discourages, but does not forbid, certification when individual plaintiffs can as a practical matter pursue their claims individually — and there is less reason than ever in this litigious society to believe individual claims will not be pursued." The "Goldilocks" problem claimed to arise from the conjunction of (A) and (F) does not exist. "How much more guidance can or should be given?"

Joseph Goldberg, 96CV141: (A) addresses a nonproblem. Those with large claims are able to protect their interests by opting out. There is ample authority to "sculpt" a class by defining out large claimants when, in an occasional case, that may be needed.

Paul D. Rheingold, 96CV145: In mass torts there are both big and small claims. The fact that some class members can find lawyers "does not negate the value of a class action on occasion, especially if it is a mature one."

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: Opposes. Present factor (A) supports consideration of the feasibility of individual litigation, together with the interest in such litigation. This interest is balanced against the interest in efficiency, fairness, and consistent judgments. The class that includes both large and small claims is a class example of conflicting

interests, to be met by subclasses and other reassurances of adequate representation. Effective protection for those with large claims is also assured by the opt-out opportunity. Inclusion of those with large claims in the class also facilitates settlement; they can intervene to share control of the action if they prefer that to opting out. Even those with large claims, moreover, may find individual litigation costly and difficult, in part because defendants have vast resources for litigation. Finally, the combination with (F) suggests a search for classes of claims that are "just right."

Fed. Cts. Comm., Chicago Council of Lawyers, 96CV148: Although (A) and (F) are calculated to strike a "golden mean," (A) "will be quickly translated into whether plaintiffs' claims are valuable enough to attract counsel on a contingency basis." But even large claims "may not be easily susceptible to individual proof, as where there is a pattern of fraud or discrimination." And some classes may include both small claims and larger claims. These changed factors could be made more palatable "by stating definitively that no single (b)(3) factor should predominate"; although this is the generally understanding now, explicit statement in the rule might discourage myopic focus on the size of individual claims.

Charles F. Preuss (with Internat. Assn. Defense Counsel), 96CV152: "(A), (B), and (C) articulate a preference for individual actions when an individual's claims are significant enough to be pursued on their own. Permitting an individual to control his or her own case and allowing the case to develop sufficiently before deciding the issue of class certification will better ensure consistency and enhance predictability in the process." These and the other proposed changes are at least "a necessary and positive step" toward redressing the abuse of class actions in medical products cases.

David L. Shapiro, 96CV153: A court may have difficulty accommodating the (A) and (F) factors. Factor (A), moreover, overlooks the (B) concern with the interest in individual litigation — members whose claims will support individual litigation may have no interest in separate litigation, but prefer "the more efficient class action procedure." "(A) seems at best superfluous, and at worst, counterproductive."

Nicholas J. Wittner (Nissan North America), 96CV158: Tort claims are normally unsuited to class treatment. (A) "avoids the ethical problem that results from the 'strong' claims increasing the value of the 'weak' ones and the 'weak'claims decreasing the recovery for strong claims in a class settlement."

American Bar Assn., 96CV162: Supports the (A) and (B) proposals.

ABA Section of Litigation, 96CV162: (This Report was not adopted by the ABA): The (A) and (B) changes "appear to have been developed to control the expanding use of the class action device to accomplish aggregation of mass tort claims." They are helpful in protecting individual litigation by plaintiffs with substantial claims. But the full implications for non-tort actions "may not be fully realized." In a securities action, for example, the rule should not be used to require exclusion from the class of all with large individual claims.

Steven F. Gates (Amoco Corp.), 96CV168: Supports factors (A), (B), and (C) ask starting points in

addressing the need for more fundamental revision of Rule 23. These proposals are recognized as among the less controversial; it is suggested that these three factors and the interlocutory appeal provisions should go forward now, while work is done on the more fundamental changes that remain to be accomplished.

Federal Bar Assn., 96CV170: Strongly endorses (A) and (B). "[T]he right to proceed individually should remain unimpaired." At the same time, the opportunity to maintain class actions that aggregate small claims is not impaired.

Washington Legal Found., 96CV171: "[A]ddition of this factor will help to return the courts to what once was the underpinning of Rule 23: the presumption in favor of individual or smaller, rather than aggregated, litigation." Opt-out practice may not be sufficient protection for the individual interest in individual litigation.

National Assn. of Railroad Trial Counsel, 96CV175: (The full statement is set out here, in operative part, for all of the proposed changes:) "The Executive Committee, which was properly empowered to act for the NARTC, voted unanimously in favor of the recommended changes * * * ."

California State Bar Committee on Federal Courts, 96CV179: "(A) assists in a reasonable weighing process," and is supported.

California State Bar Committee on Administration of Justice, 96CV180: supports.

TESTIMONY

Philadelphia Hearing

Allen D. Black, Tr. 24 - 29, 32-34: (A) is a mistake. Together with (F), it undermines the twin purposes of (b)(3) — efficient litigation, and providing a remedy for small claims that otherwise would go unredressed. A good illustration is provided by the Corrugated Container antitrust case, which recovered more than $500,000,000 for individual class members whose shares ranged from more than $10,000,000 to as little as $25 or $50. Would (A) defeat certification, or require that the large claimants be fenced out of the class? That would be horrible. The FJC study found no evidence of small-claims class abuse. The large claimants may prefer class litigation to avoid the risk of retaliation by the defendant, and to avoid the costs and burdens of individual litigation. Concern with the interest in individual litigation — already reflected in present factor (A) — can be met by making sure that claimants are well informed about the right to opt out. To the extent that concern is focused on future claims, the rule should address the problem directly within the framework of whatever limits the Supreme Court may announce.

Roger C. Cramton, Tr. 93: (A), (B), and (C) "are modest improvements. I'm sort of indifferent."

Robert N. Kaplan, Tr. 148-151: This proposal, drafted with an eye to mass torts and consumer actions, may cause much mischief in antitrust and securities litigation. It will open up discovery as to absent class members — and often, in a securities action, you do not even know who the members

are, as stocks are held in street names. How else can we assess the practical ability of class members to pursue individual actions? And how can we determine who has large claims, who small? And how measure practical ability, and the cost, and (under (F) the cost to defendants? The rules now are well known. They should not be changed; if mass torts are to be addressed, perhaps there should be a separate rule outside of Rule 23.

Gerald Rodos, Tr. 173-174: The Securities Litigation Reform Act declares that the class member with the largest claim is the best representative; it is inconsistent with that policy to suggest that those with large claims may be excluded from the class, or that class certification should be denied entirely.

Joel Gora, for ABCNY, Tr. 264-266: (A) "seems to discourage participation in class action suits by claims that are too large." In conjunction with (F), it creates a goldilocks problem, suggesting "a really narrow band * * * where class action would be appropriate."

Alfred Cortese, Tr. 281-287: Urges that (b)(3) has taken on a form by judicial interpretation that is quite different from anything intended. "This is judge-made law. It was never written into the rule. It was essentially judicial legislation." Many factors have contributed to the development — the indeterminacy of substantive law, "the revolution in communications technology, the advent of lawyer advertising." It has spawned "vast silent and indefinite classes * * * infrequently utilized as unmanageable, and more commonly utilized to compel settlement by defendants as a form of, quote, ransom to be paid for total peace." The factor changes in (b)(3) are a beginning, but only a beginning, of a cure.

Dallas

John Martin, Tr.57-58: Suggests that the example of a product defect that rarely causes personal injury but causes widespread diminution in product value should be deleted. It is not at all clear that there is any effect on property value. The property value claims should not be suitable for class treatment until trials of personal injury claims have made the liability issues mature.

D. Dudley Oldham, for Lawyers for Civil Justice, Tr. 127-133: Mass torts should be taken out of Rule 23. It is difficult to define mass torts in a rule, but the focus should be on "disparate claims involving numerous individuals that need to be adjudicated on an individual basis." Factors (A) and (B) focus on this important principle. Aggregation may be pursued by other means when it is desirable, and has been successful.

Stanley M. Chesley, Tr. 134-136: "Practical ability" would defeat certification in cases in which class members have an interest and desire to litigate as a class. In the heart valve litigation, for example, more than 90% of the class preferred class litigation because of the complexity and expense of proving liability. And we were able to win equitable relief, such as diagnostic research and medical monitoring, that could not be won through individual litigation.

Patrick E. Maloney, for Defense Research Institute, Tr. 146-153: Institute members — some 21,000

of them — probably have been involved in every class action that has been filed. The effort to encourage trial courts to reflect carefully on the advantages of individual litigation is encouraged. The Committee should find a way to say that Rule 23 is not intended for mass torts that involve product liability or medical device litigation. The lawyers benefit more from class litigation than do the clients. The Institute takes no position on the desirability of using class certification to foster class settlement because members are divided. The use of a class to achieve final disposition of a particular issue such as "general causation" is undesirable. There are so many individual issues of specific causation that aggregate resolution of the general causation issue only confuses matters.

San Francisco Hearing

Charles F. Preuss (International Assn. of Defense Counsel), Tr. 81-86: In the medical products area there are always individual questions whether the product caused the specific injury. Yet class certification has grown, and indeed has become an end in itself. Defendants feel they must settle, and judges mindful of crowded dockets are attracted to class actions as a means of resolving many cases. The breast implant cases are a perfect illustration; no defendant could afford to defend them all. "Articulating that claims should stand on their own, is an excellent reaffirmation of the preference for individual actions."

Leonard B. Simon, Tr. 91-94: There are large claimants in every class action. They do not want to bear alone the costs of litigating many modern lawsuits. (A) and (F) have no benefits. And even if there are modest benefits, they are outweighed by the costs of the additional layers of litigation they impose. Together, they will require relitigation of many issues that have been resolved by 30 years of Rule 23 experience and jurisprudence. The system works for antitrust, securities, and consumer actions. It should not be changed because of the strains that arise from stretching Rule 23 to include mass torts.

Miles N. Ruthberg, Tr. 164: The Notes to (A), (B), and (F) may encourage judges to certify class actions where individual actions could not be brought. They may encourage more class actions. The Note should make clear that common issues still must predominate, that the case must manageable. It would be better not to make the amendments than to make them with a comment suggesting broader use of class actions.

William A. Montgomery (State Farm Ins. Cos.), Tr. 184-185: (A) is an important change. But the Rule should be modified further to permit consideration of the ability of class members with small claims to pursue relief through alternative mechanisms. In a heavily regulated industry such as insurance, the possibility of invoking regulatory aid should at least been considered. So too if the defendant has undertaken curative action. Under the present system, there is the "gotcha" phenomenon that when a company undertakes to cure a problem it has identified, it promptly is sued in a class action.

Gerson Smoger for Association of Trial Lawyers of America, Tr. 189-201: ATLA opposes the proposed amendments. It supports meaningful opt-out rights and the injured victims' right to control

the fate of their own litigation. It opposes class litigation of mass torts; aggregation of claims, and joint discovery, are fine — but that is mass tort litigation, not class litigation. The purpose of class actions is the aggregation of small claims, not efficiency in disposing of individually large claims. Personal injury and death claims are very important to the individuals involved, and they must retain control — most of them will settle, of course, but there is a possibility of trial that makes meaningful the right to control settlement.

Steven M. Kohn, Tr. 215-219: In mass-tort cases, experience has been that individual plaintiffs can find counsel for individual representation. A class action is unnecessary. Bifurcation does not generally work because "there is so much overlap between liability, proximate cause, comparative fault, breach of a warranty * * *."

Donn P. Pickett, Tr. 224-225: "There is a real value in allowing real litigants to pursue their claims in the courts. * * * The value is accountability to the attorneys. The clients have a say and control the litigation. The value is that when real parties make real litigation decisions, they often come out in a way that I think is better for the overall resolution of the dispute."

RULE 23 Comments: (b)(3)(B): Members' Interests

Melvin I. Weiss, 96CV050: (b)(3)(B) is "a slight revision," but no need has been shown.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): It is desirable to give heightened focus on the interests of class members by separating new (A) and redesignating this modified version of former (A) as a new (B). The Note statement that certification is not desirable when class treatment is not as fair as individual actions, notwithstanding efficiency concerns, "offers great promise of meaningful change resulting from this amendment."

D. Dudley Oldham, 96CV083: "(B) appropriately recognizes the individual's interests in pursuing a separate action."

Patrick E. Maloney, 96CV090: For the Defense Research Institute. Agrees "with the Committee's efforts to encourage courts to reflect carefully on the advantages of individual litigation." Mass torts are not appropriate for class treatment.

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: Approves. Ties to suggested expansion of the "maturity" factor.

Henry B. Alsobrook, Jr., 96CV103: "The Committee has rightfully recognized that a class action may not be fair to individual litigants even though it may be more friendly to the judicial system."

Sheila L. Birnbaum, 96CV107: Suggests at the outset that class actions are misused in ways that not only defeat defendants' rights, but that also sacrifice the strong claims of some class members for the benefit of other members whose claims are weak or nonexistent. Discusses factors A and B pretty much together. The right to opt out does not always protect the interest in separate litigation, particularly as to class members who do not retain counsel before the opt-out period expires. The Note errs, however, in suggesting consideration of the need to marshal limited assets for fair distribution — that need is more properly a concern of a "limited fund" class under (b)(1) or a bankruptcy court. The suggestion "is an invitation to mayhem and runs directly counter to the presumption against class certification where individual actions are maintainable."

Miles N. Ruthberg, 96CV112: Supports (A), (B), and (F), but believes the comments should be changed. The Note comforts "lawyers who abuse the system by bringing class action suits that no real plaintiffs care about." The Note suggests a class should be certified whenever claims are too small for individual litigation, subject only to (F). "This invites the very abuses that the textual amendments are designed to stop." The Note should state that a class need not be certified merely because individual actions would not be feasible. Examples should be given that do not focus only on the size of individual claims. Other factors that bear on the superiority of a class action include the availability of comprehensive regulatory schemes, or the possibility that the defendant has altered its conduct. It should be made clear that "classes have public value if, but only if, they are consistent with the underlying substantive claims established by Congress." And the Note should not suggest that it is appropriate to inquire into the defendant's assets and insurance; that is appropriate only in

a "limited fund" situation.

Robert Dale Klein, 96CV113: (A) and (B) together "recognize that litigation class certification ordinarily is not appropriate when individual claims can stand alone, and reaffirm the traditional preference for individual control of litigation by the real litigants. The provisions tacitly acknowledge that claims aggregation can devalue substantial claims that could otherwise be tried individually, while adding weight to insubstantial claims * * *." They reinforce the 1966 Committee Note statement that (b)(3) ordinarily is not appropriate for mass torts.

Jeffrey J. Greenbaum, 96CV119: Comments on factors (A) and (B) jointly. They appear aimed at mass-tort classes, and may be helpful in that setting. "I am concerned, however, that the full implications of these changes in the non-tort context may not be fully realized." In a securities action, for example, they might be read to require exclusion of large claims from the class, and — with (F) — also to require exclusion of very small claims. The Note should make clear that this is not the intent.

American Bar Assn., 96CV162, and Section of Litigation Report: Approves. See the summary with factor (A).

California State Bar Comm. on Fed. Cts., 96CV179: Supports; the proposal recognizes that the interests of class members may be served by alternatives other than simple one-at-a-time litigation.

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

Rule 23 Comments: (b)(3)(C): Maturity

Public Citizen Litigation Group, 96CV044: (b)(3)(C) is supported.

Stuart H. Savett, 96CV048: (b)(3)(C) is proper, but only if it is stated in the Note that the concern with maturity is limited to claims where the element of causation is susceptible to scientific proof. The maturity concern should not apply to "an action involving, for example, a novel and complicated fraud requiring expert testimony."

Melvin I. Weiss, 96CV050: (b)(3)(C) "may unalterably prejudice" class members. Defendants will seek to stay discovery while certification is held in abeyance. Months or years could pass before the claim matures. It would be better to certify the class and allow it to proceed, reserving the right to decertify. And there is no index of maturity, nor any indication whether the court is responsible for maintaining watch on the growing maturity of other actions. Nor does the rule speak to the prospect that the related litigation may settle or drag on interminably.

National Assn. of Securities & Commercial Attorneys, 96CV059: (b)(3)(C) is desirable if the Note "expressly state[s] that the rule is limited to claims where the element of causation is susceptible to empirical proof of a scientific nature." "Maturity" should not be required "in an action involving, for example, a novel and complicated fraud requiring expert testimony."

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): Maturity is a central concept. "Mature litigation has clearly defined issues. The evidence and proofs, particularly as to scientific evidence, are better developed and more widely available. Mature cases have a tendency toward consistent outcomes."

Stanley M. Chesley, 96CV078: Maturity is a relevant factor, but account should be taken of the differences in the causes of action set forth in related litigations. If the causes are far different from those alleged in the class action, they are not relevant.

D. Dudley Oldham, 96CV083: "the Committee Notes correctly deduced that if individual litigation continues to yield consistent results or if analysis demonstrates that knowledge has not yet advanced far enough to support confident decisions on a class basis, then class adjudication is not appropriate for that litigation."

Patrick E. Maloney, 96CV090: For Defense Research Institute. Certification of immature or novel claims can coerce defendants into settlement. "When multiple claims have no track record before juries, it is difficult for counsel and defendant to evaluate the chances of a successful defense. Compounding the risk, the plaintiffs in these cases often claim serious injuries * * *. "If the class is certified, the question often becomes simply how much the defendant must pay to settle the class action."

Bartlett H. McGuire, 96CV092: "This is a real step forward." It emphasizes the need to avoid premature certification of mass tort claims before liability evidence has been developed.

FRCP Committee, American College of Trial Lawyers, 96CV095: Addition of "maturity" "strengthens the present rule." The Note is right in suggesting that when trial is imminent in

nonclass litigation, the court should consider "whether class certification would impair or assist developing cases."

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: The maturity factor would reduce frivolous class actions. (C) should be expanded to authorize a court to defer certification pending the outcome of government enforcement actions seeking similar relief for class members. Indeed, a stay should be required.

Henry B. Alsobrook, Jr., 96CV103:"I wholeheartedly agree * * * that class actions should not be certified if there is pending mature litigation."

Sheila L. Birnbaum, 96CV107: Strongly supports consideration of maturity. Particularly in the context of mass torts, "it may be extremely beneficial for a court to look at the results of a series of individual trials before determining whether a particular controversy would be capable of classwide proof." There is now "the rush to the courthouse that results from the economic incentive to be the first to file a class action in order to become lead class counsel, or at least to be a member of the Plaintiffs' Steering Committee." Often a single event, such as publication of a single study suggesting an association between a product and a disease, will trigger the rush to file.

Arthur R. Miller, 96CV111: This change is clearly directed toward mass torts, a topic otherwise not addressed. It is not clear what is "related" litigation — what are the limits of relevance as measured by subject matter, named parties, or format or locale? If certification is suspended, when does the issue become ripe — must the court monitor the related litigation? Is all action in the pending case suspended? What is the impact of settlements in the related cases?

Robert Dale Klein, 96CV113: The maturity factor "should help avert a rush to class certification before the development of any body of experience with actual trials and verdicts in individual actions."

Jeffrey J. Greenbaum, 96CV119: It is wise to focus on the maturity of related individual litigation for the purpose of not interfering by sweeping it into a class. It also is desirable to focus on the maturity of the science supporting mass tort claims, but the draft Rule is not as clear as the Note. It should be made clear that focus is on maturity of the "claim" as well as maturity of related litigation.

James J. Johnson (Procter & Gamble Co.), 96CV135: The Rely tampon was withdrawn from the market, despite the lack of any evidence that it caused toxic shock syndrome, after more than one billion were sold. About 800 individual actions were filed. Class certification was denied. Following individual litigation of some actions, showing that individual issues predominated, it was possible to resolve the remaining claims. Class certification might have imposed crushing liability. This experience shows the importance of the maturity factor. The related changes in factors (A) and (B) also are good. (See also his San Francisco testimony, Tr. 141-143.)

William M. Audet, 96CV140: If maturity means that class certification must await the results of individual cases, the courts will be swamped with individual cases and class members will be "left in the dark" about the prospect of class litigation for two years or more before they get notice from the court. It is unfair to force class members to take a back seat to individual actions.

Paul D. Rheingold, 96CV145: This proposal seems to look only to the claim that is so mature as not to need class certification. The real problem is the use of class certification to control all cases nationally when the scope of the litigation is unclear. "Mass litigation needs a long period of time to mature." The Castano cigarette class illustrates this.

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: "Maturity" should be described in a separate subparagraph of (b)(3) and limited to mass torts. (1) The Note suggestion that the court should take account of the progress of individual actions toward trial should be deleted. This concern can be addressed through factors (A) and (B), and in any event the individual litigants can protect their interests by opting out. (2) There is legitimate concern in mass tort cases, where further work by "an independent outside agency" may produce new information bearing on the element of causation. This concern is much less likely to appear in other substantive areas involved in (b)(3) class actions.

Summit Bank, by Anthony J. Sylvester, 96CV159: It should be made clear that maturity "relates not to the length of time that the particular cases may have been pending, but rather to the development of clearly defined issues in similar litigation."

American Bar Assn., 96CV162: Supports.

ABA Section on Litigation, 96CV162: (The Report is not ABA policy.) The text of (C) should be revised to include explicit reference to the problems that arise "when the science supporting claims of dispersed mass injury has not sufficiently developed and remains 'immature.'" In addition, it is wise — as the text expressly allows — "to avoid interfering with the progress of related litigation that may be well advanced toward trial and judgment."

ABA Tort & Ins. Practice §, 96CV162(Supp.): The text of (C) should be revised to include "the state of existing knowledge undergirding the class claims" in the maturity concept. (The focus is on mass torts, apparently dispersed mass torts; there is no indication that TIPS would apply this test to single-event securities litigation or other familiar class actions.)

Federal Bar Assn., 96CV170: Consideration of maturity is appropriate. "When a number of individual suits begin to converge and the results of such litigation are consistent, the principle of judicial economy clearly supports class action."

Washington Legal Found., 96CV171: Strongly supports. "[P]articularly in the mass tort context, it may be helpful for the court to examine the results of a series of individual trials before deciding whether a particular class claim would be capable of classwide proof."

California State Bar Fed.Cts. Comm., 96CV179: Endorses, suggesting "that for purposes of clarity, the amendment state that any litigation to be considered have actually commenced at the time of the class certification hearing."

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

TESTIMONY

Philadelphia Hearing

Barbara Mather, Tr. 69-72: There may not be many mass tort claims suitable for class proceedings. But actual trials will help develop the issues that are actually going to be critical at trial, and will provide a good proxy for the uniformity of claims. No number can be set for the number of individual cases. Fully developed records in a few cases might be enough; others might require more. There are alternative devices that may help — Rule 42 consolidation of central issues, or exemplar trials that provide a basis for settling others. This provision will help identify commonality and predominance. I am not sure how it will work outside mass torts.

David Weinstein, Tr. 201-203: The maturity factor could have an adverse effect on antitrust and securities cases. It might suggest that in the common situations that involve both individual litigation and class litigation, the class litigation should be stayed pending determination of the individual actions. That is a mistake.

Dallas Hearing

D. Dudley Oldham for Lawyers for Civil Justice, Tr. 130, 131-133: The maturity aspect is very well stated for mass torts; although mass torts should be taken out of Rule 23 entirely, if they remain in the rule it is better to wait until individual claims have been adjudicated and scientific knowledge has been developed. And maturity is important even if mass torts are taken out.

Stanley M. Chesley, Tr. 136-139, 146: This is a new subjective concept that can be used as a tool to deny certification. The other actions may involve quite different claims. The maturity element seems to reflect a presumption that class litigation is not a good thing. Suppose there are a million victims; a court might want 50 litigations before deciding that the claim is mature, forcing long delay, and then discover that all 50 settle. Nor should courts attempt to delay while epidemiology matures.

Bartlett H. McGuire, Tr. 162: This is an important consideration. Maturity can be measured by the suggestion of the Manual for Complex Litigation — "maturity is established when prior litigation shows that plaintiffs' claims have merit."

San Francisco Hearing

Charles F. Preuss (International Assn. of Defense Counsel), Tr. 85: "[A]llowing the case to develop before a decision is made is extremely important."

James R. Sutterfield, for International Assn. of Ins. Defense Counsel, Tr. 146-147: This should be tightened up. It is not clear whether maturity refers to the scientific knowledge problem best known from the breast implant litigation, or to the pendency of other class actions, or to the development of individual actions.

Brian C. Anderson, Tr. 205-207: A classwide proof requirement should be adopted. But if it is not, the maturity factor is a good place to expand the Note to comment on the importance of classwide proof. The class-action court should look to the type of evidence actually presented in individual cases. If it is largely plaintiff-specific, certification should be denied. If it largely focuses on the

defendant, so that it will be the same for all plaintiffs, certification is appropriate. (Specific Note language is suggested at 207.) Although liability and damages can be separated, when there is common class-wide evidence on liability, most cases involve claims with elements that are largely individual.

Steven M. Kohn, Tr. 216-218: Particularly in pharmaceuticals and medical device litigation, two or three trials are not sufficient to flush out the complicated scientific issues. It may take dozens of trials. The DES and breast-implant litigation show that the wisdom gleaned from dozens of trials is very helpful. Mass tort litigation often is instituted on the flimsiest scientific evidence. "And it takes a period of time, sometimes two, three, four years, * * * for true science to catch up with junk science." It is a great injustice to certify a class too early; the pressure to settle is enormous. The process of having individual trials also enables the parties to evaluate the claims for settlement. The settlement process is very different when there have been a number of trials.

Rule 23 Comments: (b)(3)(F) Probable Relief - Costs

John Leubsdorf, 96CV026: The proposed factor 23(b)(3)(F) should be deleted. It does not consider the general deterrence values of enforcing the law through class actions. It suggests a misleading comparison between benefits and burdens — the net benefits to plaintiffs always fall short of the burdens, because transaction costs must be paid (and usually are paid by the defendants). It may suggest that the court consider the likelihood of success on the merits in focusing on "probable relief" to individual class members. It would be better to ask "how the benefits and costs of class litigation compare with those of other available methods"; even this approach would leave the way open to deny certification even though individual actions will not be brought, because the benefits of law enforcement fail. (Roger Cramton agrees with the Leubsdorf suggestions, 96CV040).

John P. Frank, 96CV032: Strongly supports the proposal. Cases in which class members get little or nothing are "not the judicial job." The desire for social regulation arises "because neither Congress nor any administrative agency has entered the field * * *. These actions are not cases or controversies; they are usually price controls which more suited agencies have not seen fit to impose." As Justice Stone reminded us in *U.S. v. Butler*, 1936, 297 U.S. 1, 87, courts are not the only agency of government with the capacity to govern. But if the desire for social regulation through Rule 23 persists, the (F) proposal should be transformed into an opt-in class for small claims. Class members should be given "fair notice telling [them] what they can reasonably expect — and then let them decide whether they wish to expend 32 cents for a stamp on their prospects. * * * 'Opt in' would determine whether this trip is really necessary." Fluid recovery by such means as "coupon settlements," general but small price rollbacks, or escheat, are not an answer for the small-recovery class members. (The first seven pages set out the history of the (b)(3) opt-out class.)

Stephen Gardner, 96CV034: The part that bears directly on (F) appears at pp. 20 to 23. In most consumer fraud matters, individual litigation is not feasible if the claim is for less than $10,000. The proposal could "serve as justification for a court hostile to small consumer claims to reject a case that should in fact be certified." "[B]y its very nature cost-benefit analysis is a slippery slope that is subject to extraordinarily subjective, and non-legal, decisions." This is an "open invitation to social engineering by trial courts," and in cases removed from state courts creates federalism concerns when a federal judge second-guesses "the decisions of State legislatures." When individual relief is small in relation to the costs of distribution, cy pres relief should be considered, "such as crediting amounts to an existing account class members have with the defendant." Earlier portions of the statement also may bear on (F). It is urged that many consumer classes should be brought, as Mr. Gardner does, in the form of (b)(2) actions for prospective relief, depending on fee-shifting statutes for compensation. Many of these actions are brought by "carrion feeders," anxious for fees; even though there are real wrongs, causing real injury, "the problem arises at the settlement stage." The concept of trying the case is foreign to many class counsel. Once they settle, and "once their fees are sewn up," they become extremely pessimistic about the possibility of victory. These are the cases that give class actions a bad name.

Leslie A. Brueckner (Trial Lawyers for Public Justice), 96CV035 & Supp.: The (b)(3)(F) proposal "is unworkably vague" and "virtually standardless." The August 7 statement suggests that individual relief can be aggregated when it refers to comparison between the aggregate class relief and the aggregate burdens of class litigation. The Committee Minutes reflect ambiguities about the role of deterrent effect in applying factor (F). The Minutes are even more obscure on consideration of probable outcome on the merits. Apart from this vagueness, the purpose to restrict small-claims classes is clear. But that "flies in the face of one of the most important purposes of Rule 23: to compensate victims and deter wrongdoing * * * ." There is no evidence supporting the view that some small-claims classes do not "further any social goal," nor a proposal that could eliminate all small-claims classes. [With some repetition:] (1) The proposal is vague and standardless. It is not even clear whether aggregate class benefits can be weighed against aggregate litigation costs and burdens; "[c]larification on this point is obviously critical." The Committee has sent mixed signals on the propriety of considering the deterrent effects of class litigation. And it has expressly declined to say whether evaluation of probable relief permits a prediction of the outcome on the merits. "[T]he overall balancing test * * * is extremely vague and virtually standardless." There is no indication of the means for evaluating probable relief, nor measuring the costs and burdens of class proceedings. "The test is rendered even more unworkable by the fact that, in the usual case, a court would be required to evaluate these factors shortly after the complaint is filed." (2) The manifest purpose to restrict the availability of small-claims class actions, "flies in the face of one of the most important purposes of Rule 23: to compensate victims and deter wrongdoing by aggregating large numbers of small claims that would not support individual litigation." "This result might make sense if there was some showing that the burdens of small-claims consumer class actions outweigh their social utility. But no such showing has been made."

Alan D. Black, 96CV036: (F) is a pandora's box of issues. It invites discovery of the costs and burdens of defense, including such matters as counsel fee arrangements. It does not address cases that include injunctive relief, which may be more important than the damages. It is not clear whether it addresses median, average, or individual representatives' recoveries. It is unnecessary because most courts reject trivial claims classes under the manageability criterion. The FJC study shows that if the "$2" claims class exists, it is very rare. And the proposal can reach far beyond truly trivial cases; it should be made clear that relief and costs should be measure on the same scale — either the pro rata cost should be compared to individual relief, or aggregate relief should be compared to aggregate cost. The rule also seems to invite consideration of the merits, although if that were intended it is surprising that no note is made of the purpose to overrule Eisen. If (F) is retained, it should ask "whether the claimed relief to individual class members is trivial." And if it is retained in any form, the Note should give more guidance on procedure: is there to be a minitrial on liability or damages? Is visceral instinct to control? It is wise not to use specific dollar examples, but the Note should say that certainly the threshold is well below the median recovery figures, ranging from $315 to $528, reported in the FJC study.

Patricia Sturdevant, 96CV039: Personally and as General Counsel of the National Association of Consumer Advocates. Strongly opposes (F). "The assumption that recoveries of one hundred or

several hundred dollars are 'trivial' is entirely unwarranted." Such amounts can "make an enormous difference in the quality" of poor consumers' lives. (Later, it is urged that individual recoveries ranging from $3 to $50 also are legitimate in an example where the aggregate relief was approximately five times the fee awards.) For every wrong there should be a remedy. "The major problem we see is preying by business interests on our nation's citizens, particularly the elderly, the poor, and members of racial minorities through overcharging them by using unlawful practices." In addition to providing meaningful individual remedies, "the legitimacy of class actions derives in large measure from their value as a deterrent for unlawful conduct." Class counsel and representatives act as private attorneys-general. Three California Supreme Court decisions are cited for the proposition that: "Courts may and do refuse to allow classes to be certified where the potential recovery to each individual is nominal and when a distribution would consume such substantial time and expense that the class members are unlikely to receive any appreciable benefit." "So long as consumer actions are not a vehicle for lawyers to make huge fees in the absence of significant pecuniary and/or nonpecuniary benefit to class members, class actions should be deemed appropriate * * *."

Alliance for Justice, 96CV041: Poor people will be denied remedies and deterrence will suffer. "If enacted, this rule will send a message to financial institutions and utility companies that if customers are overcharged — intentionally or not — there will likely be no consequences." Bank or utility overcharges can be credited to customer accounts, providing an easily administered remedy. In rare cases where that is not possible, cy pres or fluid recoveries are desirable. Concerns over "coupon settlements" and the like should be addressed by increased court scrutiny of lawyer fees and the terms of settlement.

Robert J. Reinstein, 96CV043: (b)(3)(F) is not supported by empirical evidence. Even the smallest individual awards found in the FJC sample involved substantial aggregate awards. And no one knows how this discretionary balancing test will be applied. Balancing tests are inappropriate; Rule 23 involves a process of writing into the rule categorical determinations of the circumstances that do and do not warrant certification. Discretion is no more appropriate here than it would be in setting the amount in controversy for diversity litigation. The prediction of probable relief likely will require a minitrial on liability and damages — a matter the Advisory Committee explicitly declined to address. And it is unclear whether the public interest should be considered, or distinctions drawn between enforcement of federal claims and diversity actions, or aggregate recovery reckoned, or the costs and burdens on the judicial system taken into account.

Public Citizen Litigation Group, 96CV044: (b)(3)(F) is strongly opposed. It "mandates some sort of cost-benefit evaluation of the merits." There is no evidence of serious problems arising from trivial class claims. There are no standards. Should the value of probable relief be discounted by the likelihood of obtaining relief? What are the costs to the courts to be considered — and why should class plaintiffs alone suffer when court costs are high? (b)(3) classes exist to provide access to the courts for persons with low-value claims, and to enforce social policies. At the least, the Note should identify some cases that should have been denied certification on (F) grounds. There may

be interference with substantive policies. Congress has amended the securities laws against the background of current class-action rules; requiring a cost-benefit analysis may change the substantive law. The Truth in Lending Act and Fair Debt Collection Practices Act, moreover, impose a ceiling on "statutory damages" in class actions at the lower of 1% of the defendant's net worth or $500,000, see 15 U.S.C. §§ 1640(a)(2)(B), 1692k(a)(2)(B); theses statutes show that Congress encourages small-claim enforcement. State substantive law in other consumer-protection areas may reflect similar policies, and come to federal court. It is not good policy to focus the rule on the substantive merits of individual claims for relief.

H. Laddie Montague, Jr., 96CV046: (b)(3)(F) ignores the deterrent function. A substantial amount of aggregate damages or affected commerce should be sufficient to justify class treatment. Most plaintiff classes are represented by contingent fee attorneys — that of itself protects against the risk of insubstantial cases. The probable relief factor also will invite extensive discovery, since often it is not knowable at the time of certification what individual damages will be.

Jonathan W. Cuneo, 96CV047: (b)(3)(F) "is heavily biased against class actions. The amount of individual claims * * * will seldom be larger than the aggregate costs * * *." Aggregate benefits should be compared to aggregate costs. Even then, how much is enough? The Note suggestion that the threshold should be higher when the issues are complex shows the bias against class actions, which almost always involve complex issues. It also is subjective, and will defeat uniformity and predictability in litigation. And it does not accommodate nonmonetary relief: is that to be ignored? If it is to be weighed, how is a judge to measure its value? This is essentially a merits analysis that accords extraordinary powers on any judge who disfavors class actions. Is discovery to be allowed on probable relief? How will courts avoid premature adjudication that may distort individual actions or the course of the class action? "Cost-benefit evaluations are the stuff of legislatures and agencies, not courts."

Stuart H. Savett, 96CV048: (b)(3)(F) should be rejected. It defeats the traditional purpose of aggregating small claims; it eliminates consideration of deterrence; it would lead to unwarranted inquiry into the merits; it would directly contravene such statutory provisions as the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (authorizing class actions with no minimum recovery requirement for individual class members), the Social Security Act, 41 U.S.C. § 405(g) (allowing civil actions irrespective of the amount in controversy), and the Magnuson Moss Warranty Act, 15 U.S.C. § 2301(d)(3) (permitting actions so long as individual claims total $25); it arguably violates the Rules Enabling Act; and the "'sliding scale" suggested in the Note, requiring higher levels of individual relief if the issues are complex, will create burdensome motion practice. If it remains, it should focus on "requested relief" or "demanded relief," not probable relief.

John C. Coffee, Jr., 96CV049: If (b)(3)(F) is retained at all, it should be revised: "(F) whether the probable aggregate relief to all class members and the deterrent value of the action in assuring compliance with law justifies the costs and burdens of class litigation." The proposal seems to compare the benefit to any single class member against the global costs of class litigation; that would

defeat any class action. And it ignores the central role of class actions in creating incentives to comply with the law.

Melvin I. Weiss, 96CV050: (b)(3)(F) "is perhaps the most insidious" of the changes. The purpose of Rule 23 is to allow aggregation of claims that yield small individual recoveries. This ensures that wrongdoers may not "lie, cheat and steal, often obtaining hundreds of millions of dollars of wrongful profit, with impunity." This proposal "comes dangerously close to making substantive law." The "probable relief" standard "is completely unworkable": how can it be applied "without some early 'sneak peek' at the merits"? And how can the merits be considered without precertification discovery? And nothing "define[s] the parameters of the balance."

Richard A. Lockridge, 96CV051: This proposal "runs directly afoul of the bedrock of class litigation: the ability of individuals or business entities with relatively small claims to band together to seek redress." By looking to "probable relief," "the focus will shift to the merits of the case." The apparent purpose "is to avoid massive litigation where plaintiff and defense attorneys are well compensated at the expense of the class member's claims, i.e., useless coupons. It has been my experience [in antitrust and securities litigation] that such recoveries are rare." (In a supplemental submission, Mr. Lockridge urges that if (F) is retained, it should be revised along the lines suggested by Professor John C. Coffee, Jr.: "whether the probable aggregate relief to all class members and the deterrent value of the action in assuring compliance with law justifies the costs and burdens of class litigation."

Gerald J. Rodos, 96CV052: (b)(3)(F) "is directly contrary to the very raison d'être of class actions." It will give defendants a field day. They will force discovery on probable damages. In securities cases this will be a battle of experts testifying to the probable causes of market fluctuations and the like. In antitrust cases plaintiffs may well not have any information on the amount of overcharges. Once information is compiled, there will be another battle on whether it is "big enough to warrant class certification." The proposal is vague: do the burdens of class litigation include discovery costs (and with document discovery they may be great)? Counsel fees? What should be the relationship between recovery and costs? Are individual recoveries of $1,000, $5,000, even $10,000 enough? The FJC study figures suggest that very few class actions could survive even the $1,000 threshold. "Unless the purpose of this proposed amendment * * * is to assure that the average case that is now being prosecuted in the federal courts as a class action should in the future no longer be certified on a class basis, then this proposed revision * * * should be rejected." The purpose to remove truly small cases could be accomplished by comparing aggregate relief to the costs and burdens of class litigation.

Edwin C. Schallert, for Comm. on Fed. Cts., ABCNY, 96CV053: The (b)(3)(F) proposal "is clearly intended to eliminate small claim class actions regardless of their potential public policy benefits, or the size of the aggregate recovery being sought." It would invite certification of a 1,000-member class seeking a total of $1,000,000, but refusal to certify a 100,000-member class seeking a total of $2,000,000. It is antithetical to several statutes authorizing class claims, regardless of claim size, for violations of the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), the Social Security Act, 41

U.S.C. § 405(g), and the Magnuson Moss Warranty Act, 15 U.S.C. § 2301(d)(3)(requiring individual claims that total $25). It invites attacks on nontrivial-claim classes by the Note suggestion that higher individual relief levels should be demanded if the legal issues, or the proceedings, are complex. The reference to "probable relief," moreover, invites consideration of the probable merits in a backdoor fashion, particularly in light of the Advisory Committee's unexplained refusal to refer to "requested relief" or "demanded relief." And there is no indication that courts in fact are deluged with trivial class claims.

Max W. Berger, 96CV055: (b)(3)(F) is the most troublesome proposal, turning class actions upside-down. An illustration of the need for small-claims classes is an action settled with American Online, Inc., over its practice of adding 15 seconds to bills and then rounding-up to the nearest minute: a 46-second connection, for example, would be billed as 2 minutes. Individual claims were small. But effective relief was obtained, and the practice corrected. There are few strike or nuisance suits, as suggested by the FJC study. Courts weed out those that do get filed. Abusive practices such as settlements that award little to the class and much to class counsel have been rejected by the courts. The alternative of government enforcement is increasingly inadequate.

Thomas D. Sutton, 96CV056: From experience both as Legal Services representative for plaintiff classes and later as named representative in a class action, urges that (b)(3)(F) "would vitiate the salutary policies underlying class actions." It would defeat certification in actions in which individual damages were "only a few hundred dollars." "[T]he prospective recovery of each individual class member would seldom, if ever, be larger than the aggregate 'costs and burdens' of class litigation." I was entitled to $150 in my class action; this is a not insignificant amount of money to many people, but does not begin to compare to the class costs. The FJC study shows small median recoveries. At a minimum, the Committee should make clear that concern focuses on *trivial* relief to individuals, and that recoveries of a hundred dollars or more is not trivial. It also should be made clear that injunctive or declaratory relief figures in determining whether individual relief is trivial. (Another description of the class action in which Mr. Sutton was representative plaintiff is provided in the statement of Allen D. Black, 96CV036.)

Eugene A. Spector, 96CV057: (b)(3)(F) is contrary to the purpose of class actions to aggregate small claims, and to prevent enrichment of wrongdoers who inflict small injuries on many claimants. The focus on probable relief will encourage arguments on the merits.

National Assn. of Securities & Commercial Attorneys, 96CV059: (b)(3)(F) should be limited "to a comparison of the aggregate relief sought with those costs that are directly related to class litigation, such as the expense of notice, administration and distribution of recoveries." As the draft rule and Note stand, defendants will make the perverse argument that certification should be denied for the very reasons that justify certification — "the disequilibrium between the cost and complexity of prosecuting the litigation and the expected benefit for each individual." The FJC study shows there is no empirical need for this proposal. And there is a great risk that the focus on "probable relief" will lead

Beverly C. Moore, Jr. (Editor, Class Action Reports), 96CV060: (b)(3)(F), if included at all, should be incorporated with manageability in (D) — and it should be made clear that cost/benefit analysis bears on predominance, not on superiority. Class actions are valuable means of enforcing small individual claims efficiently — our study of many class actions shows attorney fee awards running between 18% and 19% of net aggregate class recoveries, far less than common contingent fees. Many cases (described in a multipage footnote) show that modern technology makes it feasible to distribute by mail individual awards of as little as $10. And modern electronic technology can facilitate "distribution" of far smaller amounts when many class members continue to have accounts with the defendant (as if a telephone company makes minor overcharges). The focus should be on aggregate class damage recovery potential as compared to litigation costs. This is generally true, but is particularly true when it is not possible to identify individual victims. Much of the dissatisfaction arises from "coupon settlements," and much of the difficulty with those arises from the inability to determine — even with the help of "Coupon Professors" — how many coupons will be redeemed. Coupon settlements can be made more meaningful by requiring that the defendant continue to issue coupons until a required number have been redeemed, or by establishing a market maker to clear coupons through to people who will use them. In other cases, a "second best" fund should be available for the purpose of receiving disgorgement of wrongful profits. Proposed (F) will generate litigation for decades. It will encourage preliminary contests on the merits.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): This proposal "does not foreclose aggregation of small claims altogether and is not intended to trivialize small claim consumer litigation. Nonetheless, Rule 23 does not and should not have a substantive component or context that directs courts to favor particular types of litigation for class action status, and it is a usurpation of legislative policy-making authority for courts to use Rule 23 to that end. * * * The proposed amendment thus directs courts to focus on the value of the justice to be gained * * *." The amendment invokes district court discretion, giving direction to discretion that already exists. The argument that Rule 23 should be used for deterrent effect "is not consistent with the underlying purpose of the Rule 23(b)(3) class, which is to provide a procedure for the efficient aggregation of claims for compensatory damages, as opposed to giving expression to social objectives not mandated by Congress. * * * In fact, injecting conduct-deterrence into Rule 23(b)(3) classes may be beyond the scope of the rulemaking authority." This proposal is strongly supported. But in recognition of the substantial opposition it has drawn, it may be better to proceed now with other proposals and defer action on this one.

Michael D. Donovan, for National Association of Consumer Advocates: 96CV064: Consumer class actions are a vitally important means of correcting business depredations. It is undesirable to undertake any amendment of Rule 23 now, while courts are continuing to work at resolving many issues that arise under it.

(b)(3)(F) is contrary to the purpose of class actions. It departs from the policy reflected in the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310, where Congress recognized the need for class actions involving individual claims of $25 or more and aggregating at least $50,000. So it fails to

reflect the Truth-in-Lending Act and Fair Debt Collection Practices Act provisions, 15 U.S.C. §§ 1640(a)(2)(B), 1692k(b)(2), which apply statutory damages caps at the lesser of $500,000 or 1% of the violator's net worth. These acts imply rejection of the "just ain't worth it" approach. Section 3(a) of the Uniform Class Action Act refers only to the expense of "administering" the action, not the costs incurred by the defendant. At most, it should focus only on notice and distribution expenses. It cannot properly be addressed to aggregation of claims for the amount-in-controversy requirement; that is a matter for Congress. The possible abuses can be controlled under the present rule, as shown by two California cases that deny certification when distribution will be slow and costly and class members are unlikely to receive any appreciable benefit. Most class actions are meritorious.

William T. Coleman, Jr., Esq., 96CV068: The proposal is sound. As one who was a member of the Committee that created present Rule (b)(3), submits that it was not the intended purpose to "hand a private attorney general's badge to any counsel who wants it." The Note should not say that the public values of enforcing legal norms can justify the costs and burdens of class actions. Any private attorney-general scheme should be created by Congress, not the Rules. And the Notes suggest a "sliding scale" that would make smaller claims more certifiable than larger claims. That is wrong. The defendant still may face a staggering aggregate exposure, and deserves full due process protections.

W. Pitts Carr, Esq., 96CV069: "Frequently, neither the class representative or class counsel has sufficient information at the outset of a case to determine the scope of recoverable damages." In a recent state-court action, the class of soybean farmers was cheated by an elevator that artificially overstated the foreign matter in the beans. Individual damages were minuscule; total class damages were several hundred thousand dollars; actual recovery was ten times actual damages because of punitive considerations. These factors could not be shown with any clarity at the beginning of the case.

Brian G. Ruschel, Esq., 96CV070: In representing consumers overcharged by business, I can advance only the minimum and most clearly provable amounts of the overcharges. The amounts in some of my local-court class actions are as low as $30. We need class actions to deter these defendants — even as it is, there is little enough deterrence given the infrequent number of class actions. "Giving judges another easy, subjective and potentially intellectually dishonest reason not to certify, removes risk for defendants." Already it is too easy to convince judges not to certify.

Leonard B. Simon, 96CV073: This proposal is contrary to the central purpose of class litigation — if a car rental firm is overcharging its customers $2, "there is every reason in the world to allow a class action." The cost-benefit comparison is ambiguous and one-sided. How is the investment of judicial time to be valued? Is the aggregate class benefit to be considered in relation to the aggregate costs, the only thinkable approach? There enormous problems of proof as to the costs to the courts or defendants: is discovery to be permitted? Expert witnesses? "If the Committee truly believes that cases which yield less than $10, or $5, or some other amount are not worthy of class certification, it should say so in simple and unmistakable prose."

Michael Caddell, 96CV076: This proposal "will detract from the class action device by preventing numerous small but legitimate claims from being heard." A class action provides an incentive to a group of plaintiffs to spend more on litigation than individual claims would warrant, elevating plaintiffs to a level more nearly equal to the defendant. There should be a class action remedy for conduct that inflicts small individual harm but costly public harm.

Stanley M. Chesley, 96CV078: Certification decisions are made before it is possible to predict probable relief. "From a practical standpoint, any argument made as to this factor would be extremely speculative." (He also questions the size of the median recoveries found in the FJC study. "I have never been involved in a class action in federal court where monies in this range have constituted the only recovery.")

Samuel Issacharoff, Douglas Laycock, & Charles Silver, 96CV082: (F) "redirects the class action inquiry away from the collective and back to the individual claimant. In so doing, the Proposed Rule imposes obstacles to small-claims class actions without any justification from current class action practice." The substantive implications are troubling. There is a strong effort to deregulate. "Part of the deregulatory environment must be the availability of courts to provide legal redress ex post in order to compensate for the consequences of the lack of oversight ex ante."

D. Dudley Oldham, 96CV083: "(F) offers a plan for curtailing the practice of aggregating claims where individually only minimal dollars are at stake. * * * In many instances, the value of recovery to the individual class member is so negligible that it fails to offset the associated cost imposed on the defendants and the judicial system."

Clinton A. Krislov, 96CV088: It is "inappropriate to engraft the suggestion to the courts that a merits-benefits weighing ought to be added to the rules since this will be viewed to hold most small amount mass claim class actions as dismissable, de minimis matters." This is an inappropriate attempt to move "in an outcome determinative direction." This is not a choice to be made by this Committee.

Patrick E. Maloney, 96CV090 & Supp.: On behalf of the Defense Research Institute. "Rule 23 is inefficient and burdensome because it often leads to the litigation of lawsuits that are not justified by the time and money required to prosecute them." It interferes with the interest in individual litigation. It can create unfair pressure for defendants to settle. The private enforcement justification fails because "the motives that drive class action attempts at enforcement may not coincide with the public interest. * * * Courts should be required to consider whether there is some benefit that justifies private enforcement, but also whether there are less expensive and more efficient methods of law enforcement."

FRCP Committee, American College of Trial Lawyers, 96CV095: Opposes the proposal. (i) There are no reasonable standards. This will be an ad hoc determination. There is no clue as to what must be shown as to probable relief or costs and burdens. (ii) This will encourage a preliminary peek at the merits, most likely in a non-evidentiary setting, certainly before discovery and trial, and probably would cause the court to form a preconceived view of the merits. (iii) Present concepts of

superiority, manageability, and frivolous litigation provide adequate protection. (iv) There have been some abuses in which nominal class-member benefits are paired with substantial attorney fees, but the attempt to cure these abuses in proposed (F) would eliminate the class action remedy "entire fields of commerce where [it] is the only viable procedure to arrest significant social wrongdoing." And (F) may further amend proposed (A), limiting class actions to those that do not involve substantial individual claims but do involve meaningful individual claims.

Reed R. Kathrein, 96CV096: The proposal "is a direct affront to * * * * equal access and justice, and, indeed, undermines the very foundation of the class action. Clear legal violations that skim resources away from many or injure the masses, in small amounts, yet allow the violators to make rich and handsome profits, will go unremedied. To trivialize injury is to trivialize predicament * * *. The long term implication for our society may be a bitter citizenry required to seek redress, indeed vengeance, elsewhere."

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: Class action lawyers view class members not as clients to be protected, but as "merely a necessary ingredient of the production process, to be acquired or bartered as the need arises." Indeed, class actions may be brought claiming diminished market value for products that are not defective or that have been fixed, with the hope that engineered publicity about the class action will cause the very market injury the action purports to redress. Frivolous actions are such a problem that sanctions must be sought. Factor (F) "will inhibit the prosecution of those cases in which the alleged injury is highly theoretical or de minimis and whose only beneficiaries are the lawyers."

Sheila L. Birnbaum, 96CV107: Strongly approves the "just ain't worth it" factor. "There has been an enormous growth in the number of 'nuisance' lawsuits * * * Make no mistake, these lawsuits are lawyer-driven, *not* client-driven. It is the lawyers, after all, who stand to profit from their creativity, while the clients may gain next to nothing." These are the suits that, if certified, are settled. Certification forces the defendant to consider the litigation risk in the aggregate, taking into account the prospect that the representative claims offered at trial will be the strongest claims in the class. Litigation is uncertain. There is an irresistible pressure to settle that imposes "a due process burden to be weighed against the significance of the individual plaintiffs' claims." The Note should not focus on the "public value" of class enforcement; "it is outside the scope of the Rules Enabling Act for the Advisory Committee to confer upon class counsel the role of a private attorney general * * *." The 1966 rule aimed at procedural efficiency; there was no suggestion that it was "intended to be the protocol for deputizing posses of private attorneys general who file and pursue litigation on behalf of plaintiffs who are not truly interested in the outcome of the lawsuit." When Congress has considered consumer class actions, it has taken a restrictive approach designed to keep relatively minor claims out of the federal courts; see the Magnuson-Moss Warranty Act, which requires 100 named plaintiffs, 15 U.S.C. § 2310(d)(3).

John W. Stamper, 96CV108: It is difficult and costly to resolve class actions that survive preliminary motions on the pleadings. Even a small possibility of a catastrophic loss exerts great pressure to settle. "The proposed preliminary review of the merits should help address this problem," but it

might be better to adopt stricter pleading standards that would avoid the problem of discovery to support a preliminary review of the merits. The pleading requirements should include a statement that will determine whether the claims of all class members can be proved by substantially common evidence.

Richard B. Wentz, for Mortgage Bankers Assn., 96CV109: (F) is the most important innovation in the proposals. "The experience in the mortgage banking industry has shown that class members recover little, if any, benefit from class action litigation * * *." The burdens on the courts will be reduced.

Arthur R. Miller, 96CV111: This "asks the court to weigh the probable amount of individual recovery against the aggregate costs and burdens of class action litigation. How can it possibly be equitable * * *?" This ignores the use of Rule 23 to force wrongdoers to internalize the costs of their misconduct. It "has wide-ranging substantive implications. * * * It is not the role of the courts or the rulemakers to decide that some of the rights established by federal and state substantive law are unworthy of enforcement because the amounts to be recovered by each individual class member may be small." This could effectively eviscerate a variety of substantive rights involving consumer and investor fraud or antitrust violations. If Congress has authorized recovery of $1, why deny a class of $1 claimants? The whole purpose of Rule 23 is to aggregate small and medium sized claimants into a unit. Beyond this central problem lie problems of implementation. The focus on probable relief will lead to extensive collateral discovery and examination of the merits, the size of individual damages, the ability of class members to proceed independently, and the costs and burdens of defense (including counsel fee arrangements).

Miles N. Ruthberg, 96CV112: Approves of (F). A class action is not "superior" "when the relief sought does not warrant the costs and burdens of class litigation."

John P. Zaimes, 96CV115(Supp): (F) "will provide a powerful tool to judges to ferret out those 'lawyer-created' class actions designed only to create a large attorneys' fee recovery while providing little or no benefit to the actual class."

Jeffrey J. Greenbaum, 96CV119: Although this has been highly controversial, it is "a balanced approach to a serious problem." There is a serious problem of public perceptions that class actions too often result in large attorney fees and no significant benefit to class members. It can be argued that Rule 23 should aim at facilitating efficient resolution of civil claims, leaving deterrence to attorney fee statutes and other means open to Congress. But it should be made clear that a class that includes nontrivial claims should not be fragmented by excluding claimants below a certain dollar threshold.

Guy Rounsaville, Jr., for Wells Fargo & Co., 96CV120: This statement begins with a detailed description of Wells Fargo's experience with consumer class actions, including "California Credit Card Class Action Litigation." The judgment for 1982-1989 led to distribution of $6,000,000 to

more than 1,000,000 customers whose addresses were known; they recovered an average of $5.31. Existing customers got an average of $3.94 by crediting existing accounts. The remaining undistributed damages were awarded to customers but to consumer action groups. By 1994 the California legislature had authorized charges several times the charges held unlawful by the judgment, but by then Wells Fargo had escaped California regulation by moving its credit-card activity to Arizona. There are other examples. Such actions are said to be a from of retroactive government price regulation by litigation. The costs in attorney fees, direct administration, and time of the parties are enormous. And in these actions, at least, the small awards are not going to the indigent — the first credit-card late fee class plaintiff was an attorney; the plaintiff in the action over "forced placed auto insurance" had taken a loan to buy an imported luxury car. The class members generally are "the economically stable or even affluent." For these actions, prospective relief is adequate. John Frank's statement makes it crystal clear that the 1966 revision never was intended to authorize anything like present consumer class-action practice. It is proper to reconsider the growth that has occurred since. (F) is desirable, but it is broadly worded and clearer language is needed; see the proposals of William Montgomery, 96CV122. There is no evidence that consumer class actions deter undesirable activity, but there is clear evidence that they do deter desirable economic activity. The FJC study explicitly states that it did not determine whether the size of potential liability affected the settlements it observed. The study thus does not refute the widespread criticisms of consumer class actions.

William A. Montgomery (State Farm Ins. Cos.), 96CV122: State Farm is defendant in many class actions, usually involving small amounts per claim. (F) "constructively addresses the drain presently placed on defendants and the judicial system in consumer class actions that have been touted — mistakenly, in my opinion — as admirable examples of the benefits of Rule 23 litigation." The unpredictability of trial and the costs of defense often give plaintiffs disproportionate leverage in settlement negotiations, "which is why almost no class actions ever get tried." It is a mistake to look to the amount of money made available to the class on settlement, for "the funds made available to the class largely go uncollected." The attorney fees that may seem reasonable in relation to the potential class recovery in fact become very large in relation to the amounts actually claimed by class members; the FJC study "did not capture or consider information about actual payouts to class members." {NOTE the response below.} We often find comments by members who opt out, indicating that they want no part of what they consider unfounded litigation. But the Note should not refer at all to facilitating enforcement of small claims, nor refer to "valid" small claims, nor suggest that the median recoveries found by the FJC study illustrate per-se certifiable claim amounts. The reference to "valid" claims, moreover, suggests a preliminary "peek at the merits." The Note also should suggest consideration whether there have been substantial complaints to the defendant or public agencies about the activities underlying the complaint, whether the defendant has undertaken voluntary corrective measures, and whether the class representatives have other relationships to class counsel. References to "trivial" claims should be changed to "small" claims. The suggestion that "public values" may be considered also is troubling — as the Committee Minutes express the view, class actions should not be used to substitute for explicit public enforcement remedies. The deterrence function is a substantive matter beyond reach of the Enabling

Act. {NOTE: Thomas E. Willging, by note of January 22, 1997, 96CV151, responded to the observations about the FJC Study findings. In more than 90% of the cases, the full amount of the settlement was in fact paid out to class members and for attorney fees; the failure of some class members to file claims simply increased the payout to other class members. Thus comparison of fees to the settlement amount presents an accurate picture. The median recovery figures, however, are not "actual" because they were reached by dividing the total settlement by the number of notices sent out; to the extent that some class members did not file claims, those who did file claims got more. This is a "potential" recovery.}[***Supplement***: Mr. Montgomery filed a supplement. (1) Responding to the Willging memorandum, he states that the FJC recovery figures were based on settlements in "distribution cases" that included 44 securities class actions and only 18 others. Securities cases will be changed in the future by 15 U.S.C. § 77z-1(6), which requires that fees bear a reasonable relationship to the amount of damages actually paid to class members. Coupon settlements and others that precluded ready calculation of amounts were not included. In small-stakes consumer classes, it is not customary to settle on terms that simply divide a total settlement among whatever number of class members may file claims; that would lead to enormous payments to the few who do file. Pro rata distribution "does not address the problem of nominal interest in small-stakes consumer class actions." (2) He cites Berley v. Dreyfus & Co., S.D.N.Y.1967, 43 F.R.D. 397, as an illustration of a court's desirable refusal to certify a class because the defendant had already offered to refund its customers's purchase price. This is a nonlitigation alternative to class certification. (3) An opt-in class is not a necessary alternative to (F). Instead, (F) should be modified to include consideration "whether a substantial number of individuals seek actively to pursue claims on behalf of the proposed class." The Note could suggest that the 100-representative threshold of the Magnuson-Moss Act, 15 U.S.C. § 2310(d)(3), is a good sample. (4) The ABA has now endorsed the deterrent value of class actions. But this remains wrong.]

Brian C. Anderson, 96CV125: (This part of the statement is not focused on factor (F), but seems to bear on it.) Participation in more than 50 class actions, most of them claiming economic damage from defective consumer products, shows that most "have not sought real justice on behalf of real people. Instead, these actions have been created by lawyers for the sole purpose of making money. The discovery process has invariably revealed that the named plaintiffs in whose name the lawsuit was brought have relatively little knowledge of, or interest in, the claims advanced. Further, the named plaintiffs have usually come into the case at the suggestion of the lawyers, rather than the other way around." Many are brought without any careful thought. But the requirement that the court approve dismissal makes it more difficult to pull the plug. The difficulty of winning dismissal combines with the exceedingly high stakes to encourage settlements "that seem to reward the plaintiffs'lawyers handsomely and provide only nominal value to the putative class members."

Gerson H. Smoger, for ATLA, 96CV126: ATLA policy on class actions includes opposition to consideration in the certification determination of the probable relief to be granted or the costs and burdens of class litigation.

Donn P. Pickett, 96CV128: "Class actions in which individual class members receive nominal

recoveries and the attorneys millions of dollars are not beneficial to society." An example is provided by a settlement I unsuccessfully opposed; class lawyers netted almost $35,000,000 for little more than one year's work, while class members got coupons good only for products (even though the class included those who bought service as well as those who bought products). The criticism that the proposal does not give enough guidance is not well taken. "It is the nature of Federal Rules that they provide general guidelines to be applied in individual cases." (F) "gives judges focused discretion * * *. How much more guidance should or could be given?"

William S. Wells, 96CV130: Settlements often are extorted by improvident certification. Classes often are certified where the only real benefit is to the attorneys. A more fundamental reassessment of (b)(3) is needed. As part of this process, (F) could be amplified to allow dismissal prior to certification "based on a showing that, as in many consumer class claims, the costs of adequate notice and claims processing are substantial relative to the damages to which a typical class member would be entitled. In appropriate cases, proceeding as a class action pursuant to Rule 23(b)(2) could be allowed instead." Counsel fees in a (b)(2) action would be based on effort, not supposed class benefit.

Ronald Jay Smolow, 96CV132: "Class actions are supposed to be for the consumer — the little guy." This amendment would encourage courts to deny certification because the costs and burdens on the defendant would outweigh the benefits to individual class members. That is a bad idea.

James N. Roethe (Bank of America), 96CV134: (1) The history of Rule 23 shows no intent to effect deterrence. "The Committee's recognition of deterrence as a factor which can support class certification would involve the Committee in a legislative function which is improper under the Rules Enabling Act." Most (but not all) plaintiffs lawyers bring class actions for fees, not deterrence. (2) Many class actions result in recoveries far less than the median figures found by the FJC. I have been party to settlements with small individual recoveries but large fees because of the huge cost to try the case and the large risk-weighted exposure even when there is a high probability the defendant will win at trial. (3) Of the arguably meritorious class claims for small individual damages, most involve "systems errors" or "honest mistakes," not intentional misconduct or fraud. Similar mistakes that benefit consumers of course go unbalanced. There are adequate mechanisms to reach the cases of actual fraud or serious misconduct. (4) (F) should be amended to set a specific dollar limit — say $100 per typical individual class member — below which class certification will be denied.

James J. Johnson (Procter & Gamble Co.), 96CV135: The importance of (F) is illustrated by litigation challenging the "99 44/100% pure" trademark used with Ivory Soap. Today, the soap could accurately advertised as 100% pure. But the claim was that it is not 99.44% pure. There was no legal basis for the claim. But the filing was accompanied by a damaging press release. Rather than face further damaging publicity, the case was settled for a nominal amount. Even then, defense costs included about $500,000 in attorney fees and settlement costs and hundreds of hours of time for internal lawyers and business people. Had the case reached a certification decision, (F) "would have quickly honed in on the fact that the * * * litigation had weak legal claims and speculative damages, layered on top of an already elaborate system of claims review and challenges." The alternative

means of control are many. Many products must adhere to FDA requirements for advertising. Television networks monitor advertising. And competitors provide "aggressive and well financed adversaries with high economic stakes in accurate advertising." There is no need for additional class-action regulation. (See also his San Francisco testimony, Tr. 138-141.)

David O. Haughey, 96CV137: Has been a member of several classes. In one he submitted a claim that was rejected because his share of the class settlement was less than $10; the court had ordered that to preserve the fund, claims for less than $10 not be paid, with the full amount of the fund paid to those with larger claims. This seems upside down. It would be better simply to order minimum payments — perhaps $10 — "to anyone who has gone to the trouble of submitting a valid claim at the request of the proponents."

William M. Audet, 96CV140: Courts now look at the merits before deciding on certification — often by 12(b)(6) motions; defendants invariably brief the merits in opposing certification. This proposal would require the plaintiff to prove the case on the merits without an opportunity for discovery, and would be the death knell for a number of cases. The reference to "probable" relief is particularly troubling. And the rule will suggest that classes of claims "of a few hundred dollars or less should not be certified." The message will be that it is good business to defraud many people of a few dollars each. If this proposal is adopted, we may as well abolish Rule 23.

Joseph Goldberg, 96CV141: (F) the apparent desire to weed out "trivial" claims is overstated. The FJC study found no problem on this front. There may be occasional cases too trivial to have been brought, but there are not enough to warrant disrupting settled law. The mechanism proposed is inappropriate — surely it is not intended to compare individual recoveries against the aggregate cost, but the proposed language and comments offer little guidance. The proposed comparison will necessarily complicate and prolong the certification decision, and increase its costs. "It will inevitably infuse substantial merits inquiry into the class certification." It seems unimaginable that defendants will welcome extensive merits discovery in the precertification stage.

Paul D. Rheingold, 96CV145: "This introduces subjective criteria into the decision making which go undefined. Worse yet, it implies to the judge that there is a category of mass tort suits where the individual injuries are too small to justify class status." But the Albuterol class litigation involved claimants whose settlements ranged from $2,000 to $20,000, surely deserving of class status. And how can we know what the burdens were, even retroactively?

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: Would "support a clarification of the Rule permitting courts to determine, as they have in the past, whether the likely aggregate costs directly attributable to class-wide litigation are likely to reduce the aggregate relief sought to such an extent that even taking into consideration the deterrent value of the action, certification is not warranted." To a substantial extent, courts do this now in focusing on manageability. But it also must be recognized that the present proposal has it backward. It would encourage courts to weigh individual benefit against class transaction costs, when the purpose of certification is to support litigation of small claims that present complex issues. The proposal also ignores the deterrence

purpose of Rule 23. "The unexamined consequence would be the likely proliferation of wrongful conduct that causes only de minimis injury to each individual but reaps a substantial aggregate windfall to the wrongdoer." And it should be made clear that this proposal does not support consideration of the merits; consideration of the merits would be self-defeating, a duplication of trial, an additional de facto discovery device, and an opportunity to lay the groundwork for inconsistent testimony impeachment at trial.

Fed. Cts. Comm., Chicago Council of Lawyers, 96CV148: (A) and (F) together seek a "golden mean." But (F) "would authorize district courts to drive a stake through the stereotypical $2.00 class claim (although not — interestingly enough — the $2.00 settlement class, which is held to different and weaker standards under the new subsection (b)(4) * * *)." (F) does not focus on the "public interest in forcing the defendant to disgorge unjust profits earned from unlawful or tortious skimming of small amounts of money from a large group of people * * *." At the least, it should be made clear that no one of the listed factors should predominate in (b)(3) certification decisions.

Charles F. Preuss (with Internat. Assn. of Defense Counsel), 96CV152: The proposed changes are a necessary and positive step toward redressing the abuse of class actions in medical products litigation. "Consideration of costs and benefits of class litigation * * * will benefit plaintiffs, defendants and the court system alike."

David L. Shapiro, 96CV153: (F) will "achieve massive overkill." Class actions are important to "internalize[] to a wrongdoer the true costs of the wrong — of effecting the goal of deterrence." The need for a class action does not depend on the magnitude of individual harms, nor event the complexity of the issues, "but rather on such issues as the alternative means of internalizing the costs of the defendant's wrongful activity and the social value of internalizing those costs (that is, the need for effective deterrence.)" The Committee was concerned that any reference to the "public interest" would trespass into the realms of substance. "I find myself at a loss to understand why, if this is so, it is any less of a substantive intrusion specifically to authorize denial of certification to a small claims class because it is not warranted by the potential relief to any individual. The Advisory Committee approach addresses the public interest by denying its relevance * * *." "[T]he problem is far more complex than the simplistic language of subdivision (F) would suggest, and is freighted with major considerations of substantive policy." If Rule 23 is to be revised in any way, (F) should be dropped.

Steve Ackerman, 96CV154: "(A) [sic for (F)] unfairly compares individual recovery to aggregate costs. The better approach is to compare total class recovery to aggregate costs. Why should a large corporation committing a fraud be insulated from accountability because individual damages to the victims are small."

Jeffrey Petrucelly, 96CV157: "This change would permit wrong-doers to get off the hook, rather than providing a deterrent effect and some small relief for class members."

Nicholas J. Wittner (Nissan North America), 96CV158: This threshold requirement "is absolutely essential to address the problem of protracted litigation involving frivolous and trivial cases. These

cases are a big problem for us and the entire automobile industry. We see them routinely when we announce product recalls or service campaigns." There is no need for deterrent effects — the class action is filed after, and because of, the self-corrective measures. This is so important that it is not enough to list it as a factor; it should be a required finding, along with predominance and superiority, in the introduction of (b)(3). (Later, he urges that class actions seeking recall should not be permitted if there is a government agency with authority to order a recall.)

Litigation Comm., American Corporate Counsel Assn., by Theodore J. Fischkin, 96CV161: This logical development of the superiority requirement "is a reasonable means of curing an abuse that brings disrepute upon the courts and the profession. * * * [I]t is at least sometimes true that class actions are little more than 'lawyers' lawsuits' * * *. This unfortunate condition is most likely to arise where the monetary claims are trivial." "Deterrence and retribution are functions of the criminal law," not class actions. Courts will recognize any virtue beyond lawyer fees that supports certification. Lawyers' lawsuits "are themselves a social evil."

American Bar Assn., 96CV162: Opposes "unless the Rule would further provide for the consideration of the deterrent effect of accumulating small recoveries."

ABA Section on Litigation, 96CV162: (This Report is not ABA policy.) Public confidence in the judicial system is undermined by class actions that generate large attorney fees and nominal recoveries or coupons for class members. But (F) is supported only if modified to require consideration of the litigation's probable deterrent value. The deterrent impact of aggregating small individual claims can be important. And the Note should state clearly that there is no intent to eliminate small claims from a class that is certified as to larger claims.

ABA Tort & Ins. Practice §, 96CV162(Supp.): The TIPS task force members could not reach consensus; TIPS cannot support (F). There is an Enabling Act objection "that factor (F) embodies a value judgment about the worth of small claims class actions, and provides federal judges with virtually unbridled discretion to reject this type class action." This is a normative value judgment for Congress. Other members endorse the proposal, because the judge should be able to determine whether recovery of attorney fees is the primary or sole purpose of the action, "with little or no foreseeable compensating benefits to class members." Objectors add five specific concerns: (1) It is difficult to reconcile the focus on large claims in factor (A) with the elimination of small claims through factor (F). (2) There is no reference to the public interest. (3) Judges are ill-equipped to perform this relatively unguided cost/benefit analysis. Administration may require a greater analysis of the merits than is otherwise permissible in the certification decision — indeed, some members see (F) "as a clumsy rendering of the 'preview of the merits' concept, and an unfortunate way of re-capturing this issue for the defense." (4) It is not clear that the justice system is burdened by exploitative small-claim class actions. (5) The Note spreads "more confusion and less illumination on the intent and implementation of this proposal"; one member strongly objects to the reference to the coercive effects of class actions.

James A. O'Neal & Bridget M. Ahmann, 96CV165: "As class action litigation has increased, so has

the potential for abuse." Some classes provide minuscule benefits for class members and windfalls for the attorneys. These actions burden the courts "and also add to the public's cynicism about both the courts and the legal profession." Some courts have engaged in this type of cost-benefit analysis under the "superiority" criterion in (b)(3), but it is beneficial to make this explicit.

Dennis C. Vacco, 96CV166: (This statement is initially filed as that of Dennis C. Vacco, Attorney General of New York; it is expected that other states will join.) This proposal overlooks the fact that small individual injuries may cumulate to substantial aggregate economic injury. It also overlooks the deterrent effect that Rule 23 has on market practices. And there are no standards limiting the reach of the purpose to eliminate small claims.

Howard M. Metzenbaum, for Consumer Fedn. of America, 96CV167: The proposal should be rejected. It undermines court access by victims whose claims are too small to support individual actions. It removes an important deterrent against misconduct. But if the Committee goes forward, it should make it clear that the relief to the class as a whole must be considered, as should be the value of any deterrent effect. Even then, the rule "could result in highly subjective, inequitable determinations." How can a court guess what probable relief will be at the certification stage? How is it to value deterrent effect?

Stephen F. Gates (Amoco Corp.), 96CV168: Although more fundamental changes are needed in Rule 23, factor (F) is strongly supported. it "should serve as a signal that litigation which benefits class counsel more than it benefits the class members is an abuse of the system and cannot satisfy the Rule 23 criteria * * *." Current practices "encourage the pursuit of speculative claims for marginal damages on behalf of a largely disinterested class of plaintiffs. * * * These claims would rarely be brought on an individual basis because they are too speculative and too marginal to sustain. When brought as a nationwide class action, however, seeking tens or hundreds of millions in damages, they are transformed into substantial monetary threats that a business cannot take lightly." Even this change, however, will not meet the problem that class action abuses "impose extreme costs on corporate defendants that are unjustified and destructive to the corporation, its shareholders, and the public at large."

Federal Courts & Practice Comm., Ohio State Bar Assn., 96CV169: A Resolution that "endorses the proposed amendments to Rule 23(b)(3) * * *."

Federal Bar Assn., 96CV170: Endorses (F). "It is almost trite but there are individual claims which are so minute that recourse to litigation in the federal system serves only to waste judicial assets and create the perception * * * that such actions benefit only the attorneys who invoke the Rule to maintain them."

Washington Legal Found, 96CV171: Horror stories abound of classes that yield insignificant recoveries while generating multiple-million dollar fees. "These claims are discovered, manufactured, and pursued by the only constituency that stands to profit from them — the attorneys that dream them up. * * * [A] hypothetical 'lawsuit' is first invented and only then is an 'injured client,' often a friend, relative, paralegal, or repeat plaintiff, sought to fit the theory of the case." The

costs entailed both for class attorney fees and for defendants "ultimately cost[] consumers and shareholders far more than any benefit to class members." The value of the proposed reform should not be undercut by the Note's reference to the public value of small claims cases. "There is, in fact, little if any such public value to pursuing aggregated claims for small amounts of money * * *. Moreover, it is not the function of the Federal Rules of Civil Procedure to transform class action plaintiffs' lawyers into private attorney generals charged with enforcing abstract principles of the law in the absence of injury." "Those who suggest that public policy supports expanding the use of class actions based on some 'public value' should direct their comments to the Congress * * *." "Class action litigation * * * involves private disputes between individual litigants." They exist for the sake of efficiency and fairness; when individual claims are insignificant, courts should have power to determine that the claims do not warrant the costs and burdens of class litigation.

Bradford P. Simpson & B. Randall Dong, 96CV173: Believe that (b)(3) should remain largely unchanged. "We are particularly troubled by any implication that 'small claims' class actions may not be certified under the proposed amendments."

Robert G. Bone, 96CV176: The Committee has adopted an ill-conceived theory of small-claims class actions. These actions serve to deter, to force a wrongdoer to internalize the cost of is misconduct. The value of relief to individual class members is not relevant; "[o]nce deterrence is accepted as legitimate, it is no longer clear that any amount is too trivial, or that individual (as opposed to aggregate) relief is relevant at all." The Committee, in Note and Minutes, seems to indicate a belief that adjudication is proper only when it serves the purpose of providing meaningful individual remedies. "[T]his view is controversial." Deterrence may be the main goal of the substantive law. Often Congress has expressly authorized the private remedy being pursued. The Committee has an obligation to provide reasoned argument to answer the view that "the point of adjudication is to enforce the substantive law." The Committee "must point to support for its position in current procedural practice and deal with arguably contrary evidence." Given the political realities, it is not realistic to impose on Congress the burden of authorizing small claimant class actions for very small amounts. If the Committee believes the implication of the 24-cent telephone overcharge example in its minutes, "factor (F) is misleading insofar as it focuses on individual relief." The factors that bear on the usefulness of deterrence include consistency of class action with the legislative enforcement scheme; whether nonadjudicative enforcement mechanisms — such as administrative proceedings — exist; the costs and burdens of class proceedings; and the likelihood that others will repeat the kind of conduct involved, or will be stopped by other means. If (F) is not abandoned, the Note should not say that the justification of class treatment fails if individual relief is slight.

Calif. State Bar Comm. on Fed. Cts., 96CV179: Parts of the proposal are vague and ambiguous. It is endorsed "if it is amended to allow the court to consider, in addition to 'probable relief to individual class members,' the following factors: (1) the value of the action as a mechanism for the enforcement of public norms, and (2) the value of aggregate relief to individuals. The Committee also believes that the amendment should be clarified to eliminate any doubt that 'relief' includes monetary and non-monetary remedies."

Calif. State Bar Comm. on Admin. of Justice, 96CV180: Supports if it is modified to read: "whether the probable relief to individual class members justifies the costs and burdens of class litigation or whether there may be a deterrent effect of aggregating numerous small claims."

TESTIMONY

Philadelphia Hearing

Allen D. Black, Tr. 29 - 34: This shares a problem with (A) by assuming that the court can characterize the size of the claims with one number. In fact most classes have small claims, medium claims, and large claims. There is no reason to deny certification of a class that includes $4,000 claims because the average of other claims is $100,000 or $50. And there are procedural problems. To consider the probable relief to class members, the court must have a hearing, and the issues must include liability to some extent "because often you can't figure out even ballpark damages without knowing liability." A hearing means discovery. Discovery would extend to the costs of defense — "what are you paying your lawyers, and for what?" And if the defendant has adopted a scorched-earth policy, can the class object that there are better ways of litigating at lower cost?

David Vladick, Tr. 73-78: For Public Citizen Litigation Group: There is no identification by the Committee of the problem addressed by (F), and no guidance as to the types of small claims classes that should not be certified. There are many cases with a high aggregate value, or a value in deterring unlawful behavior; often deterrence is the principal goal. There is ground for concern with settlements that yield little to class members and much to lawyers — and we have opposed many settlements on just those grounds. There is a serious ground for concern, and a need for close supervision, if potentially valuable claims are traded for coupons.

Beverly C. Moore, Jr., Tr. 89-92: Properly applied, cost-benefit analysis is appropriate. But it should be clear that even a sixteen-cent individual recovery can justify class treatment if the remedy can be distributed at a cost of two cents; it is the case with a sixteen-cent remedy and higher distribution costs that should not be certified. "Coupon" settlements can make sense, particularly if it is not possible to identify individual class members. In one settlement, the defendant agreed to continue to distribute point-of-sale coupons until $6,000,000 had been redeemed. If you cannot do that, there should be some form of "aggregate class damage Cy Pres Fluid Recovery remedy," but that demands legislation. The problem with (F) is not the concept, but that we already have it. This principle is applied as a matter of "manageability." We do not need another layer, particularly when there is nothing in the Note to explain what it means. At a minimum, the Note should make it clear that the sixteen-cent remedy may justify class treatment when the costs are less than sixteen cents.

Roger C. Cramton, Tr. 93-94: Strongly opposes for the reasons stated by Alan Black and David Vladick; and associates with the comments by John Leubsdorf.

John C. Coffee, Tr. 109-113: The inquiry into probable relief is likely to entail a look at the merits. There is no principled basis for looking at the merits for small claims cases and not looking at the merits in other cases. The balance seems to compare individual benefits with aggregate costs. And

the rule misses the importance of general deterrence. The antitrust treble damages remedy, and the securities law implied remedies, are intended to deter. The proposal, moreover, is a "double hit" for securities cases, following right after the Securities Litigation Reform Act. This factor should focus on aggregate claimed relief, and should include the deterrent value of the action. We do not need a rule that seems to say that there is an "effective right to steal one dollar from a million people."

Eugene A. Spector, Tr. 142: Agrees with the views expressed by Professor Coffee, next above.

Robert N. Kaplan, Tr. 148-151: Addresses concerns largely in terms of (A), but intermixes concern with (F). Consideration of probable relief, as well as measurement of the (A) factors, will open up a whole new area of discovery that has not characterized antitrust and securities class actions, and that should not be added.

H. Laddie Montague, Tr. 154: Subscribes to the remarks of Professor Coffee and Robert Kaplan, summarized above.

Jonathan Cuneo, Tr. 164-170: Associates with the remarks of Allen D. Black and Robert N. Kaplan. The deterrent effect of class actions in antitrust and securities enforcement "can hardly be overstated." There is a study of the bread industry that shows just how important this is. The proposed new (b)(3) factors will "add an entirely new layer of complexity to that already very difficult litigation." The draft Note "threatens to become preeminent. Instead of becoming merely a consideration, I think it threatens to become preclusive." It is wrong to focus solely on individual recovery as a measure of importance. An antitrust violation that steals $4 from every person in the United States has caused a billion dollars of injury; an action that recovers half of that would be a reasonable thing.

Gerald Rodos, Tr. 170-173, 176-177: The amendments are not written for mass torts alone, but apply across the board. They would apply to antitrust and securities actions, where there are well-established applications of Rule 23 that would be affected. I agree with the views expressed by Allen Black, Robert Kaplan, and John Coffee. It is not a solution simply to add consideration of aggregate relief, because it still can take months and expert testimony for the court to get a sense of what aggregate relief may be.

Stuart Savett, Tr. 177-185: In securities and antitrust litigation, there are no Rule 23 problems to be addressed by (F). I concur with Professor Coffee. There should be a remedy when someone takes ten or twenty dollars each from a million people. The notion that the class members do not want the litigation brought is "absolutely incorrect." The Antitrust Division and the SEC bring enforcement actions only in the big and glamorous cases. Private enforcement is the only effective remedy. And defense efforts to broaden the class definition upon settlement are not improper when the defendants add something; often there is nothing to be lost for the plaintiffs, because limitations would bar a new action. There is a problem of public perceptions of small-claims class actions, but the answer is not to change class actions. The answer is to educate the public.

Edward Labaton, Tr. 185-188: Associates with Professor Coffee and the written report of the

Association of the Bar of the City of New York. Professor Kaplan, writing about the 1966 amendments, observed that "The moral justification for treating [people with small claims] as null quantities is questionable." That is the rationale for rejecting (F). It would be a mistake to try to codify the rules further. "[T]he great beauty of the Federal Rules is that they leave a tremendous amount of discretion to federal judges. They are not written as a code. I think the federal judges have acted wisely on the whole * * *."

David Weinstein, Tr. 193-196: From experience in antitrust, securities, and consumer class litigation. Adopts the comments of Gerald Rodos, Stuart Savett, and Edward Labaton. (F) "is imposing upon a vast array of different kinds of class actions, expensive, unnecessary and potentially very long proceedings to deal with what is virtually a small subset * * *." The problem of very small recoveries is addressed now as a matter of discretion in applying the superiority requirement. "We should not be legislating more and more defined standards." To be sure, mistakes are made from time to time, but it is ironic to adopt a rule that, in an effort to spare the burdens of class litigation, "will cause the expenditure of a great deal of time, effort and money in connection with determining an issue about whether or not there's a lot of money involved."

William T. Coleman, Jr., Tr. 204: Rule 23(b)(3) has been made into something very different from the intent of the Advisory Committee. These are supposed to be procedural rules. It is for Congress to create private attorney general provisions. [M]any of these lawsuits are filed mainly because a lawyer * * * is trying to make a fee." "[I]f you were injured and it was settled and it was five or ten dollars, we live in a society where most civilized people don't bring lawsuits."

Thomas Sutton, Tr. 215-222: Endorses Professor Coffee's testimony. At the least, aggregate benefits should be compared to aggregate costs; at its least dangerous, the proposal is ambiguous in this respect. The deterrent effect also should be reckoned. And benefits of injunctive or like relief cannot be ignored in striking the balance.

Michael Donovan, Tr. 222-240: The proposal compares apples with pistachios. "[I]f the individual brick is smaller than the building, which it will always be, then the class action should not be certified" under (F). That is wrong. It will deny access to justice. Many statutes enacted after 1966 have assumed the existence of the private attorney-general enforcement system provided by Rule 23(b)(3). "They were enacted as an overlay on top of the Rule 23 jurisprudence. * * * [W]hat Congress has done is that it said, look, Rule 23 exists out there as an Attorney General statute." The aggregation question in mass tort cases should be dealt with as a matter of jurisdiction, not by Rule 23. Several clients involved in consumer class actions are here to verify the importance of Rule 23 as a path to justice.

Shirley Sarna, Tr. 240-242: State attorneys general are coming to recognize the importance of class actions. (F) should include consideration of "the deterrent effect, the public interest effect." Professor Coffee's testimony is persuasive.

Robert Reinstein, Tr. 244-250, 255-256: The evidence of trivial class actions is anecdotal; the FJC study did not find it. They seem to be very rare. It is a mistake to attempt to write a rule to address

such a small problem at such great risk. (F) requires two predictions — what relief will be, and what the costs and burdens will be. These predictions are difficult. If I were defending, I would assert that there will be no relief because the plaintiffs will lose on the merits; and I would offer expert testimony that in any event damages are minimal. Although this is only one factor to be considered, it is very ambiguous, involves much discretion, and invites erroneous judgments. The same problems of prediction and excessive preliminary litigation arise if it is made clear that aggregate relief can be considered. The rule will be asserted to resist virtually every plaintiff class. And (F) does not say anything about the private attorney general function. Congress expects its laws to be enforced in this way; it knows that the Justice Department and the SEC do not have adequate enforcement resources. The private attorney general concept inheres in Rule 23; it was the driving motive behind civil rights enforcement through subdivision (b)(2), and (b)(3) cannot be distinguished.

Joel Gora, for ABCNY, Tr. 264-268: In conjunction with (A), (F) presents a "goldilocks" problem "that undercuts the basic mission of the class action, which is * * * to deal with the large scale small claims case." Relief of $500 or $5 still gives an important sense of relief. There may be cases that seem "like a bit of a ripoff of the system," but they cannot drive the rule. There are intangible benefits in many small settlement situations in consumer case, subscriber cases. The cases that really have no benefit can be addressed by means that do not change the rule, that do not ask the district court to consider the probable relief in each case. This factor "will require the kind of preliminary mini-hearing on the merits that can become quite disruptive of normal litigation."

Leslie Brueckner, for Trial Lawyers for Public Justice, Tr. 269-272: "[T]he infamous factor (F)" "threatens legitimate class actions." The seeming comparison of individual benefits to aggregate costs and burdens goes much too far. Even if it is made clear that aggregate benefits are considered, there is no recognition of deterrence. The rule seems to invite consideration of the merits. And there is no clear indication of what is to be considered in evaluating the costs and burdens.

Deborah Lewis (Alliance for Justice), Tr. 280-281: (F) will prevent any effective remedy for the victims in consumer cases. The deterrence function of Rule 23 is very important. If there are rare cases of abuse by attorneys, the size of individual claims is not "a very good surrogate for the integrity of the attorneys for the abuse in this situation."

Alfred Cortese, Tr. 281-288: (After decrying the transformation of (b)(3) by judges into a device never intended, and approving factors (A), (B), and (C) as a beginning, also approves (F):) "Not every injury is compensable. And the problem here is that the aggregation prevents justice. It creates mass injustice because it prevents the cases from being tried * * *." The amendments work toward certifying the case that can be tried — not that they all will be tried, but that they can be tried. These are standards, not bright lines, and they appropriately confide the determination to the discretion of the district judges. The focus on deterrence is inappropriate: "That's a congressional consideration." Deterrence crosses "the line between substance and procedure or legislative functions and procedural functions."

Dallas

Stephen Gardner, Tr. 4-22: (This testimony interlaces (F) and (b)(4); much of it is summarized with (b)(4).) The testimony is based on experience with consumer class actions. Factor (F) will exacerbate the problems. "[I]t's a simple fact that many consumer class actions are brought for no other purpose than to get attorneys' fees for class counsel, with relief for individual consumers at best a land gap [sic for lagniappe] that is thrown in by class counsel to give an aura of legitimacy to their fee request." But this is the only means to provide relief on small claims, including — in Texas — claims for up to $10,000 each that cannot economically be brought as individual actions. (F) "will turn federal judges into socioeconomic arbiters. Cost benefit analysis has been used at a federal agency level. * * * [I]t has shown itself to be an extraordinarily subjective and extraordinarily nonlegal decision-making process that * * * would turn trial judges into not judges but economic professors who are second-guessing legislative intent." Congress has passed many statutes that provide for small damages. These actions not only provide relief, but also deter bad conduct. Judges should not be allowed to nitpick these intended remedies. Of course attorneys should be allowed reasonable fees in good class actions, but there should be a connection with the work. A quick settlement of a very large class claim may not deserve even a 5% share.

Richard A. Lockridge, Tr. 22-25: Rule 23(b)(3) has done what its drafters said it would do. Most of the egregious cases are in state courts, and the Committee cannot do anything about them. If there are problems in mass torts, the courts of appeals seem to be taking care of them. To the extent these proposals are addressed to mass torts, they will cause problems in other areas. The cost-benefit analysis should be approached very, very carefully.

Charles Silver, Tr. 44-48: The proposals seem to endorse the tort reform political agenda by taking small claims cases out of Rule 23. And also by allowing for quick and cheap settlement under (b)(4) if they stay in Rule 23. In the Texas "double rounding" case total class damages were uncertain, but it was agreed to work from $50,000,000 as the figure. The settlement was $36,000,000. Individual injuries were $10 to $12. The press criticizes such cases as providing insignificant individual recoveries and large fees. But the case was intensely litigated, at great expense and risk to class counsel. It is a model of what a small-claims class should be and do.

John Martin, Tr. 51-58: Approves the package of changes, based on experience as general counsel of Ford Motor Company. Offers as an example an ignition switch supplied by an outside supplier and installed in some 26,000,000 vehicles. It presents an infinitesimal risk of fire damage, and a slightly larger risk of smoke without fire. The National Highway Traffic Safety Administration has investigated it, and Ford undertook a voluntary recall of perhaps a third of the vehicles. 99.9%-plus of owners will never encounter a problem, but there is a class action on behalf of all. The "private attorney general concept" does not justify this. "[L]awyers who tend to take themselves very seriously overestimate the impact of litigation on business behavior. * * * [F]or most consumer product manufacturers, the people running these businesses run them on the basis of facts, and litigation and the outcome of litigation is so uncertain it's not something that can be taken seriously into account in relation to other factors that are measurable and are so much more significant, issues

like warranty expense, like campaign cost, customer satisfaction, customer loyalty."

Donald H. Flanary, Jr., Tr. 104-111: There should be a cost-benefit calculation, and it should consider the amount of individual recoveries as well as the aggregate class recovery."[I]f it's a complex case and the cost of preparation, the cost of defense, the cost of tying up the courts has no relationship to the individual value of the claims, I think that there should be some measure." Defendants are not going to run up the costs of defense as a means of defeating certification.

Stanley M. Chesley, Tr. 139-140, 146: This is a subjective factor that will be used to defeat certification. Usually it is very difficult to determine the probable relief and the costs of the litigation at the time of certification. It is impossible to know whether the case will be settled — and settlement rather than trial makes a dramatic difference in the cost.

San Francisco Hearing

Patricia Sturdevant (National Association of Consumer Advocates), Tr. 8-14: (F) would defeat all of the many consumer class actions our members bring. Class actions are "supremely appropriate" when they aggregate many small claims into a large aggregate. (F) improperly looks to the size of individual claims rather than the aggregate. Attorney fees are high because defendants make these cases costly, and also because congested court calendars may set trial five or six times before the case actually is tried. And "to a low-income person, a few dollars or a few hundred dollars is of enormous significance, both economically and because it gives that person a feeling that he or she has a stake in the system." The problem is not class actions, but "that big business preys on low-income consumers." "[I]t's only the class action lawsuit that enables low-income consumers to obtain economic justice. It's a very powerful vehicle. It has accomplished social change. It has challenged unlawful practices in a variety of contexts, including finance company fraud, insurance packing, overcharges on credit cards * * *." Administrative agencies do not in fact provide the redress that in theory they should. And the present rule provides ample means for refusing to approve settlements that benefit class counsel at the expense of the class.

Beverly C. Moore, Jr., Tr. 14-20: The cases that have given small-claims classes a bad name in the press do not deserve the treatment they have received. The "insurance case from Texas" that yielded $5.75 class-member benefits involved $70,000,000; attorney fees were only 18% of the total. And across a database of 500 or 600 cases that have generated $15,000,000,000 of recoveries, the average counsel fee share has been 18%. In the last few years, particularly in securities fraud cases, the settlements include a provision that small claims will not be honored — the cut-off point may be $3, $5, or $10. Counsel who settle these cases have ample means to prevent the 8-cent check from being issued; how that happened in the Melon Bank case that John Frank mentioned is a mystery. The Bank of Boston case that has generated so much concern, with a $8.76 individual recovery and a charge to that class member of many times that amount as his share of class counsel fees, was a clerical error that affected only that one class member. Counsel fees were 28% of the total benefit recovered for the class. And in another case that has been claimed to be brought over automobile defects that were cured by the manufacturer, the manufacturer did not compensate class members

for the costs of repairs, and the class action simply seeks compensation for repair costs paid by class members.

Nicholas J. Wittner (Nissan North America), Tr. 20-28: (F) is so important that it should not be a mere consideration bearing on predominance and superiority. It should be a threshold requirement for any (b)(3) action. Speaking from experience in the automobile industry, the class action has become a racket, a form of legalized blackmail, with humongous classes that cannot possibly be certified brought and settled for nominal relief and huge fees. These actions sully the reputation of the legal profession. Examples are provided by two class actions brought after Nissan announced a safety campaign to recall all vehicles with potentially defective seatbelt buckles and replace the buckles without charge. One action was dismissed because the representative plaintiff owned a vehicle that did not involve one of the buckles, a matter that would have been shown by simple examination of the buckles in his car. Even that action cost tens of thousands of dollars to dismiss. The other one lingers on, and is not subject to ready dismissal by summary judgment — injury is properly alleged as a diminution of vehicle value, even though the vehicles will all be fixed without charge and suffer no loss of value. With (F), we should be able to win dismissal of the class claim, after focused discovery.

Lewis H. Goldfarb (Chrysler Corp)., Tr. 37-45: (F) would be a big help. Chrysler is the target of three times as many class actions now as it was three years ago. Although some are legitimate, at least 2/3 of them are frivolous. The misuse of Rule 23 has corrupted the legal profession, providing "a battering ram for nationwide cartels of self-serving lawyers to shake down large corporations for multimillion dollar legal fees in order to secure cents-off coupons and other comparable trinkets for unknowing clients." Allowing a court to review the alleged harm on the pleadings "would obviate months, sometimes years of litigation before we even get to class certification." "I mean, what we're faced with typically when we do a recall or when the government closes a case, there is a lawyer coming to us and saying, 'Look, we don't care about the merits of the case. The local judge is going to certify this class. We found an expert that has concluded that your fix is no good. And if you agree to pay us a reasonable attorney's fee, we can come up with some bells and whistles that some judge will sign off on as providing some benefit to class members, and we'll all be happy. You'll buy your res judicata; we'll get our attorney's fees. And, you know there is no harm, no foul. And we are faced with that over and over again."

C.C. Torbert, Jr., Tr. 63: Favors the proposal.

Arthur R. Miller, Tr. 63-81: Those who framed the 1966 amendments had no idea of what would come. The changes are due more to an explosion of substantive federal law than to any flaw in Rule 23. Any revision is a very delicate matter. It is important to seek empiric information, and to be wary of the cosmic anecdote. Any rule change should seek to minimize litigation points, matters "that simply invite lawyer squabbling." Reliance must be placed on judicial discretion. (F) "is pernicious. To say to people, 'you just ain't worth it" is a terrible message * * *." It is virtually impossible to write a rule that distinguishes between class actions brought simply to benefit the lawyers and those brought on a legitimate claim. All that can be done is to urge and train judges to

use Rules 12(b)(6) and 56, to use Rule 16 to manage to case. "If you've got a scent, a hint, a whiff, you've got to get those lawyers into chambers and look them in the eyes, read them, feel them, strangle them, if necessary." Nothing works one hundred percent of the time. "If need be, you use court-appointed attorneys to protect third-party interests." If 6,000,000 people have been injured, we should insist on proscription of the practice. Looking back to 1966 from 1997, it has all been worth it, "knowing what I know * * * about the complexity of our society, about the risks generated in our society, about the inequalities in our society, knowing that the administrative process is not an effective form of remediation, the Texas Department of Insurance was going to do nothing about the illicit rounding up in Sandeo, you're the only game in town." Rule 23 "has, in a wide variety of contexts, from civil rights to consumers, been a very powerful social instrument." "Junk (F). Junk it. It's bad philosophy. It's bad social engineering." If anything, it would be better simply to adopt a surgical bright line — if the indicate relief is less than $10 per class member, no certification. The present proposal "is a litigation point of monumental proportions." "If Congress gives people a right, it is not, it seems to me, appropriate rule making to qualify that right based on the fact that an individual's stake in that right is not very high." Opt-in will not work as a substitute; many people will not opt in. Deterrence has always been a rather fundamental aspect of the litigation process. "Those people in Texas will be protected against rounding up." What may seem the petty costs of modern life can be important to many of those less advantaged.

Charles F. Preuss (International Assn. of Defense Counsel), Tr. 85-86: "The cost/benefit analysis * * * is extremely helpful to the class action process." It may show that it is appropriate to pursue a dollar claim on behalf of a million people.

Leonard B. Simon, Tr. 86-94: Class actions work fine in the core securities, antitrust, and consumer areas. The long experience and settled jurisprudence should not be upset because of problems that have arisen from the extension to mass tort cases. Many modern cases are so complex that individuals cannot litigate them alone, even for substantial stakes. (F) is wrong on policy grounds. And it also is wrong because it is unmanageable. It will take longer to get rid of cases than it takes by proper use of Rules 12(b)(6) and 56, of Rule 23 as it now stands, and of Rule 11. Under (F), every class action will begin with debate whether it is worth it. "The creative minds of the lawyers on both sides will conjure up enormous amounts of useless material, which needs to be studied." "Look at the debate over the two dollar rounding up. Who knows is that worth it? Is that worth it to District Judge Jones? Yeah. District Judge Smith? No. So we're going to take the cases up on interlocutory appeal to the circuits. * * * That is, with all due respect, a crazy way to run a judicial system, to be making judgment calls like that in every case." The average District Judge will think a $500 individual-claim case isn't worth the case. The claim that these cases never go to trial "is bunk.; Our firm tries a large class action a year. * * * Most of the cases settle. The Federal Judicial Center says most litigation settles. So there really is no difference." There are no standards, no guidance, under (F).

Samuel B. Witt, Tr. 96-98: "The question is: Should the class counsel and representatives be able to claim standing to enforce public values, absent the private remedial benefit that traditionally

justifies private adversary litigation? I don't think so." As summarized with the opt-in comments, suggests that an opt-in class might be used in place of (F) — rather than deny any class certification, the district court would certify only an opt-in class.

John W. Stamper, Tr. 126-130: (b)(4) "is what courts and parties have been doing and what, in all probability, they are going to continue to do, because it's practical and it's efficient, and it is often necessary and desirable for everyone to resolve cases at an early stage." The choice-of-law issue can be resolved by subclassing if there are such differences of law as to require this for fairness. At other times, it may be fair to reach the same settlement as to all class members despite some differences of law. "But you can do that in the context of the settlement and recognize that manageability from a trial standpoint would be a different question." The concern that plaintiffs' counsel has no leverage is not well founded. They know what they are selling. If there is real value to the potential individual claims, the threat of individual claims gives leverage. And beyond that, the courts are in fact looking very carefully at settlements.

Richard Wentz for Mortgage Bankers Association, Tr. 130-137: Our members have experienced a five- to ten-fold increase in class litigation in the last three years. The actions "tend to be very arcane and very technical. They do not involve what Professor Miller called 'cheating' at all. What they involve is interpreting a whole array of new federal statutes that govern the lending industry. These statutes are very complicated. The administrative agencies charged with enforcing them are still trying to figure out what they mean." While we are all trying to figure out these laws, we get barraged with lawsuits, many of them simply try to rewrite the mortgage contracts. Consumers do not feel they are benefited by these actions. To the contrary, we get many opt-out letters recognizing that the actions are frivolous and add to the costs borne by consumers. We strongly endorse (F).

James R. Sutterfield, for International Assn. of Ins. Defense Counsel, Tr. 146: Supports the proposals as a package. Not sure that it could be supported without (F) and interlocutory appeal. More needs to be done.

Jeffrey J. Greenbaum, Tr. 154-157: There is a serious problem of public disrespect for the judicial system, and it arises in part from the $2 recovery cases. People believe these cases as just for the lawyers. I am a member of a class that has 1,000,000 members and has settled for $425,000; if more than 100,000 members apply for distribution, there will be a lottery to award $4.25 each to 100,000. These settlements occur not only when the class attorney thinks the claim will be dismissed, but also when there is a difference of opinion as to the value of the case.

Stuart Baird, Wells Fargo, Tr. 165-173: Strongly endorses (F). Class actions against the bank are increasing. They involve consumer charges that were fully disclosed; that have been targeted by class actions against many other financial institutions; that have not been the subject of significant consumer complaints. The underlying legal standards are very vague, making it difficult to achieve dismissal, summary judgment or denial of class certification. In California, for example, the law came to be that credit card late fees could not exceed "cost," but there was no definition of cost. The legislature eventually remedied this problem by statute, but too late — the class actions had driven

every major credit-card issuer out of the state. Five class actions were brought against Wells Fargo on various credit card charges. They resulted in $14,000,000 of class relief; $1,700,000 in administration costs for the bank; $9,400,000 in plaintiff attorney fees; and more than $5,000,000 of defendant attorney fees. All of this for claims of violating a law that was unworkably vague. The comments to F should be strengthened. The language is inconsistent, speaking of trivial or slight claims, and of substantial claims. It would be better to refer to substantial or not substantial claims. And a bright line should be written into the rule — not Professor Miller's $10, but $300. It is "just not worth it to society, to the judiciary, and probably, most importantly, to the class members, if they don't have a claim that exceeds that." Deterrence is not a proper subject of class litigation, and was not contemplated by the 1966 amendments. Penalties should be enacted by the legislature. Class actions for prospective injunctive relief, on the other hand, are appropriate. The aggregated total of individual claims distorts the process; it does not justify class litigation, but simply distorts the process by coercing settlement of weak claims. "We're not talking about being able to act in a wrongful fashion and not having anything done about it. There are many things that can be done to address wrongdoing by a corporate defendant in our culture. One of them is we're supposed to have faith in the free market system, which regulates itself. But beyond that, if litigation is the issue, there is this prospective relief, which is much more efficient * * *."

William A. Montgomery (State Farm Ins. Cos.), Tr. 178-185: (F) is good, but the Note should be revised. State Farm, by virtue of its size, attracts many class actions. More than 50 are pending now. Most are consumer class actions. Settlements typically employ a claims procedure, "so while all defined class members are bound by the judgment, if they don't opt out, only those who submit claims recover under the settlement. And even where very extensive individual and published notice is given, and even where the claims procedure is simple and routine, very, very few, in our experience, of these class members, come forth and submit claims. * * * A fair presumption is that the matters complained about are simply insignificant to the consumers on whose behalf the case is brought. The primary beneficiaries of most consumer class actions are class counsel * * *." The general introduction of the published Note, p. 46, touts small-claim litigation; "this apotheosis of small claims class litigation ignores reality." It should be deleted. The commentary should encourage consideration of the number of complaints made by consumers, of the relationship (if any) between the class representative and counsel, and of any curative steps already taken by the defendant. (F) should reach beyond the "trivial" claims described in the Note; without setting a dollar figure, "small" claims should trigger the (F) inquiry. It should not be suggested that public norms are relevant. The "Texas rounding" case may be one that should not be a class action if, as has been asserted, the state regulators had approved the rounding up practice. The suggestion that (F) should focus on the aggregate class relief ignores the level of interest of most of the proposed class.

Joseph Goldberg, Tr. 186-189: Based on experience as plaintiff class counsel in antitrust and securities, Rule 23 works. There is a well developed body of law. Cases that are certified should be; cases that are not certified generally should not be certified. (F), as a solution to a non-problem, will not work. The costs and burdens of even a large antitrust pricefixing action are great; it does

not seem to be intended to eliminate all class actions, but the proposal does not make the distinctions that must be made. "Even if there were enough trivial cases to warrant a concern, I don't see how this proposed change is really going to affect it."

James N. Roether (Bank of America), Tr. 225-227, 229-232: Bank of America is now involved in 65 class actions. The process is being abused. Some of the commentary may weaken (F) by limiting it to cases that involve only a few dollars for individual class members. There should be a bright-line approach, although the precise number is not clear — perhaps individual relief of $50 or $100. This gives ease of administration. And it helps avoid the problem of classes in which the only real relief goes to the attorneys. We have looked at our settlements, and find that often two-thirds of the costs involved go to the attorneys, one-third to the class. In one class action against credit card rates that we refused to settle and won on the merits, other banks settled; I got 25 cents as a class member. Not much went to anyone individually. That is the kind of case that should be stopped.

Clyde Platt, Tr. 234-247: This testimony interweaves concern about (F) with rejection of an opt-in class alternative. In practice, (F) is less likely to be merely a factor that bears on determination of superiority and more likely to become a threshold requirement. The superiority inquiry assumes that there is an alternative means of adjudication. For small claims there is no alternative means. (F) "is more of a revolution than the modest restriction spoken to in the Committee's Note." Some meritorious cases will become forfeit. An example is provided by medical insurance co-pay cases arising from the practice of insurers who negotiate discount provider rates but do not reflect the discount in the 20% co-pay obligation of the insured. We have been winning summary judgments on liability in these cases. The individual class member benefits may be quite small, depending on the size of the medical bills and discounts involved. To the extent there is a problem with counsel fees, a direct approach to counsel fees is appropriate. Injunctive relief that prevents repetition of the conduct is important, but that is not all we are after; and (b)(2) often will not support certification when damages are sought in addition to an injunction. If we have an opt-in class, we may not have a class; why not allow opt-out, as we do? The proposal will delay certification until there is a determination of probable relief. I recently got a check as a member of a class; it was for $58.13. The word "trivial" did not come to mind when I received it. But how would (F) treat it?

Joseph Tabacco, Tr. 248-256: Rule 23 is not broke; don't try to fix it. Class action lawyers do not all become millionaires. It is a risk/reward ratio; because of the risk, there must be a reward, or we will not have aggregation of claims. (F) will have unintended consequences. In securities litigation, it is necessary to define damages over a period starting with the time of the fraud and ending when the truth was revealed. In a recent case, following a bifurcated trial determination of liability, my expert testified to $140,000,000 damages; the defense experts testified there were no damages. "So are we going to get into that type of presentation in the first six weeks or first three months of a securities class action, because suddenly there is this new subpart in the rules? You may have created, by this analysis, the unintended consequences of, in effect, mini trials * * *." Whether or not you intended (F) to apply to securities actions, it is part of Rule 23, and Rule 23 applies to securities class actions. "The potential for satellite litigation is much, much greater." And it is no

cure to substitute opt-in classes.

William M. Audet, Tr. 256-266: What else are we to do for the people who have nowhere to go without Rule 23? A $50 claim or a $5 claim is worthy if the aggregate is sufficient; if it adds up to $10,000,000 or $15,000,000, I can take it. But not for less. A lot of people are pleased to get $5. I would prefer to keep these small-claims cases in state court; it is the defendant who remove, and who will be arguing to the federal court not to certify because of (F). Opt-in won't work; it is hard enough now to persuade people to step forward to claim actual awards. Public agencies are simply not doing the task of public enforcement; private enforcement remains important.

John L. Cooper, for Federal R.Civ.P. Comm., Amer. Coll. Trial Lawyers, Tr. 266-271: The Committee does not support (F). There may be abuses, but they arise out of paying lawyers millions of dollars for engaging in abuses. Control of the fee process is a better answer. Here in N.D.Cal. we have a judge who invites bids to represent a plaintiff class — economics are at work here. But economics also are at work in the real world. It may be that most class members do not want to be litigants simply because a few cents have been added to the price of a two-dollar widget by pricefixing or fraud. But they also do not want to be victims of fraud or pricefixing. Unless there is class-action relief, there is an enormous economic incentive to "do it as long as you can until you get caught." Then you stipulate to an injunction, and go away free. Legislation more and more recognizes the public importance of private enforcement by providing statutory attorney fees. Class actions work fine the way the system is now.

Alfred W. Cortese, Jr., Tr. 280-287: Approves (F) and mingles it with discussion of opt-in classes. The main problems arise with litigation on behalf of classes that cannot be identified. Rule 23 is not a matter of social policy, it is procedure. It is to ensure trial of cases that could not be tried in other ways. That does not mean that it is a private attorney general function. "Three is a particular function of courts, jurisdictionally and for reasons of justiciability, particularly the federal courts are not appropriate vehicles for the enforcement of these social policies, unless they are significant." It is only the damages cases that present significant problems. "We've got a certain amount of feeding the monster going on here. * * * Lots of companies * * * know they're buying res judicata; they know they're buying the monster, but they've got to do that because they can't try these cases."

John Leubsdorf, 96CV026: The (b)(4) settlement proposal should be withdrawn for further work. Settlement classes pose many dangers. Defendants may select plaintiff counsel and representatives; class counsel may have individual clients that are excluded from the class and receive better terms; large numbers of class members may receive nothing; the right to opt out may be denied; class members may be enjoined from suing in other courts, restricting opportunities for collateral attack; the law of a single state may be forced on all class members; "a new set of procedures and remedies" may be substituted for legal remedies. Consequences will include diminished ability to choose among competing lawyers to seek the most effective class representative; stronger pressure to accept inadequate settlements, lest the suit must be dismissed because the case cannot be tried as a class action; and greater difficulty in controlling lawyer fees by advance restrictions. The effects of these problems cannot be forecast — they will sweep across more and more areas of the law. And as settlement classes proliferate, litigators will tend more and more to seek out certain states that seem favorably inclined. The drafting should be changed to make it clear that the parties not only must "request" certification, but also must show that they meet the requirements of (b)(3). There is a special problem of adjusting this proposal with the securities law procedures that require notice and opportunity for rival representatives to appear and claim the right of representation. The securities law procedures, indeed, should be considered for all classes.

Improvements in the settlement class provision would include: (1) Bar consideration of settlement until the certification decision has been made. (2) Require that class lawyers, as well as representative members, fairly and adequately represent the class. (3) Appoint a lawyer to challenge any proposed settlement, providing reasonable discovery "concerning the settlement" and payment out of the class recovery. (This is not a guardian for the class but an objector.) (4) Require notice of any settlement to include comprehensible information about the essential terms. (5) Amend Rule 23(c)(2) to provide a right to opt out of any class, no matter whether certified as a (b)(1), (2), or (3) class if "significant money damages are claimed or awarded."

John McBryde, 96CV027: This proposal "will tend to defeat safeguards built into Rule 23 against improper class action activity."

Susan P. Koniak, 96CV031: The (b)(4) proposal makes worse the already nefarious use of settlement classes. It should be withdrawn. Adopts the suggestion of Professor Coffee about (b)(3)(F).

The suggestions for reform are set out in the conclusion: (1) The Rule should forbid settlement of a class that cannot be tried. (2) It is legitimate to certify a class for settlement without an initial litigated dispute over the ability to try the class claim, but if certification is uncontested the court must provide special

scrutiny of the settlement, the representation of the class, and the process of negotiating the settlement. (3) The Rule should ensure that class notices are understandable to ordinary people, and are printed in normal type. (4) The Committee should consider ways of making more meaningful the requirement of adequate representation. Class counsel should be forbidden to represent individual clients simultaneously with the class. (5) An explicit duty should be imposed on all counsel seeking approval of a class settlement to brief, fully and fairly, the potential objections to the settlement, weaknesses in the terms proposed, and potential conflicts of interest of class counsel.

(6) Professor Leubsdorf's suggestion should be adopted by requiring appointment of an advocate for the class who is responsible for challenging the settlement and class representation.

These suggestions are supported by an exposition of the dangers of present practice and the risks created by the proposals. Present law is not, at least in the books, as contrary to the Third Circuit view as the Committee Minutes and draft Committee Note suggest. Settlement classes are subjected to special scrutiny. The proposal authorizes the "malignant form of settlement class" that cannot possibly be tried. It is particularly dangerous to require that settlement be reached before certification is sought. Defendants can select compliant plaintiff's counsel, who has no bargaining power arising from the prospect of trying the class claims. Even if counsel has no conflicting interests arising from representation of individual clients, and can rise above the prospect of fees from a successful settlement, there is a fear that rejection of the best negotiable deal may lead defendants to find other class counsel who will accept an even less attractive deal. If counsel has present clients, there is a conflict over advising them on opting out, and a risk that an alternative settlement will take them anyway. Objectors, moreover, cannot be counted on. Counsel should not advise counsel to stay in a bad settlement class so she can object. Objections are costly, and not likely to succeed. It is better to raise the shadow of objection, accept a role as cooperating counsel, and surrender; this is not a theoretical risk, but an actual event. Courts, moreover, accept virtually every proffered class settlement; they are not motivated to look for abuse, and "find class settlements all but irresistible and spend precious little energy ferreting out abuse."

"Large-scale problems that defy ready disposition by traditional adversary litigation," offered in the Committee Note as a justification for settlement classes, instead raise questions whether such matters are properly in court at all. Choice-of-law problems are problems because we are a federation of states, and because large-scale problems are properly governed in various parts by the laws of different states. If subclassing is required to reflect the different positions and interests of "class" members, that is no reason for ignoring the differences by fostering a spurious settlement class.

Although the Committee Note professes to take no position on futures classes, the proposal will support and encourage settlements that include claimants who do not yet even know that they have been injured. Of course settlement is easier, but it is irresponsible or even reckless to reopen this prospect without careful safeguards.

John P. Frank, 96CV032: "Settlement classes should not be allowed at all; if we are to have them, they should be subject to the same criteria as litigation classes." Effective judicial review requires great amounts of time that often are not available. There is a great risk of collusion. The collusion hazard was greatly increased *Jeff D. v. Evans*, 1986, 475 U.S. 717, overruling the rule of *Pandrini v. National Tea Co.*, 3d Cir.1977, 557 F.2d 1015, 1021, that required determination of legal fees separately and after settlement. The Pandrini rule "reduced the bribery potential." One effect of the current practice that negotiates a settlement first, then seeks certification, is the emergence of dueling classes: the statute of limitations is suspended by filing the first action, so rival counsel can emerge to file parallel actions and solicit opt-outs by promising more favorable settlements.

Stephen Gardner, 96CV034: The coupon settlement in the General Motors pickup truck litigation is a clear example of the problem. "[N]othing in the settlement addressed the animating principle of the lawsuit: that these General Motors pickup trucks pose a serious — but remediable — safety

hazard." It was a settlement class. Compensation for counsel was not in any way based on money paid to the class. And "the trial bench is in many instances absolutely failing its independent duty to scrutinize any settlement * * *." Trial judges are under pressure to administer their dockets effectively; this approach "fails miserably with respect to class actions * * * trial courts fall back on the hoary precept that settlements are to be viewed with favor and bend over backwards to find ways to approve them." Appellate courts often exacerbate the problem. The abuse of discretion standard of review should be replaced by plenary appellate review of any decision approving a settlement. Uncertifiable settlement classes should be outlawed, not encouraged. The best rule would require certification before any discussion of settlement. If a settlement is reached before certification, at least there should be a two-step process. The first notice and hearing should say nothing of the terms of the settlement. If certification is approved, there should be a second notice and hearing to review the fairness of the settlement. At least if there is a combined hearing, the court should conduct a plenary hearing into certification and reach fairness issues only after determining the nature of the class to be certified. And approval of a settlement class could be made conditional on approval of the settlement, "providing no res judicata effect if the settlement itself is rejected." Coupon settlements should be rejected; they reward, not punish, the wrongdoer.

Leslie A. Brueckner, 96CV035 & Supp.: Appears on behalf of Trial Lawyers for Public Justice. Opposes both (b)(4) and (b)(3)(F) proposals.

Under (b)(4), "precisely because the participants in the settlement negotiations would know the case could not be litigated as a class action, the settlement negotiations would be truly perverse." The defendant in a mass-tort action hopes to pay significantly less than through individual litigation; it does not fear class counsel, because there is no realistic threat of trial. Class counsel gets no fees unless there is a settlement. The courts will be flooded with "legally questionable class actions." The prospect of settlement even before a complaint is filed is particularly disturbing — defense counsel can pick their own adversary. The right to opt out is not a meaningful protection, and is useless for "future" victims. Nothing should be done until Georgine is decided. But the (b)(4) proposal should be abandoned no matter what the Supreme Court does. It would vastly increase the potential for abusive settlements. A mass-tort defendant wants to settle on terms that cost less than alternative modes of proceeding; class counsel wants to settle to win a fee. "But the class members would get far less than they deserved." Attorneys interested in a fee would simply file classes unlikely to be certified for trial. Settlements reached before filing will enable defendants to shop for the best bargain, and pressure "even the most ethical attorney" to accept a poor offer lest someone else accept an even worse offer. There are no adequate safeguards. The right to opt out is essential to due process, but "in reality few class members are in a position to exercise their opt-out rights in a meaningful fashion. Future victims have no means of opting out. Notice is often ineffective. It may be difficult to determine whether the class is too broad, particularly in the settlement context. Conflicts of interest will be equally difficult to evaluate. And district judges are provided no guidance.

Patricia Sturdevant, 96CV039: Personally and as General Counsel, National Association of Consumer Advocates. As pointed out by 150 law professors, this proposal "(1) contains no limiting guidelines or principles, (2) it fails to address serious constitutional and statutory problems, and (3) it formalizes what until now has been an extremely controversial practice and invites collusion." "It is unnecessary to amend Rule 23 at all to obtain the positive benefits of appropriate settlement

classes." And nothing should be considered until the Supreme Court has decided Amchem Prods. v. Windsor.

Judith Resnik, Margaret A. Berger, Dennis E. Curtis, & Nancy Morawetz, 96CV037: This statement accepts the desirability of settlement classes, and suggests the need to improve proposed (b)(4) in many ways. It is tightly written; this attempt to summarize the many observations is inadequate, and serves only as an introduction to a statement that should be read in full.

There is special danger in encouraging settlement before certification when there has been no determination that the representatives are adequate, without notice to many class members, and in some instances without the development of information by discovery. This setting invites the criticisms that are so cogently advanced by many. A judicial hearing after settlement is no substitute for presettlement supervision. Although it would be unwise to preclude any opportunity to settle before seeking certification, the practice should not be encourage.

The first principle to be recognized should be that settlement is appropriate in class actions, as it is in other actions. It is appropriate even if the class claim could not be tried. There is much value in aggregation for pretrial purposes — recognizing that pretrial work commonly will lead to settlement — even when it is understood that if pretrial disposition is not possible, the class must be decertified.

The second principle is that judges have special duties to ensure adequate representation of absent class members. The problem is difficult because there are many plaintiffs, many of whom have individual lawyers; many differing relationships between clients and lawyers, and many different views by lawyers of their responsibilities to their clients; many different roles played by lawyers in the class action, and complex relationships among the lawyers; and great difficulties in supervision of counsel by clients.

The third principle is that judges should seek to ensure that as many distinctive class-member interests as possible are actually represented during the settlement negotiation process, not later. This may make it harder to achieve settlement, but it is an important guaranty of any settlement that is achieved.

Robert N. Kaplan, 96CV038: As to (b)(4), there may be problems in mass tort litigation, but "[s]ettlement classes have been routinely utilized in antitrust and securities litigation for many years, without any adverse effect. * * * This proposed rule would recognize what has been a routine practice in those litigations."

Roger C. Cramton, 96CV040: This too is tightly written, and summary is perilous. The essence is a plea to abandon (b)(4) settlement classes, and in any event to adopt into subdivision (e) the settlement-review criteria advanced by Judge Schwarzer. The proposals "are not a 'cautious increment' but an unwise initiative."

It is unwise to attempt rule changes while the settlement class issue is pending in the Supreme Court.

The (b)(4) proposal violates the Rules Enabling Act. Settlement classes will "promulgate new substantive law," displacing existing state or federal law. Rules devised by the parties, not any

legislature, will govern. Wholesale schemes of reparation will be substituted for judicial procedure; systems comparable to bankruptcy, without its safeguards and procedures, are created. Such vast administrative schemes require legislation, not rulemaking. Managerial judges will be so involved in crafting settlements that impartial review is impossible. Defendants will choose plaintiffs' representatives. The right to opt-out will not be protected in meaningful ways. The parties will shop for a court willing to approve their deal. Side settlements for the benefit of current clients will be made in some cases. "A class action settlement with these features would have been unthinkable to lawyers and judges of a decade or so ago."

The proposal, moreover, has no limiting principles. Subdivision (a) is not alone enough. Although the proposal formally requires that the predominance and superiority requirements of (b)(3) be met, in fact "[c]ase load management and judicial convenience displace the certification standards listed in 23(b)." In practice, whatever the theory, settlement classes will be unhooked from the tests of (b)(3).

The proposal "does not support the kind of rigorous and careful scrutiny of attorney incentives that certification of a settlement class demands." A prepackaged settlement leaves no incentive for the defendant to challenge the class definition or adequacy of representation; to the contrary, there is every incentive to sell the deal already cut. Opt-out rights are scant protection — notices often are incomprehensible, and may not be taken seriously; future claimants cannot protect themselves. The important issues suggested as justifications for settlement classes — choice of law, manageability, broad-based resolution of large controversies — are too important to be left to the open-ended discretion proposed.

Constitutional concerns are raised. There may not be a true case or controversy when the first judicial event is a proposal by all parties for approval of a settlement. An action that cannot be tried may not be a case or controversy. The constitutionality of resolving future claims is a matter now in litigation, and should not be resolved so quickly. Due process standards of adequate representation may not be satisfied when the only lawyers who can represent the class are those who have already struck a deal with the defendants.

Many have written at length on the ways in which packaged settlement classes invite collusion. Even with the best of intentions, would-be class lawyers who know they have nothing unless there is a settlement agreeable to the defendants are hard-pressed to provide adequate representation. They know that if their deal fails, another lawyer may strike an even less favorable deal.

Whatever comes of the (b)(4) proposal, Judge Schwarzer's proposed check-list of settlement-approval factors should be added to subdivision (e).

The several suggestions made by John Leubsdorf (96CV026) all are sound.

Roger C. Cramton, 96CV040 (November 23, 1996 letter): Taking issue with testimony by Melvin Weiss at the Philadelphia hearing, and with comments by Francis Fox, urges that class counsel has a fiduciary duty to absent class members that requires disclosure to the court of possible weaknesses in a settlement. A duty of candor is owed to the court in ex parte proceedings, and also in cases involving persons under the court's protection. "In a class action involving absent and passive class

members, the court is a guardian for the class, and the lawyers for the class are trustees of the interests of all members of the class. The lawyer for a class owes fiduciary duties to its absent members and therefore has a duty to inform the court about aspects of the settlement that may not be in their interest." "The settling parties should be required to disclose to the court all relevant facts concerning the negotiation of the settlement and its terms so that the court may make an informed determination that the settlement is in the best interests of the class." "For example, the court should be told * * * whether class representatives are getting special treatment, whether side settlements have carved some similarly situated persons out of the class on terms different than those applied to class members, whether the resulting negotiation sacrifices the claims of a group of class members to provide larger awards to another group, etc."

In addition, Rule 23(e) should require specific findings in every case in which a settlement is approved, and "in appropriate cases" should require appointment of an advocate to oppose settlement.

Alliance for Justice, 96CV041: Many problems are reduced by requiring that all classes meet the standards of certification for trial. A single wrong may affect many people in different ways, so that they have divergent interests and cannot be included in a single class; a toxic spill, for example, may cause property damage to some, small present physical injury to others, great physical injury on some, and unknowable future physical injuries on many. A class that would not be certified for trial includes people of such different positions that they are not similarly situated. The opt-out alternative is not real. For "future" claimants it is not even possible. There is a danger of collusive settlements, and judges cannot be effective guardians. Settlement classes will be certified in contexts that exert a hydraulic pressure to settled. Unusual cases such as the asbestos cases "require their own solution, perhaps a legislative solution. They should not justify a change of rules that would affect the vast majority of other cases."

Public Citizen Litigation Group, 96CV044: (b)(4) on settlement classes "offers no guidance, standards, or criteria." The emphasis on precertification settlement "creates a breeding ground for settlement classes in which the defendants have chosen the class counsel." Rule 23 should be restructured to encourage participation of class counsel who champion class interests; this proposal has the opposite effect. It will mean either that settlement is reached even before a complaint is filed, or that the original complaint will be replaced by an amended complaint after settlement is reached. Defendants will have enormous leverage because the case cannot be litigated as a (b)(3) class — and this is particular problem in the current litigation climate, where defendants often face multiple class actions filed by different class counsel in different forums. They will engage in a reverse auction, selecting class counsel who provide the most favorable settlement. The requirement that settlement predate certification does not protect the class. It is in any event irresponsible to propose a rule that will encourage settlement of futures claims without at least making it clear that the Committee is not endorsing futures class actions, "which raise fundamental due process concerns regarding notice and opt out, * * * and serious justiciability problems."

H. Laddie Montague, Jr., 96CV046: The (b)(4) settlement proposal "is the most significant and constructive." Settlement classes are valuable. Often class certification is resisted because the parties cannot agree on such matters as individual causation or damage formulas. Settlements that resolve these disagreements are good for all concerned, including the courts. Many safeguards are

possible. The distribution plan should be presented with the settlement. Class members must be allowed to opt out. And defendants who agree to settle cannot claim coercion.

Stuart H. Savett, 96CV048: (b)(4) should be adopted. Settlement classes are an important means of speedy and efficient resolution. There are adequate protections. "I strongly recommend approval."

John C. Coffee, Jr., 96CV049: If (b)(4) is retained at all, it should be limited by adding the requirement that "the court finds that there is no realistic possibility that the same or similar claims could be successfully asserted (on either an individual or class basis) in any other court or forum." It is not proper to authorize settlement classes that would cut off claims that might be asserted in other ways; the reason defendants are willing to settle is that it costs less to settle on a class basis. This is particularly true as to future claimants. The court is in a poor position to evaluate fairness.

Judith Resnik & Jack Coffee, 96CV049: The detailed proposal should be appended to these (b)(4) notes. It is a draft settlement-class rule and Note, reflecting an attempt to preserve the values of settlement classes while reducing the risks. At the outset, they repeat their view that by requiring a consummated settlement agreement, the present proposal focuses on the most dangerous setting of all. It invites "small collectives of plaintiff and defendant lawyers" to negotiate before filing, without any judicial determination that the representatives are adequate, without notice to anyone, and often without development of information sufficient to support an informed settlement. Often is it impractical to opt out. Such settlements are seldom reshaped in any meaningful way during the process of court review and approval. Turning to their proposal, they distinguish between two settings: the first is a "litigating" class, tentatively certified with the recognition that it is likely to be useful for discovery and settlement; this class may be sought by plaintiffs alone, and the standards for certification are less searching than the standards for the second type of settlement class. The second type is sought jointly by a plaintiffs' steering committee and one or more defendants. For both types, the proposal emphasizes the need to include more participants, the importance of developing a comprehensive information base, and more exacting judicial scrutiny. It expressly stated that the court has a fiduciary duty to class members. There is heavy emphasis on considering divergent interests within the class and the possible need to create subclasses. The need to consider alternative modes of aggregation is stated explicitly. Use of special counsel, guardians ad litem, "or other additional procedures," is encouraged. Detailed information is required in conjunction with requests for approval of a settlement, including the means by which plaintiffs's lawyers came to engage in negotiations; the reasons for any differences in treatment of class members; "the means by which the remedial provisions shall be accomplished"; and detailed information about compensation for all attorneys involved, including special counsel, and about compensation for guardians ad litem, court experts, objectors, or others. The Note observes that "close scrutiny" is required when "futures" classes are involved.

Melvin I. Weiss, 96CV050: The (b)(4) settlement proposal "does have merit." The parties have far greater control of their destiny when they negotiate a settlement than when — at great expense — they risk the hazards of jury trial. But there is also great risk that settlement will be auctioned off to the lowest bidder, as was attempted in Georgine. The court should be required to examine the "ethical underpinnings" of the settlement, and should "allow limited discovery to test the strength and weakness of asserted claims. Judicial oversight of the negotiation process can eliminate any

concerns of collusion." And notices to the class should be comprehensive and comprehensible.

Edwin C. Schallert, for Comm. on Fed. Cts., ABCNY, 96CV053: The (b)(4) settlement-class proposal advances the core purposes of Rule 23. Settlement classes can ameliorate problems with choice of law, proof problems, and "the very scope of certain kinds of cases." The proposal codifies the practices of many courts. There are substantial concerns with collusive or inadequate settlements, but the Note points to the various devices that can be used to protect against these risks.

Fed.Cts.Comm., Assn. of Bar of City of NY, 96CV053(Supp): Supports the proposal as confirming present practice that "has emerged as an important method for achieving many of the core purposes" of class actions. The risk of "unexamined and even collusive settlements" "is considerably overdramatized." The risk exists for litigation classes as well as settlement classes. There are a number of protections. The requirements of Rule 23(a) must be satisfied, as well as the superiority and manageability requirements of (b)(3) (although these matters should be made more explicit in the text of the rule). Notice and the right opt out provide the central means of protection. Courts have inherent power to monitor settlement negotiations, including the powers to establish protocols for negotiation, to utilize special masters, and to appoint different counsel to represent conflicting interests. The benefits outweigh the risks. (n. 5 states that the Consumer Affairs Committee of ABCNY opposes (b)(4). It will encourage plaintiffs' counsel to compromise class claims. It contains insufficient guidelines for trial judges. The right to opt out is not sufficient protection in consumer class actions; future claimants must have a right to opt out at a meaningful time. Full, fair, and comprehensive representation of the essential terms of the settlement must be set out in the class notice. Courts should be required to ensure that persons with similar claims receive similar treatment, and that class representation is adequate against the risk of conflicting interests.)

National Assn. of Securities & Commercial Attorneys, 96CV059: (b)(4) settlement classes are desirable. If defendants risk a binding certification for trial at the settlement stage, regardless of the outcome of the settlement process, they will be unwilling to settle until there has been a contested ruling on a trial-class certification. Concerns with collusion and disabling conflicts of interest relate primarily to futures classes; the proposed rule "does not diminish the ability of courts to respond in an effective and flexible manner when faced with these or other concerns." Steering committees, guardians ad litem for the class, limited discovery by objectors, extended opt-out periods, administrative determinations of settlement payouts in the future, and like means can address these concerns.

Beverly C. Moore, Jr. (Editor, Class Action Reports), 96CV060: (b)(4) is desirable "though not for the reasons that most commentators will state." The Third Circuit properly disapproved the inadequate settlements in Georgine and General Motors Corp. Pick-up Truck. But it is wrong to allow a class settlement only if the same class could have been certified for litigation. Settlement discussions will precede certification in any event, and will be shaped by the risk that certification will be denied. As important, to insist that a settlement class meet the tests for a litigation class will lead to two unfortunate results. One result will be that judges make findings favorable to a litigation class, creating undesirable precedent for real litigation classes. The other result will be denial of certification in such settings as large personal injury mass tort actions, where settlement classes may be desirable. The proposal "should be accepted, so as to require federal judges to do their duty of *disapproving* proposed inadequate settlements under Rule 23(e), which judges have heretofore

usually declined to do."

It remains an issue "to devise some amendment to Rule 23(e) to make judges disapprove inadequate settlements under that provision."

John D. Aldock, 96CV061: As national counsel for the Center for Claims Resolution, is petitioner in Georgine. A summary of the facts found by Judge Reed in Georgine is provided; the Supreme Court Brief for Petitioners in Georgine is attached as an appendix. Supports the (b)(4) proposal. **A.** Settlement classes promote settlement. Settlement of "many cases" at once multiplies the benefits of settlement; uniform treatment of class members is ensured; and the particular expense of litigating on a class basis is spared. Settlement classes have been used for at least 25 years. They embrace not only mass torts but also securities, civil rights, and antitrust disputes. Many kinds of cases cannot meet the standards for certification for litigation; requiring that they be resolved individually, or in small groups, will create enormous burdens. And in cases involving individual claims too small to support individual litigation, the alternative to a settlement class is no remedy at all. If a defendant cannot agree to a settlement class, there is a strong incentive not to stipulate to a litigation class. **B.** The supposed risks of settlement classes are overstated. All the elements of 23(a) and (b) must be met, and the court must approve under (e). In Georgine, the objectors were afforded extensive discovery and there was a five-week fairness hearing. The hearing reviewed the course of negotiations, the allegations of collusion, and the adequacy of representation. Class counsel has negotiating leverage arising from the costs of single litigations as an alternative to class settlement. Looking at the terms of a proposed settlement provides better evidence of adequate representation than the speculation made before a result has been reached. Class members can protect themselves far better because they know the outcome before deciding whether to opt out. Courts need not be concerned about drawing state cases to federal courts — the cases are there now. Settlement is proper judicial business, as emphasized by Civil Rule 16. **C.** Other available means of resolving multiclaimant disputes are far worse. In asbestos litigation, individual tort actions face great delay, high transaction costs, capricious verdicts, and settlements that force surrender of any opportunity to recover for future aggravated injury. In reality, moreover, the vast majority of asbestos cases are resolved by group settlements of hundreds or thousands of cases; the plaintiffs' lawyer unilaterally allocates the proceeds. There is no judicial supervision of the amount of the group settlement, nor of the allocation, nor of the reasonableness of attorney fees.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): "Under the Third Circuit standard, most, if not all, of the mass tort settlements over the last twenty years would not have passed muster. * * * The same holds true for other types of damages claims for which Rule 23(b)(3) class status often is sought, such as consumer fraud actions. Since there is no realistic possibility of a fair trial, class certification serves as a vise pressuring the parties to settle. Although using the class action rule as a device to coerce settlement is unfair and should be discouraged, the ability to settle claims as a class at times may be the only viable alternative for resolving massive numbers of widely dispersed, disparate individual claims. In rare instances, the availability of class settlements can be an essential safety valve even though the same claims could not be certified for class adjudication." It may be wise, however, to await the Georgine decision.

Alan R. Dial, 96CV067: Hearings should be postponed until the Supreme Court has decided the "Georgine" case.

Eric D. Green, 96CV072: Supports the proposal so enthusiastically as to recommend consideration of extension to (b)(1) and (b)(2) classes as well. (1) The proposal "will clarify uncertainty about the legitimacy of settlement classes, increase fairness and efficiency in mass tort litigation, reduce transaction costs, increase compensation to deserving plaintiffs, decrease ruinous exposures and bankruptcy to defendants, and provide a reasonable and fair tool * * *." It is made necessary by the Third Circuit decision in Georgine. (2) The objection that there are no limiting principles in the proposal is unpersuasive. All the present class-action protections remain unchanged. Shifting the focus to state courts, "where problem cases may be more numerous," does not provide helpful guidance for federal court practice. The prospect of settlement bears on all the factors that must be considered under (b)(3), and the newly proposed factors make further improvements in this process. Appellate review under (f) adds still further protection. Any attempt to spell out detailed limitations and criteria would be premature — it is better to clearly authorize settlement classes and gather experience as it develops. (3) The "case or controversy" objection cannot be made in the abstract; it may be real in specific cases, but must be evaluated on a case-by-case basis. "Article III does not require that a case or controversy be triable in any particular format." Justiciability as to futures claimants turns on the extent to which state law requires present injury, allows recovery for fear of injury, and the like. Adequate representation must be assured. (3) The fear of collusion, and a "race to the bottom" as would-be class counsel vie for representation and fees, is not unique to settlement. Defendants may shop for class counsel who will be less threatening as trial counsel. The threat of collusion is not necessarily increased by the prospect that the same class cannot be certified for trial. Experience in many mass tort classes shows that the threat of multiple individual actions, or small groups of aggregated actions, with perhaps multiple punitive awards, is a greater threat to defendants. Denying the possibility of class settlement may seriously harm class members. Class lawyers are likely to be the most experienced, knowledgeable, and passionate lawyers, the ones who initially developed the evidence and law and made the claims into viable class claims. And a properly conducted fairness hearing is adequate protection. (4) A guardian ad litem can be used as an effective tool to gather information, communicate with class members, engage in discovery as to the substance of the settlement and the negotiations that led up to it, review attorney fee arrangements, and the rest. A guardian could be an even more effective tool if appointed before final negotiation of the settlement, but negotiation dynamics may preclude this. (5) Settlement classes must be judged in relation to the real-world alternatives. "In many cases, the alternative will mean no effective recovery at all to the absent class members * * *. Experience in mass torts teaches that bankruptcy is not an effective approach to these problems."

Michael Caddell, 96CV076: Was lead or co-lead counsel in two state-court polybutylene class actions that settled. (b)(4) is "a positive step toward assuring the continued use of settlement classes." (a), (b)(3), and (e) provide adequate protection. By requiring that there be a settlement agreement the rule protects against pressure to settle an otherwise uncertifiable case. The result is efficient and fair. And if a litigation class cannot be certified, the alternative to a settlement class often is individual litigation that cannot be brought, leaving no remedy.

Stanley M. Chesley, 96CV078: "As a practical matter, the proposed amendment addresses a need and facilitates settlement. * * * [I]t must be remembered that every proposed settlement must be approved by a court. * * * [A] court can easily conduct a 'collusion' inquiry should allegations arise."

Linda Silberman & Marcel Kahan, 96CV079: The comments are based on their article on the Matsushita decision in the Supreme Court Review. They urge five specific suggestions, in addition to endorsing the proposals made by Judge Schwarzer in 80 Corn.L.Rev. 837: (1) A preliminary fairness hearing on the settlement before notice is sent to class members. (2) Require disclosure of any parallel litigation, and invite participation by plaintiffs in any other action; if counsel for a parallel class has contributed to the value of the claims, the fees from the settled case should be shared. (3) The benefits of global settlement must be explicitly weighted against the risks of "plaintiff-shopping" and "forum-shopping" for collusive settlements. (4) There be a substantial nexus between the court approving the settlement and the claims or parties, so as to reduce forum shopping. (5) That the settlement include only claims that are "transactionally related."

Samuel Issacharoff, Douglas Laycock, & Charles Silver, 96CV082: Settlement should be encouraged, but the FJC study shows there is no pressing need to further encourage settlement of class actions. They settle now at about the same rate as other litigation. The chore is to find an acceptable half-way house; the (b)(4) proposal does not satisfy. There are special problems when there are parallel class actions. Fee arrangements exacerbate the problems because the lodestar method "discourages plaintiffs' attorneys from maximizing the value of class members' claims." There is little overt collusion, but inadequate representation does occur. Coupon settlements are the most notorious examples; even counsel for the plaintiff class in the airlines pricefixing case now recognizes the inadequacy of the settlement. But cash settlements also can raise questions — as shown by the inadequate funding for the proposed breast implant settlement, and the exhaustion of the Johns-Manville settlement. Questions also can be raised about "limited fund" settlements that allow shareholders to keep a considerable portion of a defendant's value. Plaintiffs' attorneys often undervalue class claims "because they are operating under inappropriate incentives." "The most significant current concerns arise where the claims of absent class members are sold off to benefit an inventory of claims by individuals with prior relations to class counsel, or, more commonly, to benefit plaintiffs' counsel incommensurately to the benefit realized by the class." Rule 23 must protect against these threats. A settlement-only class deprives counsel of the threat of litigation, greatly weakening the class bargaining position. Defendants will settle "only to avoid greater losses to plaintiffs who have viable individual lawsuits." [This may mean to suggest the argument that the positions of strong-claim plaintiffs are sacrificed for the benefit of weak-claim plaintiffs and counsel.] It can be appropriate to allow a conditional stipulation to class certification for settlement purposes that does not bind the defendant if the settlement falls through; this would encourage settlement negotiations, without committing the defendant to litigation on a class basis. The dangers persist, however, and any version of (b)(4) should address the problems explicitly.

Frederick M. Baron, 96CV085: "For corporate defendants long hungry for a way to cap their liabilities, backroom settlement class negotiations have rendered legislative tort reform efforts an obsolete means to that end." (b)(4) grossly exaggerates the agency problem because it tends to collapse the adequacy of representation inquiry into an evaluation of the settlement: if the settlement seems fair, it is concluded that representation was adequate. "But * * * post hoc review of a settlement's terms by a court can *never* substitute for zealous, unconflicted representation by the actual negotiators." As the court said in In re General Motors Corp. Engine Interchange Litig., 7th Cir.1979, 594 F.2d 1106, 1125 n. 24, the integrity of the bargaining process is important because the court's only control is rejection of an inadequate settlement; the court cannot undertake the task of

bargaining for better terms. The fairness hearing, moreover, provides grossly inadequate information. "Finally, * * * a court's interest in clearing its dockets can and does cloud the judgment of otherwise fair-minded judges." And there is a further difficulty with future tort claims. Apart from the single event mass tort, any comprehensive solution must encompass future claimants. (b)(4) will permit settlement of future claims cases unless it is altered to expressly forbid them. Future claims settlements violate the Constitution, but it is not clear that the Court will even resolve that question in the Georgine case.

Clinton A. Krislov, 96CV088: "The issue of whether mass-tort/large-damage personal injury suits should be tried or settled as class actions binding on smitten future claimants (with or without permitted opt-outs) is a substantive due process issue." The choice will be made by the Supreme Court; it is not for this Committee.

G. Luke Ashley, 96CV091: "The addition of subdivision (b)(4) properly makes clear that, in proper circumstances a party can waive objections to the structure of a proposed (b)(3) proceeding in the settlement context."

Bartlett H. McGuire, 96CV092: The proposal is good. "In complex cases, the parties can sometimes develop creative settlement structures to resolve issues that would be horrific to try." These settlements need not be rejected merely because individual issues would predominate at trial, and perhaps make the class unmanageable.

John L. Hill, Jr., 96CV094: Classes have been certified for settlement for years without inquiring whether Rule 23 requirements are met. The proposal is sound. It will help defendants who wish to "achieve peace regarding somewhat varied individual claims." Without this rule, parties will be tempted to stipulate to class certification, but face the risk that the certification will carry forward if the proposed settlement is not approved. Without this rule, parties will feel coerced to offer more in settlement to ensure approval. Without this rule, futures settlements will be prohibited. And without this rule, certifications made for the purpose of settlement will set bad precedent for litigated class certifications.

FRCP Committee, American College of Trial Lawyers, 96CV095: Despite possible advantages of efficiency and economy, there is a substantial potential for abuse of settlement classes. There is a risk of collusion between class counsel and defendants. Prepackaged settlements can be arranged by defendants with sympathetic class attorneys pre-selected by defendants, and then presented to a court chosen by all these lawyers as one likely to approve. "Futures" claims remain a problem that is not addressed. "There are frequently issues of the adequacy of notice on opt-out provisions." The proposal raises Enabling Act concerns.

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: Settlement classes should meet all the requirements of (b)(3), but further comment is inappropriate while the Georgine case remains in the Supreme Court. It is tempting for a defendant to buy res judicata by settling unfounded claims, but "the more you feed this monster, the greater its appetite grows. Succumbing to this temptation also infuriates our customers when they learn that they've been used by the class action lawyers."

Hon. James G. Carr, 96CV104: This comment arises from Judge Carr's experience with a class action in which he had granted summary judgment in favor of the putative plaintiff class

representative on the merits as a prelude to considering certification. He then learned that a Texas state court had granted preliminary approval to a settlement of the same class claims, and directed notice and planned a hearing on the question whether to grant final approval to the settlement. Judge Carr concluded in his case that the due process rights of his would-be class representative were denied by the failure to provide notice before the preliminary approval, because of the realistic consequences of even preliminary approval. His answer under current law was that if he should certify the class in his court he would deny res judicata effect to any final judgment in the Texas action, and would impose on the defendant the costs of notice to the class. His suggestion is that if settlement classes are to be approved, the defendant should be required to certify whether any other class actions have been filed. Notice would be given to the representatives for any overlapping class, and an opportunity to be heard, before even preliminary approval of the proposed settlement. The competing class representatives can provide information about the merits and weaknesses of the proposed settlement. (In his case, counsel for the representative plaintiff asserted that he had rejected the same settlement that was accepted — along with a $2,000,000 fee award — by counsel for the class in Texas.)

Lawrence W. Schonbrun, 96CV105: (Based on experience as an objector in a number of class-action settlements.) "An overworked judiciary * * * too often finds it easier to follow the maxim, 'better a bad settlement than a good trial.'" Coupon settlements have produced "a long string of settlements whose terms look favorable to plaintiffs on the surface — but only on the surface." "[T]he parties often provide the judge with purported expert projections, forecasts and guesses as to how many class members will avail themselves of the coupons being offered, the idea * * * being to legitimate the size of the fee they have negotiated with the defendant. * * * And in many cases, very little money is actually paid out." The problem is greatly exacerbated by the practice of separately negotiating for fees to be paid by the defendant, not out of the class recovery; even though they follow the form of negotiating the settlement before the fee, there is an irremediable conflict of interests. (This problem is described further with the notes on attorney fees.)

Sheila Birnbaum, 96CA107: The proposal merely confirms common practices, dispelling the contrary Third Circuit developments. Although further action should await the Supreme Court decision, comment seems appropriate now. "Settlement classes are different creatures from trial classes." Defendants voluntarily waive a number of due process rights, such as the right to demand state-by-state application of the law. This waiver is the reason why certification of a settlement class cannot support conversion into a litigation class; the Note should make that point clear. Rule 23(a) still must be satisfied. The fear that the parties and court will approve inadequate settlements from the desire to avoid litigation has been unfounded; courts do review settlements carefully. The fear of "collusion" includes the argument that defendants will shop for quiescent "low bidders" to reach a settlement. This is a hypothetical danger, not reality. If there is any merit to the class claim, dueling class actions are often filed; any class attorney willing to sell out would face strong opposition from other firms who would object to the settlement or pursue parallel opt-out litigation. Some counsel file class actions on a "settlement speculative" basis, merely to test whether a cheap settlement can be won without much work. This concern can be addressed in the Note by "an admonition that courts should not entertain proposed settlements unless the litigation of the matter has generated a sufficient factual record to allow a meaningful review of the adequacy of whatever settlement is proposed. * * * [B]efore approving a proposed settlement class, a court should have

'lived with' the case (or related litigation) long enough and have before it sufficient record evidence to determine whether the settlement is fair. Further, * * * the Note should urge courts to restrict attorneys' fee awards in purported class actions that settle at an early stage, particularly those that yield only minimal awards for the individual class members."

John W. Stamper, 96CV108: The settlement class proposal is consistent with widespread practice. One special use may be to facilitate classes in which the common issues are settled and ADR mechanisms are adopted to resolve individual issues, an emerging practice that deserves more development. In my experience — mostly confined to defense of securities class actions — there has not been a problem of collusion. The problem is that it is easy to obtain certification of marginal claims; "[t]he problem is not that the settlements are not genuine but rather that the claims are not." Finally, the right to opt out protects any class member "who would be sufficiently motivated to file and litigate an individual claim * * *."

Arthur R. Miller, 96CV111: This modest proposal "merely recognizes an existing fact of life — settlement classes serve important purposes in today's complex litigation." Of course they raise claims of abuse. But defendants' may not have as much bargaining power as the critics fear, since the alternative is dozens of smaller class actions or hundreds of individual actions. "Indeed, the seemingly pervasive monitoring of cases by other interested lawyers serves as an effective deterrent to the success of such tactics." And the perceived problems can be minimized through diligent examination of proposed settlements. "Indeed, most circuits have longstanding, well-established criteria to make that determination." The requirement that the terms of settlement be defined before certification increases the court's objectivity in reviewing the settlement. Objecting class members "almost always appear." The court can permit "limited confirmatory discovery to test the strengths and weaknesses of asserted claims, and class members can opt out * * *." Courts also can appoint representatives for absent class members, limit the right of class counsel to represent clients in related individual litigation, and appoint masters to review settlements when the court has played a role in settlement negotiations. Adequacy of representation should be reviewed as well.

Miles N. Ruthberg, 96CV112: Strongly supports (b)(4) as codification of the law that prevails outside the Third Circuit. Settlement classes are indispensable for voluntary resolution of mass litigation. The solution to any perceived abuses is careful supervision. Defendants are protected because they must consent. Plaintiffs are protected by judicial insistence on the 23(a) requirements, review of the settlement, and the right to opt out. The amendment is useful no matter what the Supreme Court does in the Georgine case. But the Notes to (b)(3) revisions should be amended to reflect the (b)(4) proposal. The notes to (b)(3)(A) and (B) speak of individual litigants' interests, but these go to control of litigation and can be protected by notice and opt-out rights. The suggestion that certification can be deferred pending the maturity of a new tort case, lest settlements be ill-informed, can be misconstrued as standing in the way of voluntary settlement of less than mature torts; that would needlessly postpone recovery for plaintiffs. And the Note should state expressly that a certification for settlement is not precedent for certifying a litigation class.

Roger Dale Klein, 96CV113: "The availability of the consensual settlement-only class device has been and continues to be essential to the ability of defendants to limit and manage their product liability risk." It is not a cure for the ills of unrestricted claim agglomeration, but it is a balm. The amendment "would restabilize the real world practice of consensual settlement classes." Under the

Third Circuit approach, defendants have powerful reasons to refuse proposed class certification and settlement, for fear that the settlement will not survive but the certification will survive. A settlement class is better than other means of agglomeration such as consolidated mass trials, sample or test cases that are extrapolated to other cases, common issues trials, or separate trials with the prospect of nonmutual preclusion. "None of these more common aggregative techniques is in any way subject to the scrutiny and restraints on class action litigation * * *." At least the settlement class gives the defendant an opportunity to win "global peace."

John P. Zaimes, 96CV115(Supp): Settlement classes could be an important tool, but also could be a powerful tool for abuse by class lawyers. "Additional safeguards are necessary to avoid settlements of questionable or meritless claims and to avoid classwide settlements which may advance the interests of defendants and class lawyers, but eliminate the legitimate claims of individual class members."

John L. McGoldrick (Bristol-Myers Squibb), 96CV116: The Committee has heard much evidence and should speak out without waiting for the Georgine decision. The proposal "simply makes good practical sense. There are numerous multiple-claim disputes — mass torts come to mind — that lend themselves neither to class action litigation under Rule 23, nor to individual litigation with its heightened transaction costs and collective action problems. Without the possibility of class settlement, however, there is no way short of class certification and a trial on the merits for the judicial system to satisfy the numerous individual claims" and achieve res judicata. Trial courts — with the help of objectors — can protect against collusion. The self-interest of defendants in achieving the durable protection of res judicata, and in not encouraging future suits, will work against collusion. And defendants should be free to waive the protections of commonality, typicality, and other related Rule requirements that exist to protect defendants.

Jeffrey J. Greenbaum, 96CV119: This is a good compromise. The potential for collusive settlements can be minimized by court review of the settlement; the explicit hearing requirement in proposed (e) is a help. It would be wise to redraft to make it even more clear that there is a right to opt out. And the Note should "be clarified to elaborate on how the court is expected to apply the (b)(3) factors of predominance and superiority in the settlement context and to highlight that particular care should be given to defining the scope of class membership."

William A. Montgomery (State Farm Ins. Cos.), 96CV122: "For the same reasons advanced by other supporters of this change, we believe that it is important affirmatively to recognize the propriety of certifying classes for purposes of settlement."

Gerson H. Smoger, for ATLA, 96CV126: (1) A trial class cannot bind individual class members with respect to individual damages issues; a settlement class should not be permitted to do this. (2) Claimants who have not yet suffered injury, or who do not have reason to recognize present injury or to connect it to the defendant, must be allowed a reasonable opportunity to opt out after they have suffered injury and have reason to know of its existence and causation. (3) Representative plaintiffs often are ignored by class counsel, and were chosen because they were the first to appear, or are believed pliable, or were simple random choices. (4) Mandatory settlements on a limited fund theory have been misused, and are particularly strange when a single defendant seeks a limited-fund class for punitive damages while accepting an opt-out class for compensatory damages. The combination seems to imply that funds are limited for one purpose, but not another. (5) The supposed need for

finality for corporate wrongdoers cannot justify the expansion of class actions to mass torts. The right to individual choice of jury trial, and individual control of litigation, should be preserved. As the Court observed in Fuentes v. Shevin, 1972, 407 U.S. 67, 90 n. 22, "[p]rocedural due process is not intended to promote efficiency ... it is intended to protect the particular interests of the person whose possessions are about to be taken."

John F. Klebba, 96CV131: Opposes. There is no problem with weak settlements now. But the settlement-only class means counsel has no leverage. There is a risk of settlements engineered to ensure recovery of attorney fees. All a defendant need do is convince class counsel and the court that the settlement is a good one.

Ronald Jay Smolow, 96CV132: A settlement class that does not at least arguably meet the requirements of 23(a) and (b) makes no sense. Georgine is wrong because the parties should have the right to stipulate to class certification as part of a settlement. "It is, I would suggest, improper for the court to involve itself in the settlement negotiations and second guess whether the defendant is correct or incorrect in its decisionmaking as to whether the case meets Rule 23 criteria." And when certification and settlement are proposed, courts should be concerned with fairness and with protection of the rights of absent class members.

Richard A. Koffman, 96CV133: The fear of abuse expressed by Professors Koniak and Resnik "is not supported by actual experience." They provide no examples of abusive settlements. The overwhelming majority of class counsel take their ethical responsibilities seriously. Without a settlement class, many class members would achieve no recovery because a litigation class could not be certified.

James N. Roethe (Bank of America), 96CV134: If settlement classes different from trial classes are to be permitted, the Rule should clearly set out the differences so there is no risk that a settlement class certification will transmute into a trial certification when a settlement fails.

Ron M. Feder, 96CV136: Opposes all of the proposals, and particularly (b)(4). "I particularly object to any provision that denies the individual the right to consult and employ counsel and any provision which would deny relief to potential class members who have not yet developed an injury. The proposed Georgine was an abomination." National class actions should not be allowed to destroy state-by-state resolution of personal injury and commercial claims."

David C. Vladeck, 96CV139: Writes to Judge Levi to follow an exchange at the Philadelphia hearing. The choice-of-law problem cannot be resolved by treating a decision not to opt out as consent to application of the law chosen by the court. Class notices have not explained choice-of-law problems, and it is difficult to imagine a notice that explains such complex problems. Settlement under one law, moreover, may sacrifice the interests of claimants from states whose law gives a more valuable claim for the benefit of claimants from states whose law gives a less valuable claim or no claim at all. The problem is better solved by subclasses that correspond to the strength of different state-law claims. "[W]e [the Public Citizen Litigation Group] simply do not have enough faith in the notice and opt out process to say that they cure all ills."

Paul D. Rheingold, 96CV145: The proposal does not address the impracticalities of opting out. Often notice is given too quickly. And there are penalties for opting out, such as mandatory

arbitration or delay for trial. "The pernicious practice has developed of defendants exposed to mass tort liability approaching willing plaintiffs' counsel to set up a settlement class to get rid of claims cheaply and yet to give fees to counsel." "[T]he great abuse today is in settlement classes. One of the best means of control is to ensure that the facts of the action would have qualified the matter otherwise as a (b)(3) class."

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: This proposal "is necessary to confirm the legitimacy of an already common and useful practice." It is proper to limit certification to cases in which settlement has already been reached, so as to avoid the risk of undue settlement pressure. There are problems with "futures" claimants, but "there is nothing inherent in the proposed rule that would permit courts to provide anything less than vigorous protection for the rights of those and all other class members." But the Note should state that the court must take particular care to consider the ability of counsel to represent all members of the settlement class, including consideration of the need for subclasses. The court should consider also the desirability of appointing a guardian ad litem for different subclasses, or formation of "a broad and representative committee to either approve or re-negotiate a proposed settlement on behalf of a class." But "[of] course it should be emphasized that the need for multiple counsel is in most cases unnecessary and should be balanced with the desire to ensure an adequate settlement fund * * * which fund might otherwise be decimated by attorneys' fees." And (c)(2) and (c)(3) should be revised to refer to (b)(4) to make clear the right to opt out.

Fed Cts. Comm., Chicago Council of Lawyers, 96CV148: "It is notable that the only proposal likely to expand the availability of class certification is one that the defense bar currently endorses * * *." This will encourage the quick "sell-out" variety of class. The Steering Committee has well stated the corrupting influence that this will have on class-action practice. "The new (b)(4) class removes the brakes and guardrails of subsection (b)(3). It provides no standards to guide district court discretion * * *. It also tips the balance in favor of quick, cheap settlements * * *." And it omits the opt-out procedure; although the Note states that there is a right to opt out, the text of the rule does not state the right. "Any rule that fosters class settlements ought to provide a lot of protection for unnamed class members," yet this proposal lessens protections "by encouraging negotiation by persons whose adequacy has not yet been established. Objectors, historically, have had a tough row to hoe once a settlement is tentatively approved. The drafters of this proposal have not addressed the objectors' needs at all." And there is no apparent need for this proposal "courts have long allowed settlement classes under current Rule 23, subject to the normal conditions of certification."

Howard M. Downs, 96CV149: The comment is supported by an appended article: Downs, Federal Class Actions: Diminished Protection for the Class and the Case For Reform, 1994, 73 Nebr.L.Rev. 646; see also Downs, Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon, 1993, 54 Ohio St.L.J. No. 3. Adoption of (b)(4) would have several bad effects. (1) The basic protections of typicality, adequacy of representation, and conflict-of-interest are diminished even though formally the requirements of Rule 23(a) continue to apply. (2) If different class members could invoke different state laws to govern their claims, there is a conflict of interest between those whose state law is more favorable and those whose state law is less favorable; a settlement is likely to compromise the conflict by way of a "generalized composite," "esperanto" law. Protection requires representatives from each state, or at least each group of states with similar law. (3) Court approval will not protect the class. The settlement presentation is not

adversarial. There is little discovery, a scant record on the merits, and not much inquiry by the court. Conflicts of interest are not explored; dissents are not reported; named representatives often do not participate in shaping the settlement. Even if named representatives voice preferences, their views may be ignored. (4) The protection afforded by notice and opting out is inadequate because the notices are inadequate. "Adequacy of representation and absence of conflicts is not described in any detail in the notice." Objections to the settlement are not disclosed. Often the plan of distribution is not described. The deficiencies in the present rule cannot be met by Note suggestions that particular care should be taken by the court. Use of proposed (b)(4) in mass torts will be inappropriate.

David L. Shapiro, 96CV153: (1) Although there may be standing and ripeness problems with respect to such matters as future claimants, Article III permits some settlement classes. Even when settlement is reached before suit is filed, Article III permits a federal court "to play a role that only a court can fulfill in such a case." Court approval is necessary to bind the class. We accept negotiated guilty pleas, and consent decrees. The judicial role in a settlement class "consists primarily of evaluating and, if appropriate, approving the settlement after full opportunity for hearing." (2) The benefits of a settlement class may outweigh the costs. The settlement class that now is proposed for the blood solids litigation is a good illustration. There are real fears of such dangers as the "reverse auction," sacrifice of class interests for the benefit of individual actions simultaneously pursued by class counsel, and the strong bargaining position of a defendant who knows that class trial will not happen. "But these fears may well be overstated." There is little empirical evidence of the reverse auction. The defendant's bargaining position is weakened by the risk of such alternatives as multiple state-wide class actions, or "the defendant's nightmare of one-way nonmutual offensive issue preclusion." Settlements reached before filing, moreover, reduce the probability that the judge will be involved in negotiating the terms and thus enhance the prospect of objective judicial review. The very prospect that the settlement can be rejected without forcing a class trial may increase the objectivity of judicial review. (3) The text of the proposal is far too brief; the Note is "disturbingly vague or confusing" on some points. The Note, moreover, is not law in the way that the Rule is. The text is not clear "whether certification is contemplated under (b)(3)," or whether the (b)(3) limitations apply. It would be far more clear to incorporate settlement classes into (b)(3); the suggestion in the April, 1996 Minutes is a start. (4) The Rule should address "the special difficulties that arise when a settlement class is certified at the outset of litigation." These include the risks that there have been no adversary proceedings, no discovery, no submission of material from objectors; that lawyers will be torn between the interests of the class and the interests of individual clients; that dramatic differences in applicable state laws will be overlooked, overvaluing some claims and undervaluing others; and that lawyers will be awarded disproportionately large fees. Perhaps these risks should be addressed in subdivision (e); the suggestions of Leubsdorf and Schwarzer are good. Thought should be given to provisions for appointing an advocate for absent class members; limiting or even prohibiting representation by class counsel of clients who are maintaining individual actions; and limiting the ability of a judge who has taken any part in settlement negotiations in the review and approval process.

Jeffrey Petrucelly, 96CV157: The proposals "would foster collusive settlements."

Reporters Comm. for Freedom of Press, by Jane E. Kirtley, 96CV160: (b)(4) will encourage "the already increasing use of confidential settlement proceedings and agreements to which the First

Amendment and common law right of access do not attach." Courts generally hold that the right of access does not extend to settlement negotiations or agreements. And increasingly, courts "are approving confidentiality orders that restrict the release of information about the terms of settlement agreements." "Secret settlements are particularly troublesome in cases of heightened public scrutiny," including class actions. This amendment would permit denial of access to settlement proceedings or documents. "Our concern is that a dispositive tool not be overused for the purpose of clearing the court's docket, particularly at the expense of public access." Confidentiality orders have a great potential for abuse," but often are signed on a routine basis.

Litigation Comm., American Corporate Counsel Assn., by Theodore J. Fischkin, 96CV161: The proposal "would further the highly important policy of promoting voluntary settlement of disputes." "It would be anomalous if this strong substantive policy could be frustrated by a procedural rule. Since the Georgine decision threatens to do just that, it is properly overruled by the proposed amendment."

American Bar Assn., 96CV162: Supports, "provided that adequate due process protections are provided for the parties."

ABA Section on Litigation, 96CV162: (This report is not ABA policy.) This "is a good compromise that allows the continued use of this [settlement class] device, despite recent adverse decisions, while reducing the potential for abuse." Courts and practitioners have found settlement classes useful, and have use them with increasing frequency. The potential for collusive settlements can be reduced through the court's examination of the fairness of the settlement, and by opting out. Rule 23(c)(2) and (c)(3) should be amended, however, to confirm the right to opt-out for (b)(4) classes by referring to (b)(4) wherever (b)(3) is mentioned. And the Note should state more elaborately "how the court is expected to apply the (b)(3) factors of predominance and superiority in the settlement context and to highlight that particular care should be given to defining the scope of class membership."

Tort & Ins. Practice §, ABA, 96CV162(Supp.): Although a task force majority support the change, there are sufficient reservations by others that TIPS cannot support (b)(4) as written. Many members believe the proposal embodies existing practice; some doubt this, finding little authority to permit class settlement "where there may be a substantial, even unrebutted, challenge to certification." Others fear collusion, and the lack of bargaining power when all parties know the settlement class would not be certified for litigation. Some think there should be (b)(4) language requiring heightened scrutiny of the settlement agreement. But there is concern that the inherent tendency to approve settlements will defeat heightened scrutiny. There also is concern that settlement classes will supersede state tort and contract law. Some believe that settlement classes are inappropriate for mass-tort litigation, and particularly for "classes of future claimants with exposure-only latent injuries." Settlements accomplished prior to filing suit are particularly dangerous. The supporters respond that adequate protection lies in judicial review of the settlement, the opportunity to opt out, the ability of objectors to present challenges, and the court's power to appoint a special master. Finally, some believe "that settlement as to a class so diverse as to be unlitigable on a class basis differs fundamentally from a settlement as to a litigable class." The more diverse the class membership, and the more complex the settlement, the more difficult it is to represent all class members — especially intense judicial review of the settlement, going well beyond present usual practice, is necessary.

A. Mark Weisburd, 96CV164: The proposal cannot be justified. (1) There are due process difficulties with adequate representation. If the class includes members whose individual claims would be governed by different laws, the settlement is bound to trade off the stronger claims for the benefit of class members with weaker claims; the conflict of interest defeats adequate representation. (2) Although the Note says that all the subdivision (a) prerequisites must be met, it is clearly intended to apply a "weaker standard" to (b)(4) settlement classes than to (b)(3) litigation classes — "surely there is a serious risk that (b)(4) will be read as giving a green light to less searching examinations of all the factors relevant to the certification decision." (3) (b)(4) "seems extraordinarily vague, and difficult to reconcile with (b)(3). How does it mesh, for example, with the purpose of proposed factor (F) to discourage classes framed more for the benefit of counsel than the benefit of class members? (4) "The most fundamental problem * * * is that it is difficult to imagine [(b)(4)] being used in good faith. After all, it is intended for use in circumstances in which a defendant presumably would have an excellent chance of preventing class certification entirely." The defendant's motive for settling, then, must be "concern[] about suits by class members despite the weakness of the class claim * * *."

James A. O'Neal & Bridget M. Ahmann, 96CV165: The (b)(4) proposal provides necessary guidance. The recent Third Circuit decisions have thrown the often-utilized settlement class device into a state of uncertainty. The Third Circuit view is directly contrary to the overwhelming weight of current case law. It also discourages settlement. The concerns of abuse and collusive settlements are met by insisting on the prerequisites of subdivision (a), the notice requirement and the opportunity to opt out, and the requirements for hearing and court approval.

Dennis C. Vacco, 96CV166: (This statement is submitted by Dennis C. Vacco, Attorney General of New York, but may be amended to add other states.) The controversial settlement-class practice, recently rejected by the Third Circuit, has a high price. The proposal will exacerbate existing abuses by changing the leverage in negotiations — since there is no fear of trial, class counsel may well be those most willing to join with defendant in a deal that provides attractive fees but few class benefits. The rule 23(a) requirements are not enough. The mandatory hearing on the settlement is not enough either; the Georgine case shows that even extensive hearings cannot ensure due process. The right to opt out is not meaningful for future class members, unless there is a right to opt out when a claimant becomes ill. If there are to be settlement classes, several requirements must be provided. (1) Notice must be in plain language. It must include the essential terms of the settlement, information about distribution, a description of opt-out rights, the procedures for filing a claim, the procedures for objecting, the amount of attorney fees, the source of class counsel fees, and any other disclosures needed to support informed decisions. (2) The opt-out right should be made explicit, including the right of future claimants to opt out after their injuries develop. (3) Heightened scrutiny of the settlement should be required. The court should inquire into such matters as parallel representation by class counsel of non-class clients; settlement agreements for non-class clients negotiated "in conjunction with" the class settlement; more favorable settlements for non-class claimants than for class members; and class definitions limited to members who have not filed individual actions by a specified date.

Howard M. Metzenbaum, for Consumer Fedn. of America, 96CV167: The proposal authorizes a settlement class "without having to meet the standards for class certification in Rule 23(b)(3)." It invites collusion between class counsel and defendant against the class interests. Class members are

not likely to be adequately represented, and few will have the resources to hire an attorney to file objections. Even those who are not aware of the litigation or whose injuries are not yet manifest may be barred. The proposal should be withdrawn.

Federal Bar Assn., 96CV170: "The proposed amendment reflects a practice adopted in several recent cases." Because some courts have rejected the practice, "codification of the practice is warranted."

Washington Legal Found., 96CV171: Comments now, but believes it prudent to defer action until the Supreme Court has decided the Georgine case. This proposal simply recognizes the current state of the law "in all but the Third Circuit." It is powerfully supported by the policy favoring settlement. The theoretical objections are mostly theoretical, not practical. Superiority, predominance, and manageability are all different in the settlement context than in the litigation context. The core fairness notions of Rule 23(a) still apply.

Bradford P. Simpson & B. Randall Dong, 96CV173: "[S]pecial emphasis should be added to the proposed Rule to ensure that no collusion occurs. It is imperative that this rule retains an opt out provision."

Robert G. Bone, 96CV176: Settlement classes may at times be appropriate. They can reduce transactions costs, speed recovery, achieve more equitable distribution of a limited fund, and achieve an administrative-type solution to large-scale compensation problems that the parties would (had they known of the coming injuries) have agreed to ex ante. But there are well-known risks in agency problems, trading off strong class-member claims to benefit the weak claims, and adverse selection that dilutes individual recovery in claims resolution facilities. An ideal rule would provide guidance on how to balance these costs and benefits in particular cases. It would also suggest procedures to reduce the costs, such as appointment of guardians, attention to subclassing, and careful review of attorney compensation. The modest approach taken in (b)(4) does not provide the needed guidance. And the text of the rule should make "much clearer" the application of the Rule 23(a) prerequisites and the (b)(3) constraints. It also should make clear how much effect the prospect of settlement has on the (b)(3) requirements of predominance and superiority — it does not seem likely that the Committee intends great departures. The requirement that the parties reach settlement before requesting certification "only exacerbates the agency problems." The Resnik-Coffee proposal is a good start. Specific findings should be required on the (b)(3) requirements, and also on "such matters as subclassing, guardians ad litem, special masters, and the like." It is good to require findings whether any subclasses might do significantly better outside the class action; the suggested appointment of a steering committee will at least help address the informational difficulties, but participation by others also might be invited. It is critical to require disclosure of information important to assessing the fairness of the settlement. All of these things should be supplemented, however, by adding to the rule an explicit reference to the potential benefits of class settlements. And the Note should provide examples at least of good settlements, in some detail; although it is delicate, examples of real-world bad settlements also would be helpful. The examples should be more complex, and the discussion more extensive, than the "Illustrations" commonly provided in the ALI Restatements.

Committee on U.S. Courts, State Bar of Michigan, 96CV178: "[S]trongly opposes the proposal on both theoretical and practical grounds." Analytically, the proposal eliminates the need to satisfy any of the (b) class categories; by definition, common questions will not predominate and a class will

not be superior to other available methods of adjudication. "An action that does not meet any of the subsection (b) requirements simply does not present a group of claimants sharing a community of interest * * *." On a practical level, the proposal "will create undesirable, and even perverse, incentives. Especially in mass tort cases * * *, the rule would provide an open invitation to collusive settlements." And the rule provides no guidelines to distinguish a "good" settlement class from a bad one. This is not a proper occasion for attempting to affect the rights of absent parties.

California State Bar, Comm. on Fed. Cts., 96CV179: The proposal would assist settlement "in order to promote efficiency, consistency, fairness, and ease of administration and distribution of award burdens." The requirement that there be an agreement will protect against early coerced settlements. It will help treat similarly situated persons alike in ways that cannot be achieved by litigation of separate actions in different courts with different choices of law. It is endorsed, with the recommendation that the Note say explicitly that it is intended to overrule the Georgine approach.

California State Bar, Comm. on Admin. of Justice, 96CV180: A majority of the Committee voted to support the amendment, recognizing that a majority of courts take the approach it proposes, but the Committee took no position pending the decision of the Supreme Court in the Georgine litigation.

Kenneth W. Behrend, 96CV181: The Committee should endorse the Third Circuit Georgine holding, and should provide that a class-action settlement binds only members who opt in to the class. Present practice creates a juggernaut for settlement. Notice often fails even to reach class members, and is confusing even when it does arrive. The lists of class members may include "thousands of persons who are indifferent or even frivolous or who have not been advised of their alternative rights by their own counsel." Judicial scrutiny of settlements should be more exacting. Ordinarily the certification decision should be made before there are any settlement negotiations. Injunctions that purport to preclude settlement class members from pursuing their own litigation, in their own courts and under their own state law, deny due process. Class representatives should not be able to bargain away the rights of class members under their own states' laws.

TESTIMONY

Philadelphia

Professor Susan Koniak, Tr. 8 - 24: The Rule should be amended to make it clear that a class can be certified only if it could be certified for trial. And it should be further amended to make sure that there is adequate representation and the settlement is fair. The proposed rule invites collusion. A class that cannot possibly be certified for trial is "malignant." Indeed it is not a class at all; if it cannot be tried, there is no justification for lumping these people together as if a class. The pressure to settle is too great when, absent settlement, the class lawyer surrenders the class. A class that might be certifiable for trial but is created for settlement is "benign" in the sense of a benign tumor - it needs attention, but we may have to live with it. Often it will be not entirely clear whether the class would be certified for trial — the parties are not contesting certification, and there is no other source of sufficient information to support an informed determination. But the plaintiffs do have leverage in negotiation. And this test may be met if certification is possible for issues, although not for resolution of liability to class members — if reliance must be proved on an individual basis, still the underlying misrepresentation issues might justify class trial and thus certification that leads to settlement. And there should be procedural protections — Professor Leubsdorf's proposal to appoint an advocate for the class is wise. To be sure, it cannot be said that all settlements of class claims that could not be tried are corrupt, but that is not the standard for rulemaking. The kind of information that is not revealed to the court includes such matters as the terms of parallel settlements of individual cases that are much more favorable than the terms of the class settlements. The integrity of the judicial system is compromised by allowing these deals. The choice-of-law justification for settlement classes does not work; "those laws are important. They are state laws." Subclassing is important to protect different rights — the difficulty of subclassing does not justify a nontriable settlement class. And the vague notion of "large-scale comprehensive solutions" to widespread problems seems to refer to the futures class, which presents special problems. A victim "wake[s] up on day, you know, 10 years later, and they find out that some lawyer settled their claim and they are dying and they can't go to court and they don't even know what happened."

Melvin I. Weiss, Tr. 35 - 44: Lawyers in this field practice diligently, ethically, at arm's length. Judges have become comfortable with the oversight role. "[S]ettlement classes should be something that you consider very seriously because that's what we do. That's the way these cases are resolved, overwhelmingly." Defendants care about more than just the amount paid. Class-based settlement provides certainty, or at least better predictability. It provides uniformity of treatment; the importance of uniformity is illustrated by a number of life insurance policyholder classes, in which the insurers are anxious to deal uniformly and fairly with their entire customer base, and in which state regulators are breathing down their necks. Class settlement also accelerates resolution of the problems. Class members are well protected by the information provided and the right to opt out. If it is argued that there is no meaningful right to opt out because individual relief is not available, it is argued that there should be no remedy at all. The appointment of an advocate for the class "is a disaster waiting to happen." Experience with advocates shows that it adds another costly level of procedures; "I mean, once you hire an advocate, the advocate has to advocate." Does the advocate

have to make every argument? Can the advocate use a business judgment approach, be sensible? Advocates have said that they cannot deal with counsel for the class, because their obligation is to raise all arguments on behalf of the class. As advocate for the class, the class lawyer cannot be totally candid about the problems with the case; the judge is there to provide overall supervision. As to hearings, there should be and are hearings whenever a class action is dropped, unless it is dropped without prejudice and no money is being paid to anyone. Yes, at times class lawyers will be influenced by the prospect that settlement class would not be certified for trial — defense lawyers also will be influenced. "That is why we have Rule 23. That's why lawyers can't just drop cases, settle cases, take payoffs. They have to go through a process." The rule works effectively and fairly; it should not be trashed because there are occasional problems that cannot be addressed effectively by any rule.

Steven Glickstein, Tr 62 - 65: A settlement class involves a purely consensual arrangement — the settlement cannot be crammed down an unwilling party's throat. Class members have an opportunity to opt out on the basis of full information about the settlement. And the settlements are not uncontested; to the contrary, there are active contests, often mounted by members of the plaintiffs' bar who fear loss of future cases in the area. And the district judge "cares about the absent class members." District judges are holding hearings, and making excruciatingly detailed findings. And the result is not always approval of the settlement. In the Shiley heart valve litigation, the district judge listened to the objectors and made us adjust the settlement to meet their objections.

David Vladick, Tr. 78-83: For Public Citizen Litigation Group: The settlement class identified by (b)(4) involves cases with the highest potential for abuse. Often the case could be certified for trial on liability issues, even if other matters such as reliance of damages must be litigated individually. "[T]he problem with (b)(4) is that it transfers a litigation device into a settlement device." There is no effective way to protect the rights of absent class members in class settlements of cases that could not be tried as class cases. "[T]here is nothing adversarial about that settlement." What is wrong is the cases that are brought only for the purpose of settlement — those that Professor Koniak describes as "malignant." No one ever argued that the Georgine case could be tried as a class.

Beverly C. Moore, Jr., Tr. 83-89: Favors (b)(4). Georgine, Castano, and Rhone-Poulenc all could be tried as class actions. What is needed is proper structuring, including an exclusion of certain states from certain claims and having a few subclasses. Statistical proof can be used to set individual damages, as in Cimino and the Ferdinand Marcos action. The problem with some settlements, as Georgine, is discrimination against some class members, or against all class members in favor of individual clients. The solution is not to prohibit settlement classes but to exercise Rule 23(e) authority. Traditionally judges did not want to review settlements closely because they wanted to clear these cases from their dockets. But that is changing. Objections are being made, and settlements are being changed in response. If we deny settlement classes, judges will make spurious findings that support certification as if for litigation, distorting the class action jurisprudence.

Roger C. Cramton, Tr. 94-109: This proposal exceeds the power of the Committee and violates the Enabling Act. Reliance on waiver is misplaced. Waiver implies consent, and even as to present claimants the notice process is inadequate; consent is fictional. The Manual for Complex Litigation recognizes this. The reasons given for (b)(4) are all wrong. The choice-of-law suggestion seems to abandon Erie, Klaxon, and VanDusen. It would allow self-appointed lawyers to agree to substitute

"a new national law" for authentic state law. Manageability concerns are equally spurious. Management in these cases involves the judge becoming involved in the settlement process, and then reviewing the settlement for fairness and reasonableness. "It looks unjudicial." The desire to establish wholesale schemes for reparation involves Article III judges in legislation. The present language, moreover, "is meaningless. It provides no standards, no possibility for the development of a coherent appellate law." Because of notice problems, "consent" cannot justify any of the supposed advantages. The objectors who show up, moreover, are "bottom feeders. That is, they were not named as class counsel and what they really want is a share of the action, a special deal on their clients' cases and so on * * *." They may abandon their objections once the sweetener is provided. Settlement classes, if allowed at all, should be limited to those in which the judge concludes that the class probably would be certified for trial, and makes a conditional certification for settlement. And Rule 23(e) should be strengthened along the lines suggested by Judge Schwarzer, requiring specific findings on the matters of general concern. There must be adequate discovery on the merits of the settlement, and it must come early enough to support informed objections. The negotiation process must be open for inquiry; the theory of many judges that privilege and work-product protection can be invoked against the class members who are clients of class counsel is outrageous. Everything must be made available to the objectors. "Otherwise, it is a cover-up." When plaintiff and defendant join in urging approval of the settlement, it is like an ex parte proceeding, in which Model Rule 3.3(d) imposes a professional obligation to bring forth all relevant facts. Counsel appears not as an advocate but as trustee for a class. The written documents sent to class members should provide intelligible information; simply providing a telephone bank is not enough. Although there is case law on Rule 23(e) procedures and requirements, it is not terribly well developed, is no uniform among the circuits, and often is not paid much attention by trial judges.

John C. Coffee, Tr. 113-121: There is a basic conflict of interest when the class attorney has no stake in, and does not care about, related class actions or individual cases; there is every economic motive to settle them in the class action if that can be done. And the fact that the case cannot be tried in this class form weakens bargaining leverage. The "reverse auction" is a further problem, arising from the fear that if the settlement is not made sufficiently attractive the defendant will shop for another class attorney who will strike a more favorable deal. Future claims also present problems, with the risk of divesting claims of much greater value than they receive in the settlement class. There is a legitimate place for settlement classes. Originally it comes from the fear of a defendant who wants to settle that agreeing to certification will carry forward to trial if the settlement falls through; the purpose of a settlement class was to achieve a kind of contingent certification. And there may be cases now in which there is no present possibility of an effective remedy in any other form. Global settlement may be necessary to get complete relief. What we should look for is the case in which no one is injured, no one is made worse off, by the settlement. One factor may be the risk that when a future claim matures there will be no defendant, and no insurance, to satisfy it. It would be best to put all of these things in a long commentary on (b)(3), not as express text. The cigarette class action, for example, could be evaluated to determine whether there are better remedies in individual actions, or awaiting further development of state law. Rhone-Poulenc may have been a good case for a settlement class — plaintiffs had lost almost all of the individual actions that had been tried, suggesting that individual actions are not viable.

Judith Resnik, Tr. 121-138: The focus is that there should be "litigating" classes in addition to settlement and trial classes. The starting point is that the civil rules are organized to dispose of cases by settlement or by adjudication without trial. Class actions should fall into the same approach. A group can constitute a class for pretrial purposes, even if not for trial. This is accomplished now by other means, such as multidistrict transfer or other consolidation with plaintiff steering committees. Class actions have a virtue that is not present in many other modes of aggregation, such as multidistrict litigation transfer: Rule 23 provides a structure and roles for judges and litigants, "pushing them to the visible arena." Ethical obligations are created by certification in ways that do not arise from steering committees or like devices. The rule should not be limited to settings in which a settlement agreement has been reached before the request for certification; to the contrary, it is better to have the court consider adequacy of representation at the outset, and to open up the process by making it visible. The certification should state clearly that it is for pretrial proceedings or settlement, and may not extend through to trial. The concern that leverage is lost because the class cannot be tried overlooks other sources of leverage — the prospect of trying other classes or individual actions, and the costs of discovery in this action or in other actions. To the extent that defendants today would resist certification for any purpose without having an agreement in hand, for fear that the certification will carry forward for other purposes, a well-crafted rule can encourage certification before there is an agreement. Rule 23(e) should be tightened up to insist on careful exercise of the power and obligation to review settlements. There are other problems not addressed by the rule, arising from the layers of lawyers and the other costs that should be spread across related litigation. Document depositories and the exchange of information across districts are only beginning to be addressed. Clients who have individual lawyers as well as class lawyers may face multiple attorney fees.

Stephen Burbank, Tr. 139-142: (b)(4) does not seem to raise Enabling Act problems under current interpretations of the Act, because they set very loose standards. We should take seriously the prospect that there may be limits beyond those stated in Sibbach and Hanna. Rulemaking should not extend to rules that predictably and unavoidably affect rights under the substantive law. The (b)(4) proposal does not seem to do that. More generally, however, there is a special problem. Rule 23 may not have been intended to affect substantive rights, but it has. Does that mean that the Supreme Court cannot undo or temper what it has done, because that is to modify the substantive effects it has wrought? That would put the Court in an impossible position.

Eugene A. Spector, Tr. 143-144: Plaintiff-class attorneys take seriously their responsibilities to members of the class.

Robert N. Kaplan, Tr. 150-151: Settlement classes are used in securities and antitrust litigation. They are arm's-length negotiations; I had one that negotiated for a year and a half before a settlement master. Discovery is used to probe the merits while settlement is being considered. Problems that may exist in mass tort classes should not wash over to other kinds of classes.

H. Laddie Montague, Tr. 154-162: In antitrust class actions, there are certain parts of the plaintiff's class definition that always are attacked by defendants claiming that impact and injury are not common to class members, and so on. This can become a battle of experts at the certification stage. And, before any determination whether the case can be tried as a class, the parties agree to settle. This resolves every issue that would be litigated. Although defendants will want the class defined

as broadly as possible, for maximum protection, plaintiffs can resist — and I have. The practical problem is that a defendant fears that a class defined for possible settlement will carry over for trial if the settlement fails. Perhaps there should be some safeguards, but the courts have been able to develop them without rule provisions. Concern with the distribution among plaintiff class members should be addressed by the terms of the settlement and approved as part of the 23(e) process. Settlement is very constructive.

Edward Labaton, Tr. 189, 192-193: Settlement classes work well in securities litigation. There may be problems in other contexts. To insist that the case be one that could be tried for the same class does little, because "lawyers are imaginative enough to find a way to say that we could have tried this case. * * * [P]eople would work around that relatively quickly."

William T. Coleman, Jr., Tr. 211-212: Settlement classes are now in the Supreme Court. It is understandable why defendants should want them.

Michael Donovan, Tr. 227-228: The Supreme Court decision in the Georgine case will provide guidance. It is not necessary for the Committee to jump the gun.

John Leubsdorf, Tr. 256-264: The proposal addresses a problem that does not exist. The problem is not that courts are refusing to approve desirable class-action settlements. The problem is that they are approving settlements that should not be approved. The settlements recently rejected by the Third Circuit "were awful settlements," to be rejected for many reasons. The problem arises from a failure in the adversary system. A small group of people, plaintiffs, plaintiffs's lawyers, and defendants get together and agree on a settlement. (b)(4) will make that easier. It encourages people to package a settlement before certification is requested, and presents the certification for the first time with a defendant whose interest is in supporting certification. And it dilutes the protection arising from the requirement that the case be capable of trial as a class action. If there is to be any change, it should be to increase the safeguards against bad settlements. First, only in the most unusual circumstances should settlement negotiations be permitted before certification, before it has been determined that the plaintiffs and their lawyers can adequately represent class interests. Second, the rule should require that the lawyers be adequate to protect class interests — it is the lawyers, not the representative class members who ensure adequacy. Third, whenever there is a significant amount of money at stake the court should appoint an official objector; several lawyers have testified that they would consider it improper to present information that might destroy the settlement — it is because "lots of lawyers do think that way" that we need official objectors. Fourth, there should be a more adequate notice requirement. Fifth, the right to opt out should exist whenever significant monetary relief is involved; it should not be defeated by a (b)(2) certification. Finally, if a "futures" class is certified, notice of the opportunity to opt out should be in a form "reasonably likely to permit an informed decision by a person to whom it's addressed."

Leslie Brueckner, for Trial Lawyers for Public Justice, Tr. 272-280: (b)(4) focuses on the precertification settlement, which creates the greatest risk of abuse. This requirement of settlement before negotiation is not in any way a protection for the class. The right to opt out is not much protection "given the complexities of notice, class actions that are certified where the actual identities of class members are not known." Approval hearings "tend to be * * * dog and pony shows * * *. There is no real adversary process except in the very rare instance when a plaintiff's lawyer or public interest group manage to muster the resources to mount massive objections." More often, a few

individual objectors appear and are bought off. As a public interest group, we commonly are denied standing to object unless we have a class-member client; and the defendants then offer an individual settlement so attractive that our duty to our client requires that we accept. The policies in favor of settlement do permit settlement of a class that could not be certified for trial. But the court needs to look at it "very, very carefully. * * * [Y]ou need special protections for the class members, and you cannot rely on objectors * * *." The proposal does not provide the necessary special protections.

Deborah Lewis (Alliance for Justice), Tr. 281: Opposes, for basically the same reasons as Leslie Brueckner. "[T]he opt out provision has to carry the heavy load of protecting against the potential dangers of this proposal of collusiveness, of the conflicts within the class, and * * * the opt out provision just can't provide that kind of service * * * for really just for the opt out provision to serve this function, we would have to have advice of counsel to understand both the notice and the proposed settlement, and whether or not the settlement will make them whole. And that would be just prohibitively expensive for the poor absentee class members."

Dallas

Stephen Gardner, Tr. 4-22: (This testimony interlaces observations about (b)(4) and factor (F); most of it is summarized here.) Consumer class action experience provides the framework for this testimony. Settlement classes foster abuse; this proposal, and factor (F), "will exacerbate rather than address the problems." The very concept of trying a class action is so foreign to the weltanschauung [Tr: bel tan shong] of many plaintiff class lawyers that settlement becomes the sine qua non. Counsel who begin with high praise for their cases "become suddenly and extraordinarily pessimistic about the legal and factual merits of their very lawsuit once the case has been settled and their fees have been sewn up." These are triable classes. The claims are very, very good. The problem is quick and dirty settlements. "The problem is they've never intended to seek relief for the class. * * * [T]he relief to be obtained in too many cases focuses on fees and not on relief for the class." Coupon settlements are a good illustration. "If a case is bad, it ought to be lost, it ought not be settled, and particularly so with class actions. * * * [Y]ou do not discourage abusive filing of class actions by making them easier to settle when they do not have a basis for settlement." If there are choice-of-law problems, perhaps there should not be nationwide class; California lawyers resist nationwide classes that risk trading down the strong California consumer law claims for the advantage of weaker claims under the less favorable law of other states. There is no need for (b)(4); settlement classes can work even under the Third Circuit formula. The problem that defendants may not stipulate to certification when they fear a settlement will fail and that they may be forced to try the class action can be met in part by getting certification rulings before settlement discussions begin, and in part by liberal use of the power to "recertify, decertify, uncertify." Most consumer classes could be brought just as well in the form of (b)(2) classes; injunctive relief can be as effective as minor damages awards. (b)(4) offers "an unstructured, unregulated approach to settlement classes." The Committee should wait.

Richard A. Lockridge, Tr.25-27: (Testifying from experience as plaintiff class lawyer in antitrust and securities actions.) The (b)(4) proposal is beneficial. There have been problems with settlements that seem to result from less than arm's-length bargaining, but "a slightly heightened level of judicial scrutiny would help resolve that." Courts could look to whether there has been an agreement on attorney fees; it would be better to have no agreement at all, but if there is an agreement courts

should look at it carefully, and recognize that the fee agreement makes the settlement more suspect. It also supports the settlement to show that documents have been reviewed, and at least some depositions have been taken.

Samuel Issacharoff, Tr. 28-40: Rulemaking is premature. It is better to let these problems work out through the process of adjudication. Judicial experience with settlement classes is "hesitant and unknowing." The Georgine decision will begin the process of further judicial development. (b)(4) represents an impulse to facilitate settlement classes that is quite problematic. "For example, there are problems when you have groups of plaintiffs who have preexisting relations to plaintiffs' counsel that other groups of plaintiffs don't have. We've seen this in some of the cases. * * * There are issues for concern where you have future claimants * * *." Perhaps there should be a distinction between tort cases and "the more economic harm contract type of cases and how we assess the question of manageability under (b)(3)." The courts should be looking for middle ground; the Third Circuit Georgine decision may be too harsh. Defendants who recognize that they have done wrong should be able to settle and avoid the cost of further litigation. But "the evidence of collusion is real." Courts can examine the processes by which settlement was reached: how arm's-length were the negotiations? What were the relations between various types of class members and class counsel? What kind of notice was there — particularly notice to rival groups? "[F]ederal judges are extremely able people with extremely limited resources and * * * have no capacity to enter into an independent examination of the facts presented to them because they do not know the record, they do not know the evidence." There is a very limited capacity to intervene, particularly with (b)(1) settlements. There is an incentive for judges to clear their roles. "And what this panel's proposal does is to say to the federal judges the fact that they come before you with something called a settlement should pretty much take care of the issue." This is particularly problematic as Rule 23 is extended into areas "very far removed from what was originally contemplated when Rule 23 was put into effect." "I am a disbeliever in rule making in this area. I think that the committee should be leery of presuming its competence simply by the way of very smart people thinking about problems in the abstract and instead should trust to the federal courts to develop these responses on a case-by-case basis."

Charles Silver, Tr. 41-43: Follows Professor Issacharoff's testimony, stating that one of the problems is that the standard of comparison in evaluating a class settlement is other class settlements. Even if courts await until there has been enough individual case litigation to make the class claim mature, the comparison will largely be to individual case settlements rather than individual case trials. And the database of settlements is tainted because the incentives are inadequate across the board. n The real focus for the Committee should be attorney fees. (Noted separately.)

John Martin, Tr. 56-57: Approves the whole package, but has some reservations about (b)(4). There should be very careful analysis of proposed settlements; the added hearing requirement in (e) is good.

John Henderson, Tr. 67-73: As defender in class actions, welcomes the (b)(4) proposal. Settlement classes are needed. They are the best way to resolve mass personal injury torts, that otherwise would take many years to decide. Concern that plaintiffs will lack leverage because the case cannot be tried is misplaced. There is a real prospect that absent settlement, some form of class action — or actions — will be certified for trial. Plaintiffs' lawyers are interested in settlements, and there are formal and informal ways to participate and protect against sweetheart deals. And federal judges look

carefully at the settlements; there is no need to add particular scrutiny requirements.

Fred Baron, Tr. 80-95: Opposes all uses of class actions in mass torts. They are not needed. Rule 42 consolidation and § 1407 transfer are sufficient. And settlement classes are particularly bad. Whenever we try to settle large numbers of individual cases, the first demand is that we create a nationwide class and deliver peace for ever and ever and ever. These cases involve very individualized injuries that would be resolved differently under different laws; they could never be certified for class litigation. Allowing settlement certification invites the friendly deal. Rigorous scrutiny by the court should solve these problems, but it does not. A settlement class would be proper if there were a genuine right to opt out that could be explained to each class member and made good by each class member. The opportunity to object does not give much leverage; it is very expensive. Our firm spent more than a million and a half dollars objecting to the Georgine settlement. That is not the way these situations should be handled. We presented reams of evidence that there were dual track negotiations, settling present cases on condition that the future cases be settled on a class basis. The only way to defeat this kind of competition among attorneys is to deny the opportunity for class certification. If a future claimants' class is to exist — and it should not — there must be an effective right to opt out as a matter of due process. The HIV settlement is good, because it carries an effective opt-out right. For future claims, as in asbestos, it would have to be a "back end opt-out." Bankruptcy is a better alternative when there is a real risk that there will not be sufficient assets in the future to compensate the future injuries. If changes are to be made, there should be clear opt-out rights in any mass torts case; no futures classes; compensation for successful objectors; more scrutiny of settlement classes. And all of this should await the Supreme Court decision in Georgine.

Alan Dyal, Tr. 111-113: The Committee should provide another opportunity for public comment after the Supreme Court decides the Georgine case.

John L. Hill, Jr., Tr. 116-117: Settlement classes should be allowed. "[W]e're wise enough to know how to solve problems of unfairness, problems of fraud, problems of collusion, that sort of thing. That's what lawyers with fiduciary duties are for, that's what our ethics are for, that's what our trial courts are for, that's what discretion is for." In mass tort cases, settlements provide relief that is quicker and easier, and do not "just bury our courts with case after case on an individual basis."

Clinton A. Krislov, Tr. 117-126: The rule should provide a roadmap of procedures for the trial judge to follow in reviewing a settlement. Counsel for any competing class should be informed and invited to appear. The objector's role is very difficult. "You never get paid if you don't change the settlement in some way. You will probably never get listened to, and it's very difficult. You're the least wanted person there. You are the one who is messing up this train which is headed in a direction and you're trying to derail it, and so nobody really loves having you there." The concept of a guardian ad litem for the class is "rarely effective. * * * I'm not sure * * * whether it's the incentive or the logistics. There is a real benefit to having counsel in there, whether it's with * * * the best of intentions, the most aggressive of intentions or the incentive of actually getting paid as well." When there are competing objectors, it is better to form a group and select lead counsel to pursue the objections. It is less effective to allow several objectors to proceed independently. To be successful, an objector has "to find something that is fundamentally wrong with the settlement. And typically the 'it ain't enough,' 'it out to have been more' and 'somebody else added in a case

that we're in' and 'we could have done it better,' those typically get rebuffed pretty quickly. You really have to come up with something that is tight, to the point and a really fundamental problem. Usually you don't have much of an opportunity to do anything as an objector because if you get the notice, there's very little — there's no discovery on file usually. You have to go through something that is sort of conceptually on the face of the deal." In addition, the Committee should do something the change the rule in several circuits that denies appeal standing to a class-member objector who has failed to intervene. There is no risk in the real world that hundreds of dissatisfied class members will hold up the settlement by appealing; one or two is the highest real number. Heightened scrutiny should be required; some courts have approved settlements that the class was against.

Stanley M. Chesley, Tr. 140: Settlement is good, and the proposed amendment "addresses a need and facilitates settlement." The fear of collusion can be met by court inquiry — the allegations have been made, inquiries have been had, and collusion is very rarely found.

Bartlett H. McGuire, Tr. 159-161: (b)(4) "makes sense * * * for all of the reasons discussed in your advisory committee notes. And it would overturn the Third Circuit's decision in Georgine, which is good." But it would be wise to defer final action pending the Supreme Court decision in Georgine.

San Francisco Hearing

Eric Green, Tr. 28-37: (b)(4) is a desirable clarification of the law. It does not require certification of a (b)(3) settlement class, but only authorizes it. Consideration should be given to authorizing settlement classes also under (b)(1)(B). There are sufficient procedural protections to answer all of the concerns raised by the 120 academics arrayed on the other side of this issue. As guardian ad litem for the plaintiff class in the Ahearn settlement, I observed an extremely detailed and vigorous settlement hearing that lasted 9 days. There was substantial discovery ahead of time. As guardian, I had full authority to conduct whatever discovery I wanted into the settlement; I had an 800 number; I had contact and correspondence with hundreds of class members; I scrutinized all aspects of the settlement, including the ethical aspects and the alternatives. Special masters also may help in the process. The other requirements of Rule 23 all must be satisfied, and provide adequate protection for class members. Although my experience is in mass torts, I believe that settlement classes also may be important in some consumer class cases. There may be differences between personal injury and economic harm cases. And there may have been some bad settlements; the coupon settlements seem dubious. The proposal authorizes courts to consider any problems of justiciability, jurisdiction, or the like. The future classes problem is a red herring; it is a matter of state-law authorization for fear of cancer, for emotional distress, for medical monitoring, or like relief. This proposal does not address those issues. The academic critics have shifted focus to abuses in state courts; the federal rule should not be defined by state-court problems. It might be a bit better to allow certification before a settlement agreement is reached, but as a practical matter that is not going to happen very often. It might help to appoint a guardian for the class before the settlement agreement is reached. But the practicalities of negotiating make that difficult. In some of these cases, the effective negotiation process has been going on for years; it is only the final stages that involve the concentrated series of meetings all around the country. And a guardian who seeks to participate in the negotiations had "better be a superb negotiator and a very experienced person, so as not to inadvertently, through poor negotiation or unfamiliarity with the issues or whatever, because of some notion that the guardians got to add value somehow to the deal or to justify himself or herself, disrupt

the process."

Lewis H. Goldfarb (Chrysler Corp.), Tr. 43-44: It is a very close question, but we oppose (b)(4) — although "settlement classes have been beneficial to us" — "because we're trying to wean ourselves from that temptation. * * * It is, in many cases, in our interest to sign onto a settlement that may not meet Rule 23.

Elizabeth J. Cabraser, Tr. 45-52, 56-58: There are real concerns about the corruption of procedures in settlement, but (b)(4) is desirable. It will confirm the legitimacy of a valuable practice that has grown up to become, before the Third Circuit decisions, an accepted part of federal jurisprudence. The supposed polarization between trial and settlement classes is overdrawn; many of the settlement cases could in fact be tried, at least in part, utilizing the procedures of (c)(4)(A) and (B). Yes, there are concerns that arise when the negotiators have an interest in settling for the largest possible class and the courts have a need to resolve large numbers of cases. But evaluation for compliance with 23(a), and appropriate notes to (b)(4), will support good resolution of the problems by lawyers and judges. The Manual for Complex Litigation also helps. The factors suggested by Judge Schwarzer's article, and by the cases, should be adopted in the Note. They include similar treatment of people similarly situated, and the adequacy of notice. It is easier to give good notice now than ever before, and less expensive, although it remains quite expensive with large classes. And the media have become interested, giving free — if not always accurate — coverage. Ironically, what happens in the largest classes may be that the court hears from the interests of everyone but the class members "who would simply like to have a fair recovery in their lifetimes." It would be better not to limit (b)(4) to cases that are settled before certification. The greatest concern is with cases that are settled before they are brought. This is a particular problem when we bring a case, knowing that we may have to try it but hoping it can be settled, and litigate it for years, and then someone else who has not gone through this process, who does not know the case and would not know how to try it, packages a settlement in another court, packages a settlement. That should be stopped.

Arthur R. Miller, Tr. 69, 80: We need the settlement class as a practical of late 20th Century litigation phenomena. "It can be a very powerful force for good, when constrained, when guarded." There may be Enabling Act problems. "I certainly would limit the (b)(4) to a situation in which you have an adversary proceeding, anterior to any settlement. But you're on the knife's edge."

Samuel B. Witt, Tr. 96: Obviously (b)(4) will not be resolved until Amchem is decided. "My question for you is whether you reopen public comment after the Supreme Court gives us its thoughts on that, to allow this debate to go forward in the context of what they're saying."

John L. McGoldrick, Tr. 105-106: There are very different purposes for trial certification and settlement certification. "There is no reason why they should have the same standards." Without settlement classes, defendants and plaintiffs and courts will march "through long years of litigation, that nobody wants or needs." Permitting settlement classes will not encourage added filings on nonsubstantial claims; settlement classes are the law now, outside the third circuit.

Sheila L. Birnbaum, Tr. 110-118: Speaking from experience in mass torts, (b)(4) should be limited to cases where a settlement has been reached. This does not mean that people simply begin all litigation by negotiating a settlement and then filing for class certification. Instead, there are cases all over the country, being tried and being settled. The settlement class resolves the mass tort. And

mass tort classes do not exist in a vacuum. There are aggregations by consolidation, by MDL transfer, by consolidated discovery. "But if you don't allow for the ability to settle cases globally with 23(b)(4), then you will have mass chaos on your hands in the courts." This is something that exists everywhere but the Third Circuit. Notice is given, and given broadly — defendants want res judicata, and protect it by broad notice. There will be no need for (b)(4) after the Supreme Court decision only if the Court says expressly that settlement is different from trial for certification purposes; that choice of law and predominance do not apply; that the 23(a) requirements do apply; that the settlement must be proved fair; that there is a case in controversy. Georgine was settled over a 20- to 30-year history of litigation. The rules give the judge all the power needed to review fairness, including special masters. The settlements that go on now occur on an aggregated basis, but without judicial review. Class settlements, reviewed by a court, may give a more equitable resolution. A bad settlement will be challenged by objectors; more and more lawyers have learned the opportunities in objecting. There is no need to provide more guidance in the Note; the Manual for Complex Litigation does that. And there are appellate courts. It is not fair to suggest that district judges and circuit judges are closing their eyes to fairness because they want to get rid of these cases. They are there to protect the class. "These court cases, even without class actions, * * * need to be settled globally, you cannot take that tool away. It's just a tool. And that's why it should only be used when the parties are prepared to settle the case, because it is only then that the defendant is willing to give up some of the due process rights that they might be asking for to get the global resolution of the problem." There are real cases out there before the settlement.

John Aldock, Tr. 118-126: Is counsel for the Center for Claims Resolution, 20 companies in the asbestos litigation. Negotiated the Georgine settlement. The critical issue about settlement classes is the need to compare class settlement to "individual" litigation, to the realities of the alternatives. The supposed problems with settlement classes are not new; they were identified by Judges Friendly and Wisdom, and resolved. The findings of fact in the district court in the Georgine case have not been challenged. They show that in individual litigation, attorney fees account for more than two-thirds of the amounts expended. Contingent fees are 33% to 40% in cases that are no longer contingent. In most jurisdictions it takes more than three years to resolve a case. Jury verdicts are erratic: "People who aren't sick make millions. People with cancer get nothing." In Cimeno, "the nonmalignants got more than the long cancer." Individual litigation affords no protection to the futures. Those who have present claims settle by giving a full release — if they develop worse diseases in the future, there is no claim left. And bipolar litigation has not occurred for 20 years. The cases are tried in large group consolidations. "Asbestos lawyers don't have clients any more. They have inventories. They talk about them as their inventories. They are retailers and wholesalers. The cases brought in Texas were brought by a North Carolina lawyer, who has brokered them three times, and they're now being filed in Texas. The fee is being shared so many times, nobody even knows who is getting it. The idea that these people have clients and that the clients are making the litigation decisions is a fix." It is hard to believe that the clients are even consulted in the group settlements, that they even know that their cases are being settled. And there is no judicial superivision of the amount of the group settlement, nor of the allocation among individuals, nor of the fee. In a settlement class, the judge looks at all of these things. And the settlement ensures that people are treated the same. "Call it administrative justice; call it whatever you ant. it is fair; it has more protections; it protects the futures." Extensive notice was given in Georgine; the futures know they have been exposed to asbestos, and worry about, and want peace of mind.

Jeffrey J. Greenbaum, Tr. 153-154: (b)(4) will add honesty to the system. Cases will settle, whether (b)(4) or there or not. The proposal will allow direct focus on the settlement class. And it is right to insist that there first be a settlement agreement; otherwise, some judges will make a "conditional" certification for settlement purposes that intimidates counsel into settling for fear that the certification will persist through trial.

Miles N. Ruthberg, Tr. 160-161, 162-164: We were concerned about settlement classes when writing the Harvard Developments Note in 1970, and people are still concerned. Even then we were talking about subclassing, guardians ad litem, and so on. Settlement classes are a good thing, but they require active supervision — a lot of hard work — by the court. If the Supreme Court affirms the Third Circuit in Georgine, it will be essential to amend the rule. Even if it reverses, it will help to have a clear rule. But it would be a mistake to attempt to write into the rule, in subdivision (e) or elsewhere, more detailed guides for approving settlement. Subclasses may work in one context, but be a bad idea in another. Guardians ad litem or special masters may work in some cases, but not in others. A comment that the judge must be actively involved would be appropriate.

Stephen B. Ringwood (Kaiser Aluminum), Tr. 174-178: Approves the package of proposals, but focuses on (b)(4). Mass tort claims generally are inappropriate for class trial. (b)(4) is a judicially manageable safety valve that confirms a useful, longstanding process. Settlement classes avoid huge, unfair transaction costs. Class members are better protected than they would be in a litigation class. "More is known up front, can be evaluated in the context of a fairness hearing, scrutiny in the certification process." Defendants get predictability.

Gerson Smoger for ATLA, Tr. 189-201: Much of the focus of this plea for individual control of individual actions in mass torts, not class treatment, is focused on (b)(4). For a class, there must be a meaningful opt out, which requires "true notice," "notice where somebody really knows." Class treatment loses sight of who is actually being represented. It is the individual injured who must determine what a fair settlement is, "and the victim is out of this play. He's no longer a constraint * * *. The representative plaintiffs often are the first people who walk through an attorney's door." This is in part a matter of adequacy of representation, but it is more. "When we get to the level of settlement class, we're putting much more power in the individual attorney to settle that case and the courts to monitor that. * * * The real quality of the representative plaintiffs is not viewed at all, and nobody even gives consideration to that, and then we're asking somebody to make decisions on behalf of an enormous number of victims who are hurt." (b)(4) can never work in a mass tort. The one thing that has to happen in a mass tort is that "at the end of the day, the attorney has to go to those individual clients with serious injuries and say, 'is this a good settlement, and is this what you want?' * * * They are controlling the fate of litigation that is very significant to their lives."

Robert Dale Klein, Tr. 209-215: (b)(4) simply brings Rule 23 into the real world. It "reaffirms economic reality and necessity." Settlement classes are better than the alternative devices also being used. Aggregation is accomplished by many devices outside Rule 23. Rule 42 consolidations "bring all of the downsides of class actions under 23 with none of the protections, if you're a defendant, or, for that matter, if you're a member of the plaintiff group." Massive consolidated trials that extrapolate "a few supposedly illustrative or representative — and I use those terms in quotes — plaintiffs" are masking devices. We also see several trials; you win some, and then lose one, and in the next case the loss is used as collateral estoppel. Rule 23 cannot solve this, but (b)(4) "does help

address and provide a way out for corporate defendants who have to deal with this mess day-in and day-out." "The threshold for consolidating cases for mass trials has slipped below the horizon of due process fairness in too many courts." These are pseudo-classes. Even with opt-outs from a (b)(4) settlement class, defendants can identify and count the opt-outs, and gain predictability, calculability.

James N. Roethe (Bank of America), Tr. 232-234: Settlement should be available. The Note suggests that you have to meet all the requirements of (a) and (b)(3), albeit in the context of settlement, but it should be made clear that if a settlement falls through "there is not some admission or presumption raised that a class is appropriate."

William M. Audet, Tr. 258: (b)(4) "is a good idea, to be consistent with what the courts have been doing over the last ten years."

John L. Cooper, for Fed.R.Civ.P. Comm., Amer. Coll. of Trial Lawyers, Tr. 271-274: There are opportunities for collusion. The defendant wants to buy a cheap retroactive insurance policy through a class action settlement. Perhaps an opt-in settlement class would work; that addresses the problem of a retrospective insurance policy. Examination of a settlement for collusion may work, but it requires close attention by the judge and the issue may not be presented; objectors may not appear. The real protection is advocacy; if the case has been litigated long enough before settling, that is protection.

Lawrence B. Solum, Tr. 274-279: If we already have settlement classes, would we make the system fairer by eliminating them? Settlement can be fair because it provides a party's entitlement, or because it is a fair negotiated compromise, or because it results from a fair process. The alternative to settlement in a (b)(3) class is litigation as a class; the alternative in a (b)(4) class is some form of nonclass, disaggregated proceeding. The standard that a settlement must be fair, adequate, and reasonable provides little guide. The Fifth Circuit factors like fraud or collusion, complexity, expense, stage of the proceedings, also do not provide real criteria. (b)(4) "by its very nature, is adding cases in which there are differences among class members." So it raises the question whether a settlement may systematically provide more fairness to some members than to others by moving some members closer to their entitlements and other members further away. Should such a settlement be approved? Can we ask whether the net benefits to the class as a whole substantially outweigh the harm to some subgroup? Or should such a settlement simply be disapproved? This problem needs to be thought through and addressed.

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

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

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

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

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

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

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

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

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

Miles N. Ruthberg, 96CV112: Strongly approves. The current system forces premature class certification decision. "This forces a life or death decision to the very front of the case before adequate discovery or development of the claims and defenses to be tried." Although courts commonly make conditional certifications, this seeming qualification is no real comfort. Defendants are denied due process when the litigation focuses on individual representative claims that do not share the fatal defects in the claims of other class members. Nonrepresentative class members are denied due process when their valid claims are defeated by defects in the claims of representative members.

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

Donn P. Pickett, 96CV128: The present "as soon as" requirement "often pressures the District Court into a premature consideration of the superiority factors. In addition, it tends to ease the burden on

plaintiffs to authorize court reliance on assumptions regarding superiority rather than evidence." The change will allow certification decisions when the evidence is ripe. And it will make even more meaningful the opportunity to seek interlocutory appeal.

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

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

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

Fed. Cts. Comm., Chicago Council of Lawyers, 96CV148: "This rule would, we expect, encourage defendants to trump class certification by filing preemptive summary judgments on the merits." This runs counter to the rule that the merits cannot be considered in making a certification determination. In some cases, such as pattern-or-practice employment cases, evidence on the merits can take years to develop, and it is unfair to place the burden of merits discovery on the plaintiff before a class has been certified. The dangers could be mitigated "if the new version of section (c) provides expressly that dispositive motions prior to class certification are disfavored when there has been little or no merits discovery * * *."

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

American Bar Assn., 96CV162: Supports.

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

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

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

Federal Bar Assn., 96CV170: "The practical effect of the present practice has already effectively

translated the language of the rule into 'when.'" The proposal is endorsed.

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

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

TESTIMONY

Philadelphia Hearing

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

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

Dallas Hearing

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

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

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

San Francisco Hearing

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

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

Rule 23 Comments: (e) Hearing & Other Suggestions

William Leighton, 96CV030: Appears as an "objector" to a class settlement. The settlement is characterized as one in which "the putative defendants have written a complaint against themselves and, for $3,200,000 [paid to attorneys for the plaintiff class] have settled it on their own terms."

Rule 23(e) should be amended to require findings that: the action was brought within the limitations period; plaintiffs have standing as class members; the court has certified the class after affording class members an opportunity for hearing; the court has jurisdiction; reciprocal discovery has been undertaken before the settlement agreement was reached; there are no agreements between attorneys for plaintiffs and attorneys for defendants with respect to attorney fees; the damages for the plaintiff class are a sum certain; the settlement amount is fair, reasonable, and adequate; the judgment binds only class members served with the judgment; and the judgment does not contain an injunction against class members served with it. There must be entry of a final, appealable judgment. It must be clear that objectors can appeal.

William Leighton, 96CV030: This is a supplemental statement. The need to amend 23(e) is shown by the refusal of a judge to allow Mr. Leighton to appear to object to the proposed settlement of a securities class action. It seems to be suggested that one aspect of the amendment should be to recognize standing to appeal "by a nonparty, such as a prospective witness." (Apparently Mr. Leighton wanted to object to allowance of fees to class counsel because of his view that class counsel had violated its duties to the class — of which Mr. Leighton was a member — in a different and apparently unrelated class action.)

Stephen Gardner, 96CV034: Notice of settlement should be improved, requiring at least these things: the number of class members; the total class relief; individual relief; total fees to be awarded or sought, and the method of calculating fees; reversion of unclaimed funds to the defendant, if that is to happen; options available to class members, including at least opting out and objecting; and an address to write for further information.

Public Citizen Litigation Group, 96CV044: The (e) proposal to require a hearing is sound, but should go further. (1) Clear provision should be made to support objectors by requiring that the settling parties provide an evidentiary basis for the settlement, and their arguments in support of it, at least 45 days before the time for filing objections. (2) It should be made clear that the discovery rules apply at this stage. Present practice often leads to last-minute evidentiary ambushes of objectors by materials filed after the objections and just before the hearing. (3) Preliminary hearings on proposed settlements should not be closed; subdivision (e) should require that all preliminary hearings be held on the record with notice to all known interested parties. (4) A nonexclusive list of factors should be provided for consideration in evaluating proposed settlements, drawing from Judge Schwarzer's Cornell article.

Stuart H. Savett, 96CV048: The hearing requirement added to subdivision (e) should be adopted. But the Note should make clear that hearing and notice are not necessary where the purposes of (e) are not implicated — as if there is a precertification dismissal, or an involuntary dismissal.

Melvin I. Weiss, 96CV050: The notice and hearing requirement in subdivision (e) should not apply when there is no prejudice to absent class members, as with precertification dismissal.

Edwin C. Schallert, for Comm. on Fed. Cts., ABCNY, 96CV053: The hearing requirement added to subdivision (e) is sound, but the Note should observe that no hearing is required if there is no prejudice to class members and no consideration has passed. This practice has been approved as to precertification dismissals.

National Assn. of Securities & Commercial Attorneys, 96CV059: The (e) hearing proposal is desirable, but the Note should make it clear that it applies only when the concerns of this subdivision are involved. If no consideration is paid, there has been notice of the action to induce reliance, and dismissal is without prejudice, there is no need for a hearing. So there is no need for a hearing if the dismissal is involuntary.

Alfred W. Cortese, Jr. & Kathleen L. Blaner, 96CV063(Supp): "To the extent that the amendment is understood as codifying existing practice, it is unobjectionable." But it does not authorize the court to remake the deal struck by the parties.

Leonard I. Garth, 96CV065: As written, this rule seems to require a hearing and notice to all class members in any action that includes class allegations. Class allegations are routinely added in all the pro se prison conditions complaints we receive. Probably the Committee does not intend to require hearing and notice; this could be made clear by limiting subdivision (e) to "a class action that has been certified." If the Committee does mean to require notice and hearing before dismissal of every action that includes a class allegation, the proposal is wrong.

Stanley M. Chesley, 96CV078: Often the action is not dismissed upon settlement. The court retains jurisdiction to administer the settlement. "The language change appears to require another notice and hearing at the time of the dismissal subject to settlement."

Clinton A. Krislov, 96CV088: Criticisms of class settlements arise from inadequate representation of the class.. Defendants exert tremendous leverage. Often there are many parallel class actions. Within the federal system, the MDL system works well, although it tends to select the forum most convenient for the defendant. But there is no device to coordinate state actions. Parallel actions creates "the unfortunately perfect structure for a 'Dutch auction' by which the defendant shops the deal around among the cases. * * * The leverage is real and powerful." Objectors typically are rebuffed. Even when they produce "vast improvement in the settlement, the courts favor original counsel and allocate the lion's share of the fee to them." Rule 23(e) should be strengthened. One improvement would be to require "the inclusion of the views of all counsel, including objectors' and competing parallel case counsel as well." Another improvement would be to resolve the conflict among the circuits by clear rules for appeal standing. The minority view that any class member has standing to appeal approval of a settlement works. But it may be better to follow the middle ground that allows appeal standing for any objector who participated in the trial-court proceedings.

FRCP Committee, American College of Trial Lawyers, 96CV095: The proposed amendment is desirable. It is customary to hold a hearing. The hearing helps dispel confusions often caused by class notice. But "the lack of standards or criteria in Rule 23 to guide a district judge in evaluating a proposed settlement" are a matter of concern.

Jeffrey J. Greenbaum, 96CV119: Although this is a good idea, it should be made clear that notice to the class and a hearing are not required for "a voluntary or consensual dismissal prior to class

certification." Precertification dismissals present reduced risks, and assurances can be required that obviate any danger of collusion.

Donald E. Klein, 96CV146: "[A]fter a successful Motion to Dismiss or Motion for Summary Judgment by Defendant(s) must there be a further hearing pursuant to Rule 23(e) before the action can be dismissed?"

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: Supports, but the Committee should make it clear that the rule applies only when there is a risk of prejudice to the class. There is no need for notice or hearing if there is an involuntary dismissal, nor if there is a voluntary dismissal on terms that do not prejudice the class. This is the present practice, and it should be confirmed.

David L. Shapiro, 96CV153: The specification of matters considered in a fairness hearing should be expanded, even if the settlement class proposal is abandoned.

Summit Bank, by Anthony J. Sylvester, 96CV159: Notice of dismissal or compromise should be required only if certification has been granted. Members of an uncertified class are in no way prejudiced by settlement or compromise. The would-be class representative should not be burdened with notice costs absent certification.

American Bar Assn., 96CV162: Supports.

ABA Section on Litigation, 96CV162: (This Report is not ABA policy.) The express hearing requirement is particularly important in light of the settlement class proposal. But notice and hearing should not be required when an action brought as a class action is dismissed voluntarily or by consent before a ruling on certification. "With respect to pre-certification dismissal, the court can usually require sufficient assurances to protect against collusion."

ABA Torts & Ins. Practice §, 96CV162(Supp.): The revision requires notice before dismissal, and a hearing. This embodies present practice in most, although not all, federal courts. It is generally a good thing. Neither the present Rule nor the proposed amendment require notice and hearing for a precertification dismissal; there is no need to amend further to clarify this. But the Note might well refer to this.

Federal Bar Assn., 96CV170: "Subdivision (e) should be adopted. This amendment will conform the rule to the present practice of holding hearings to protect the rights of the class members."

Certificate Clearing Corp., 96CV172: (Certificate Clearing Corporation is engaged in the business of making an independent market for the exchange of coupons arising from coupon settlements. In a settlement in *In re BMW M5 Litigation*, 91CH 04192 (Ill.Cir.Ct. Feb. 9, 1993), the plaintiff requested that a secondary market device be adopted. The settlement called for $4,000 coupons good toward automobile purchases or leases. 7% of the class redeemed their coupons. A few transferred their coupons independently. More than 50% sold their coupons to CCC.) (1) Notices of pendency and of settlement are often incomprehensible; some class members even think they are being sued. (2) Class counsel should be responsible for making efforts to locate class members after a first mailed notice is returned by the Post Office. (3) The objection process is made as difficult as possible by class counsel and defense counsel. More time should be allowed. Access to information

about the settlement needs to be improved. Discovery is critical. (4) Usually the defendant winds up as administrator of a coupon settlement, and can effectively defeat use of the coupons if it wishes. Class counsel, having been paid, takes no interest. "Coupon settlements are incompatible with the judicial process. Coupons have a finite life. The judicial process can be manipulated by the defendant to leave every issue unresolved until after the coupon expires." A third-party administrator could be appointed to solve these problems.

California State Bar Comm. on Fed. Cts., 96CV179: "[I]t is unclear whether hearing provides superior review of a settlement proposal if the proponents seek to waive the hearing or no objectors intend to appear at the hearing. In such an event, however, the administrative burden on a court to hold a hearing if none of the parties object or appear at the hearing is likely minimal at best." The mandatory hearing requirement would likely best serve and protect the parties' interests. The proposal is endorsed.

California State Bar Comm. on Admin. of Justice, 96CV180: "Most courts already follow this procedure, but this protection should be mandatory."

HEARINGS

Philadelphia Hearing

Roger C. Cramton, Tr. 94: The hearing requirement is meaningless; it exists now in the decisions. What is needed is to amend (e) to specify matters that must be considered, specify procedures for objections, and require findings on the relevant matters. (This is summarized with his testimony on the (b)(4) proposal.)

William Leighton, Tr. 144-148: As a citizen affected by class actions, believes that Rule 23(e) should be amended to include the elements listed in his written statement. And notes settlements that have proved to be improvident, while cutting off the rights of class members to seek effective relief.

Dallas Hearing

Stanley M. Chesley, Tr. 141-142: The proposal is "burdensome and unnecessary." After settlement is approved, the court typically retains jurisdiction to administer the settlement. Does the proposal require a second hearing after the settlement has been implemented? Notice for a second hearing would be expensive — for example, one publication notice in USA Today costs $26,000.

Rule 23 Comments: (f) Appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alfred W. Cortese, Jr. & Kathleen L. Blaner, 96CV063(Supp): Strongly support the amendment, suggesting that the reference to restraint be removed from the Note. "As a practical matter, erroneous class certification imposes irreparable injury unless remedied before the case proceed further."
Michael D. Donovan, for National Assn. of Consumer Advocates, 96CV064: Interlocutory appeals will be sought by all defendants, and ordinarily stays will be granted. Plaintiffs will almost never appeal in consumer actions. "Therefore, the rule as written does little to advance a claimant's situations, but does provide significant dilatory opportunities for defendants." California allows appeal from denial of certification on the ground that it effectively terminates the action.

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

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

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

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

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

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

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

John L. Hill, Jr., 96CV094: The opportunity to appeal should encourage more rigorous district-court decisions, and deter the use or threat of certification as a tool to leverage settlements. The Note should not discourage use of the appeal device.

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

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

Sheila L. Birnbaum, 96CV107: "[A] defendant evaluates 1,000 individual cases very differently than it evaluates a class with 1,000 members." If there is a judgment for the class, the defendant cannot

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

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

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

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

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

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

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

John L. McGoldrick (Bristol-Meyers Squibb), 96CV116: Prefaces endorsement of the need for interlocutory appeal by describing the abuses of Rule 23. Rule 23 often means "that companies that have committed no legally cognizable wrong find it necessary to pay ransom to plaintiffs' lawyers because the risk of attempting to vindicate their rights in a class action is simply not a sensible business decision. Corporate decisionmakers are confronted with the implacable arithmetic of the class action." "American companies often feel forced to decide — after shaking their heads in disgust at the legal system — to pay what amounts to blackmail in order to settle meritless lawsuits." If they decide to fight, often it is not because it makes economic sense but because they need to defend other stakes — the hard-won gains from a strong affirmative action program are threatened if they settle an employment discrimination action, or a strong reputation for product quality is damaged by a settlement. Section 1292(b) appeals and mandamus in fact provide review in only a small fraction of cases; the numbers found by Anderson show 15 interlocutory appeals and 3 mandamus petitions that reached the merits in the last 10 years. Some district judges deny certification because they do not appreciate the enormous practical impact of certification. And, worse, some deliberately use unreviewable certifications to force settlements. Counsel often shop for favorable courts and judges. "[W]hether a company will deem it economically rational to defend its rights in court, or decide it economically necessary to pay an extortionate settlement, may well depend on the outcome of the class certification question." A realistic possibility of review also may spur district courts to take certification decisions more seriously. The opportunity for review is not a one-way street; plaintiffs too have sought review, and may benefit from it.

Jeffrey J. Greenbaum, 96CV119: This is a substantial improvement. Plaintiffs denied certification may face crippling costs of trial before winning a final judgment. Defendants confronted with certification may face potentially ruinous liability for weak claims. The pressures on defendants are increased in the increasing number of cases that certify mass torts. (f) "is an important step to achieve fundamental fairness." And it reduces the pressures that may distort mandamus review practice. But the Note is too restrictive in many respects. The references to restraint in granting review, and to a mere "modest expansion" should be deleted. The suggestion that review almost always will be denied when certification turns on case-specific factors also is unwise — substantial justice may require review even in such circumstances. The invitation to district judges to express their views on the wisdom of appeal "appears to reintroduce unnecessarily the often insurmountable certification provision of * * * § 1292(b) * * *." Finally, 10 days is too short in the unusual circumstance that justifies a motion for reconsideration because the trial court has overlooked a controlling fact or point of law. The period should run from the order granting or denying certification or from an order denying reconsideration.

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

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

Brian C. Anderson, 96CV125: "[T]he most important proposed amendment is Rule 23(f)." Trial courts vary widely in their understanding of Rule 23; precedent can be found for almost any proposition.

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

Gerson H. Smoger, for ATLA, 96CV126: ATLA policy "opposes any court rule that would establish special appeal procedures for class actions, or which would confer special rights on parties with respect to appeals from orders granting or denying certification of a class."

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

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

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

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

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

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

judges are ready to certify the ruling for appeal.

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

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

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

Fed.Cts.Comm., Chicago Council of Lawyers, 96V148: It is difficult to square a proposal for more frequent appeals with the deferential standard of review applied on appeal. There is no empirical support for the implicit view that district courts are prone to err in certification decisions. Indeed, district courts may become less responsible if the locus of responsibility is shifted to appellate courts. "[P]arties opposing class certification will face irresistible client pressure to pursue appeals whenever class certification is granted." When certification is denied, however, there is little likely benefit from appeal because appellate courts are not likely to force certification on an unwilling district court. If the proposal is adopted, the "restraint" language from the Note should be incorporated in the text of the rule.

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

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

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

settle.

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

American Bar Assn., 96CV162: Supports.

ABA Section on Litigation, 96CV162: (This Report is not ABA policy.) The proposal "is a substantial improvement over current practice." Plaintiffs denied certification face litigation expenses grossly disproportionate to their individual claims. Defendants confronted by certification may face ruinous liability, particularly with the growing tendency to certify mass-tort claims. The proposal properly balances the need for procedural protection against the danger of unreasonable delay. But the short time period for appeal may create difficulties when there is good reason for seeking reconsideration in the district court. The rule should be changed to make the 10 days "run from the order granting or denying class certification or denying reconsideration of such a determination."

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

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

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

Bradford P. Simpson & B. Randall Dong, 96CV173: Strongly oppose. If it goes forward, it should be revised to allow pretrial discovery and other procedures to continue during the request for permission

to appeal and during any appeal granted. "Without such a change this rule simply becomes a tool for delay in the repertoire of defense counsel."

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

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

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

TESTIMONY

Philadelphia Hearing

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

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

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

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

Barbara Mather, Tr. 65-67: This is the first real opportunity to appeal. Section 1292(b) does not do

it, and mandamus is not the right way to go. Even when egregious cases come to the courts of appeals, the courts will write balanced, thoughtful opinions; there is no reason to fear development of a skewed body of precedent.

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

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

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

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

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

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

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

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

Dallas

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

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

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

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

John L. Hill, Jr., Tr. 113-116: Experience as former Chief Justice of Texas demonstrates the value of interlocutory appeal from class certification decisions. The right to a stay of trial-court proceedings also is important. The proposal will "go a long way toward preventing the use of class actions as a tool to extort settlements."

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

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

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

San Francisco Hearing

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

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

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

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

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

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

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

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

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

Jeffrey J. Greenbaum, Tr. 149-153: Class certification is outcome-determinative. It is the ball game. It creates insurmountable pressure to settle. Interlocutory appeal is important not only in mass torts, but also in securities and antitrust and other areas. But the comments should not take away what the rule gives. There is no need to speak of restraint; the appellate courts know which case they are going to hear. There may be a flood of applications during the first years after the rule is adopted, but

lawyers will learn and will seek an appeal only when there is a good chance that it will be granted. The Note also should not disparage appeals based on case-specific matters; individual justice is important, not merely resolving novel issues of law. And it is unwise to encourage district courts to express opinions on the advisability of appeal. That has been an insurmountable hurdle in § 1292(b) procedure. Most lawyers have problems in persuading a judge that an issue should go up on appeal now. "And I think a lot of judges may not see that clearly, and I think you should allow three objective people to make that decision." Finally, the time limit should include a period for reconsideration by the district court before appeal time expires.

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

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

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

Donn P. Pickett, Tr. 221-224: With certification decisions made "when" practicable there will be an even better to support interlocutory review, and (f) will work still better. The beauty of the proposal is that it is neutral, favoring neither plaintiffs nor defendants. It gives the appellate court "pure discretion," unencumbered by the technical requirements of § 1292(b). The Note seems to take away from the discretion by describing a modest provision to be used with restraint, and hardly ever in cases that turn on case-specific matters. It is better to leave it all to the appellate court, on the model of certiorari. These notes are, in practice, used to create side debates.

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

Enabling Act Comments

FRCP Committee, American College of Trial Lawyers, 96CV095: The (b)(4) settlement class proposal may "constitute creation of substantive law and in doing so, violate the Rules Enabling Act."

Sheila L. Birnbaum, 96CV107: In discussing the proposed 23(b)(3)(F) factor, urges that the Note be modified to delete references to the public values of class-action small-claims enforcement. "[I]t is outside the scope of the Rules Enabling Act for the Advisory Committee to confer upon class counsel the role of a private attorney general, which is exactly what the Draft Note appears to do."

Arthur R. Miller, 96CV111: Dissatisfaction with class actions reflects a myopic focus on a particular procedural vehicle. Mass problems and mass litigation arise from contemporary social phenomena that are far beyond the scope of the rulemaking power. Aggregation will occur in one way or another; the question is what means are best. The subfactor (F) proposal would permit courts to refuse to enforce some substantive policies when the benefits to individual class members do not seem to justify the costs and burdens of class litigation. That modifies substantive rights and is beyond the limits of the Enabling Act.

Miles N. Ruthberg, 96CV112: This is a plea that as now administered, Rule 23 defeats substantive rights. The proposed amendments are necessary to restore a proper balance. Courts do not insist on "unity of proof." The claims of representative plaintiffs may be stronger than the claims of other class members, imposing liability that denies the due process rights of defendants. Or the claims of representative plaintiffs may be defeated by defenses that do not apply to other class members, defeating the due process rights of the class. "[T]he underlying substantive claims are effectively altered * * *." Under the Enabling Act, Rule 23 "cannot be allowed to create or alter the underlying substantive claims. * * * Deterrence, to the extent intended by Congress, is appropriate; over-deterrence, given the resulting social and economic costs, is not. Unfortunately, experience has shown that trial courts too often stretch Rule 23 to accommodate class actions — even when it means altering legal rights by glossing over differences in proof and coercing defendants to settle cases that never should have been brought."

William A. Montgomery (State Farm Ins. Cos.), 96CV122: The suggestion in the Note on factor (F) that class actions serve a deterrent function "is beyond the scope of the judiciary's authority under the Rules Enabling Act." [Mr. Montgomery states in a supplemental statement that "[t]he class action device is not intended broadly to expand or modify substantive rights by creating an open invitation for self-appointed 'champions' of public interest to pursue their goals through glass litigation. * * * [M]odifying Rule 23 to incorporate a deterrent effect concept would contravene the constraints imposed by the Rules Enabling Act."

Paul D. Carrington, 96CV138: This comment is twenty single-spaced,

small-typed pages constituting the body of an article co-authored by Professor Carrington and Derek Apanovitch. The footnotes are omitted. It is tightly written. Even this lengthy summary does less than justice to the message. And the message is important: it is urged in many ways that proposed Rule 23(b)(4) is invalid, and that in any event it would be folly to pay the price that must be paid for attempting to push it through the Enabling Act process.

The discussion is focused almost entirely on settlement classes in mass tort litigation. It is based on the assumption that common issues need not predominate in a (b)(4) action. This assumption is not necessarily at odds with the fact that a (b)(4) class must satisfy the requirements of (b)(3). It may be meant to urge that common issues predominate in a (b)(4) class only in the artificial sense that the many individual issues are improperly swallowed up by the settlement. Many of the arguments might seem to suggest that a (b)(3) class action can never be settled, but it is implied repeatedly that settlement of a (b)(3) litigation class may be legitimate. Many of the arguments rest on the impact that a settlement class has on rights created by state law; to that extent, they do not address the use of settlement classes in federal-claim cases such as the frequently offered antitrust and securities law examples.

The shortest statement of the argument appears at p. 7 of this draft: Proposed (b)(4), and the district-court practice it would legitimate, are not procedure but "radical tort reform." Some version of this proposal may be desirable, but the judgment must be made by Congress, not through the Enabling Act. "The attainment of global peace in mass torts is a legislative purpose of formidable complexity."

Ten substantive consequences of the (b)(4) proposal are enumerated. **(1)** Unless all class claims are governed in all aspects by the law of one state, the settlement class "necessarily overrides differences in state law." Congress might have power to do this, although even a statute "might be denoted as a randomized preemption of state law vulnerable under the Due Process Clause of the Fifth Amendment." **(2)** The proposal supersedes state choice-of-law principles, binding on federal courts through *Erie* and *Klaxon*. **(3)** The class creates an artificial contract between class members and class counsel; notice and opt-out procedure does not justify this, since the typical class-action notice "is so uninformative to the average citizen * * * as to make most other contracts of adhesion look like carefully negotiated bargains." The danger of the fictional contract is minimized when there is a trial. But a settlement class, "not identified by the predominance of common questions," burdens class counsel with conflicts of interest. "It is beyond the experience or expectation of reasonable citizens that the failure to respond to what looks like a piece of junk mail constitutes assent to the employment of self-selected counsel to represent the mail recipient in an action involving serious personal injury or death." **(4)** The fictional contract radically modifies ordinary attorney-client relations, because ordinary client control of settlement is displaced. "Moreover, an ordinary lawyer has a duty to reject a compromise providing generous fees but modest relief for the client." **(5)** A lawyer who betrays duties owed to a client is subject to state-law sanctions. If it is intended that (b)(4) insulate against such state-law sanctions, there is another displacement of substantive state law. **(6)** There is no standard to support meaningful evaluation of the substantive individual claims surrendered by the class settlement. It may be possible to prudently evaluate individual claims when common issues predominate, as in a (b)(3) litigation class. But it is not possible "[w]hen common questions do not predominate, as in proceedings under proposed * * * (b)(4)," absent information on the merits of each case — "a process that would defeat the purpose of the exercise." The property rights class members have in their claims are modified. **(7)** Typically the defendant has no interest in the allocation of the global settlement among class members. "The result is that the cost of defending against false or excessive claims falls on the class." **(8)** "[T]he right to individual control and management of one's own personal injury claim is itself a substantive right, indeed perhaps a constitutional right. * * * A legal system that no longer has time for individuals has seriously modified the quality of justice." **(9)** The defendant's ability to pay is a significant factor in judging the fairness of settlement. The ability is connected to the defendant's

other substantive rights and duties. In many settlement mass-tort classes, (b)(4) will become "a voluntary bankruptcy process for use by solvent debtors." It lacks, however, any of the complex standards and procedures addressed by bankruptcy law. **(10)** The Committee Note will encourage courts to go still further in fashioning global peace for defendants by settling the claims "of future plaintiffs, including those yet unborn."

The next portion of the article urges that working all of these substantive effects through a judicial process "would * * * be in violation quite possibly of every constitution in the world," and surely violates our Constitution.

Constitutional concerns are tied tightly to practical political concerns. The "rulemaking process has been embattled in recent years." Those engaged in the process should remember Ron Degnan's advice at the beginning of the process that led to adoption of the Evidence Rules and the subsequent intervention by Congress: reaching for too much may cost them everything.

"The disability of Article III judges for the practice of democratic politics was recently illustrated by the action of the Judicial Conference of the United States derailing the proposal to restore the size of civil juries to twelve." (The many faces put on the relative disability of Article III judges do not reflect great esteem for the probable workings of Congress — at p. 11, for example, it is noted that "[e]xperience with civil procedure fashioned by factional democratic policies * * * was generally adverse.")

The Supreme Court itself will be transformed if it should ill-advisedly take on the role of "making laws evoking a high level of political partisanship and lobbying activity." It will not long rely on the Judicial Conference or Judicial Conference committees "to keep it informed about the social, economic, and political consequences for which it is asked to take responsibility."

"Paragraph (b)(4) is politically controversial, supported by some factions and opposed by others. That is a solid proof of its substantivity in the pragmatic sense." The strong reactions of opposing forces reflect that "the proposal has important effects extrinsic to the process by which courts decide cases or controversies in accordance with law." That makes the question one for Congress. The Civil Rules Committee "has never recommended a rule to which there was stout, principled opposition by persons aggrieved by the prospective substantive consequences of the pending proposal." (There follow a series of examples suggesting that at times the Reporter, the Committee, or the Court have overlooked Enabling Act limits by recommending and adopting rules with substantive effects.)

The 1966 adoption of (b)(3) was meant to address the problem of one-way intervention in the former "spurious" class action. There was little concern regarding its validity because "no one favoring the addition of paragraph (b)(3) envisioned the uses to which that text would be put. * * * Assuredly, no one in 1966 considered the possibility of an action being certified as a class action for the sole purpose of approving a settlement under that subdivision, thereby conferring a res judicata effect on an essentially non-judicial resolution of the claims of thousands and even millions of non-parties." It is well within the aim of procedural law reform to facilitate aggregation of claims for smaller harms. But it was necessary to reject the improper extensions into such things as fluid recovery, or requiring the defendant to pay for class notice.

In the 1980s the Committee "was unanimous in the view that Rule 23 was too politically freighted to bear treatment by the apolitical process associated with Article III institutions." The innovations that have been made in adapting Rule 23 to mass torts appear to be the work of only a few prominent members of the federal judiciary. The Third Circuit, even in rejecting such an attempt in the *Georgine* case, suggested that perhaps the Enabling Act process should address the

question. "In making that suggestion, the court was inattentive to the statutory and constitutional limitations on the rulemaking power."

David L. Shapiro, 96CV153: Carrington and Cramton have addressed the Enabling Act issues; their arguments need not be repeated. Rule 23 presented Enabling Act difficulties in its original form, and the difficulties were exacerbated by the 1966 amendments. The highly controversial present proposals, and particularly the factor (F) small-claims proposal, "may well constitute the last push needed to plunge the rule over the Enabling Act precipice." These concerns "argue strongly for leaving these difficult questions for resolution either by federal legislation where that is appropriate, or by state authorities where state law governs under Erie."

ABA Tort & Ins. Practice §, 96CV162(Supp.): In expressing the views of Task Force members who oppose factor (F), argues that "(F) embodies a value judgment about the worth of small claims class actions, and provides federal judges with virtually unbridled discretion to reject this type class action." This exceeds the Advisory Committee's authority by making a normative policy decision about these class actions that is a matter for Congress.

Roger C. Cramton (November 23, 1996 Letter): Urges the views advanced in the May, 1996 letters to the Standing Committee from Professor Carrington, and from Professors Miller and Shapiro. (1) Consent is a weak basis for substituting settlement deals for substantive rights. (2) Federalism concerns weigh against private deals between a class lawyer and a defendant that displace state tort and contract law. (3) Separation-of-powers concerns weigh against substitution of vast claims-administration systems for court-administered justice.

PUBLIC HEARINGS

Philadelphia Hearing

Stephen Burbank, Tr. 139-142: (b)(4) does not seem to raise Enabling Act problems under current interpretations of the Act, because they set very loose standards. We should take seriously the prospect that there may be limits beyond those stated in Sibbach and Hanna. Rulemaking should not extend to rules that predictably and unavoidably affect rights under the substantive law. The (b)(4) proposal does not seem to do that. More generally, however, there is a special problem. Rule 23 may not have been intended to affect substantive rights, but it has. Does that mean that the Supreme Court cannot undo or temper what it has done, because that is to modify the substantive effects it has wrought? That would put the Court in an impossible position.

San Francisco Hearing

Eric Green, Tr. 36-37: Experience with Evidence Rules 413, 414, and 415 supports the view that it would be better for the Committee to address settlement-class issues than for Congress to do so. But has not studied the question of Enabling Act authority.

Arthur R. Miller, Tr. 79-80: Both (b)(4) and (b)(3)(F) may violate the Enabling Act. "This back-room deal, 'Hey, let's get together, start the class, and then here's the settlement,' I mean, that's a real article 2072 problem. But that lies in writing the rule properly, or relying on the inherent good sense of district judges working with counsel under the Canons of Ethics * * *. I certainly would limit (b)(4) to a situation in which you have an adversary proceeding, anterior to any settlement. But you're on the knife's edge. I think modern rule making is always going to keep this Committee on the knife's edge."

Rule 23: Other Comments

Preliminary Consideration of the Merits

Bartlett H. McGuire, 96CV028, 96CV092: This comment is the draft of an article captioned "The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits." The title describes the suggestion — the Committee should not have abandoned the proposals to require preliminary consideration of the merits as part of the (b)(3) superiority analysis. Unlike the proposals most recently considered by the Committee, this proposal would make consideration of the merits simply one of the list of superiority and predominance factors, as a new (b)(3)(D):

> **(D)** whether there is a substantial possibility, as determined after a preliminary assessment of the merits of the claims (which may include a preliminary hearing and a review of related litigation), that the claims of the class and the class representatives will succeed on the merits;

The article suggests that the Eisen statements that prohibit preliminary consideration of the merits were mere dictum, and not authorized by the structure of Rule 23. The decision in the Coopers & Lybrand case that rejected "death-knell" appeals from orders that deny certification is said to be inconsistent with Eisen, since the Court reasoned that a class certification decision is not collateral to the merits but instead is entangled with the merits.

Perhaps more important, there are many settings in which the class certification decisions of lower courts regularly consider the probable outcome on the merits. Cases that turn on the maturity of mass-tort claims deny certification before there has been substantial litigating experience, and — as in the asbestos cases — approve certification after there has been enough other litigation to ensure complete discovery and good information about probable determinations of liability and typical damages awards. Determination of mandatory "limited fund" class certifications require assessment not only of the defendant's assets but also of the probability of adverse judgments on the merits in sufficient amounts to exceed the assets. Motions to dismiss or for summary judgment are resolved before certification, effectively denying certification after an adverse determination of the merits. Certification of a settlement class and approval of the settlement necessarily involve an appraisal of the merits. And in other settings as well, clandestine consideration of the merits is common.

The 1979 Department of Justice bill, H.R. 5103, 96th Cong., 1st Sess., called for a showing of sufficiently serious questions going to the merits to make them fair grounds for litigation, drawing from one articulation of the preliminary injunction standard. District courts have suggested other phrases; the most apt is Judge Weinstein's "substantial possibility of success." This requires less than a 50% chance of success, but more than is required to defeat summary judgment or dismissal. The determination is easy to make with mature mass torts, or in actions that follow government litigation. As to small-claim litigation, on the other hand, there is not likely to be any substantial experience with related litigation; the finding would be based on initial disclosures, some limited discovery controlled by the court, and evidentiary hearings. The fact that claims are small and are not likely to be pursued by other means would be a reason to lower the threshold.

The concerns that have deterred the Advisory Committee are overblown. The preliminary inquiry into the merits need not engulf the process, and the fruits of discovery will remain useful whether or not certification is granted. A discovery-assisted assessment of the merits will, moreover, reduce the risks of untoward settlement. The indication of probable outcome on the merits will be

useful, not a hindrance, as the case progresses.

(The summary of his Dallas testimony, 96CV092, is similar. The testimony is set out at Dallas transcript, 163-169. The task of assessing the merits without undertaking a preliminary trial is a matter of case management, of control by the trial judge. The preliminary assessment may provide some guidance for settlement; if the result a determination that it is a strong claim, the settlement is likely to reflect the strength of the claim. Today, many lawyers say that settlement discussions do not reflect the merits; "going to a jury is a crapshoot, and everyone can get stung and the sensible thing to do is settle this on the basis of the amount in controversy with a discount of some kind * * * we never even talk about the merits." The court should look for a "substantial possibility of success," or "substantial evidence.")

96CV033: Brenda Fontaine, President, and Alan M. Porten, Vice-President, Class Actions Notification, Inc.: A request to testify at the November 22 hearing that suggests that they will be advancing suggestions for making more effective notice in (b)(3) and (b)(4) class actions. This may be superseded entirely by their testimony.

William T. Coleman, Jr., Esq., 96CV068: Was present "at the creation" of present (b)(3), and urges several changes to correct the "unmitigated disaster" that courts have worked by failing to adhere "to the clear language of the Rule and the Committee Notes." (1) Any class-action complaint must be pleaded with particularity. (2) If certification is denied, the court should follow the approach used with discovery disputes: the moving attorney should be required to pay the expenses caused by the motion unless "there was substantial justification for each element of the failed motion." (3) A "classwide proof" requirement should be added, in line with several appellate decisions that require consideration of the way in which the case actually will be tried. The movant "must show that the evidence likely to be admitted a trial regarding all elements of the claims asserted by the certified class will be substantially the same as to all class members." This conforms to the original intent that certification "would be available only where the evidence applicable to all putative class members' claims would be virtually identical." (4) The superiority requirement should be clarified to exclude almost all actions that simply "piggyback" on parallel public enforcement proceedings. If the claims "could be resolved through federal or state administrative processes, class certification usually should be denied."

Gerson H. Smoger, for ATLA, 96CV126: ATLA policy on class actions includes, ¶ 5, opposition to any rule that would permit consideration of the merits among the criteria for certification.

Mass Torts

D. Dudley Oldham, 96CV083: Single-event mass torts may be appropriate for class treatment. Dispersed mass torts are not. Rule 23 should be amended to exclude them.

Patrick E. Maloney, 96CV090 & Supp.: For Defense Research Institute. Rule 23 is not appropriate for dispersed mass torts. Rule 23 often permits distant courts and attorneys to deprive plaintiffs "of the personal control of their claims which they deserve." The Supplement adds: "We wish the Advisory Committee would announce affirmatively that dispersed mass torts are not appropriate for resolution under the rubric of Rule 23(b)(3)."

G. Luke Ashley, 96CV091: Takes exception to the Note references to mass torts. The Seventh Amendment jury-trial right requires that "only one jury * * * determine all issues necessary to fashion a judgment," and that a jury resolve individual issues of causation and damages. Individual issues thus necessarily predominate. Individual issues also may predominate as to some seemingly basic liability issues — a duty to warn of product dangers, for example, may arise only as to products made after a particular time, yielding different answers for different plaintiffs, or may depend on the differing circumstances of different plaintiffs. Punitive damages determinations are inextricably intertwined with issues of liability and compensatory damages. "The suggestions in the commentary that class certification in mass tort context would now be more appropriate are totally unwarranted and should be eliminated."

William S. Wells, 96CV130: There should be probable liability rulings as a preliminary to class certification, based on a minitrial proceeding and — if warranted by the minitrial — trial of a test case. An administrative tribunal may be needed to handle claims assessment. A workers compensation model should be considered as a means of funding damage payments.

Nicholas J. Wittner (Nissan North America), 96CV158: The Committee Note should reaffirm the 1966 caution against using class actions in mass torts.

William T. Coleman, Jr., Phil.Tr. 204: As a member of the Advisory Committee when Rule 23(b)(3) was created, assures that "what the courts have done * * * was far beyond what we have ever intended." The Note said that mass torts would not be covered. The Committee was thinking of things like a plane crash. Once you move beyond those, there are different state laws; it is a mistake to attempt to try a few issues in isolation and send the rest of each case elsewhere to be completed. We have gotten away from the requirement that most issues should be common. A federal judge has attempted to resolve the choice-of-law problem by taking one rule of negligence for all claims. The "conglomerate rule of law * * * wasn't what was meant when Rule 23 was adopted."

Arthur R. Miller, San F. Tr.68: Perhaps the time has come to abandon pure transubstantive rules and write a mass torts rule. The Committee should think about it.

Samuel B. Witt, San F. Tr. 95-96: The Committee should think further about mass tort class actions. "General causation does not determine the specific causation necessary to find an individual defendant responsible. And that's the defect in the system that needs to be focused."

Sheila L. Birnbaum, San F. Tr. 106-118: Speaking only to mass torts, states that even cases that have

no merit cannot be tried. The Copley case, involving a contaminated drug, is a good illustration. It started trial but then settled. There were five representative plaintiffs. Each may have been injured in a different period of time, with different facts. Trial means adducing much evidence that does not apply to other plaintiffs. "Everything gets mixed together. There is no way to separate it. Each plaintiff gets [sic] credence to every other plaintiff on the causation issue * * *. People look at class actions differently. They respond to it differently." When you calculate the chances of trying a case, you cannot do it. "So the playing field changes when you certify a class. It's inevitable; it's innate. You can't help it. What charge do you give in a national class on a mass tort"? In the Copley case, on discovering that not all states adhere to Restatement Second of Torts § 402A, the judge decided to give the jury six separate instructions based on the laws of the states of the representative plaintiffs." Such cases should not be certified.

Common Evidence

Alfred W. Cortese, Jr. & Kathleen L. Blaner, 96CV063(Supp): Approves the recommendations for class-wide proof. "A number of federal courts have adopted similar requirements." This will ensure the efficiencies class actions are intended to provide.

John Beisner, 96CV086: Proposes addition to (b)(3) of a new element in addition to predominance and superiority: "(ii) that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought is substantially the same as to all class members." "The real problem * * * is that the judicial system increasingly allows litigants to bring and pursue meritless class actions whose stakes are so high that defendants have no choice but to accede to the extortionate demands * * *. [S]ome courts * * * are paying mere lip service to * * * commonality." The issue is not only whether there are common questions, but also whether there are common *answers*. "Either the class defendant is liable to all members of the class, or it is liable to no class members." Unless the court considers carefully the variations in evidence relevant to individual class member claims, "there is a significant risk that named plaintiffs whose claims may be strongest may be advanced to mask the relative weakness of other class member's [sic] claims." The amendment would prevent class members from escaping the burden of proving their claims that would exist in individual litigation. It also would require the court to think at the certification stage about how the case would be tried as a class action. (His Dallas testimony, Tr. 97-104, repeated the theme. Courts are forgetting that individual litigation is the bedrock, that the class action is a narrow exception. There is a need to resurrect the commonality requirement, to focus on how the case will be tried, to consider whether a jury can fairly be asked to return a common verdict. Although common questions, superiority, and predominance are required for (b)(3) classes, "trial courts are increasingly missing that need to look at evidence." Subclasses and issues classes are not a sufficient answer.)

John W. Martin, Jr., 96CV093: Testifying as General Counsel of Ford Motor Company. The proposals all are desirable, but they do not go far enough to cure the many abuses of class actions. As one additional measure, (b)(3) should require that "the evidence likely to be admitted at trial regarding all elements of the claims asserted by the certified class is substantially the same as to all class members." The emphasis is on "all elements." Classwide proof "lies at the heard of the commonality, typicality and predominance requirements." If there are substantial variations, the class will be unfair to the defendant or unfair to class members: the claims of the representative plaintiffs may excite sympathy and unfairly imposes liability for the benefit of all, or may fail for reasons that should not defeat the claims of all others. If an attempt is made to accommodate substantial individual variations, on the other hand, the class will become unmanageable. "Unfortunately, some district courts have failed to give any serious consideration to the proof that would be presented at trial * * * [L]awsuits have been certified that can, as a practical matter, never be tried in a manner that respects the due process rights of the defendant and the unnamed class members." (This suggestion is renewed in his testimony, Dallas Transcript 58.)

Sheila L. Birnbaum, 96CV107: Urges incorporation into the first paragraph of (b)(3) of a new

element in addition to predominance and superiority: "(ii) that the evidence likely to be admitted at trial regarding all elements of the claims asserted by the certified class is substantially the same as to all class members." This reflects the "classwide proof" requirement articulated in such cases as Blue Bird Body Co., 5th Cir.1978, 573 F.2d 309, 321-322, and Walsh v. Ford Motor co., D.C.Cir.1986, 807 F.2d 1000, 1017, 1018. This will defeat the attempt made by some class counsel to rely on proof of individual claim elements as to representative plaintiffs to take the place of proof as to other class members who may not be able to make the showing. Individual reliance in a fraud case must be shown as to each class member. "[T]his tactic is invalid because it seeks to permit individual class members to recover without ever being required to prove their claims. Allowing claims to be tried to a 'yes-or-no' liability verdict as to all class members without ever confirming that the evidence presented actually applies to and proves all class members' claims 'alters substantive rights.'" Trial courts have been certifying classes without determining whether the representative can prove "all elements of all claims at issue using only proof simultaneously applicable to all class members," and have been reversed. See Valentino, 9th Cir.1996, 97 F.3d 1227, 1234; Castano, 84 F.3d at 740, 744-745; American Medical Sys., 6th Cir.1996, 75 F.3d 1069, 1083-1086. Trial courts need to envision how the class claims would be tried. Absent essentially uniform, across-the-board proof, the proceeding either will sink into an unmanageable morass of individualized proof "or class members will effectively be excused from proving their claims. Neither result is consistent with fundamental due process principles * * *."

Miles N. Ruthbert, 96CV112: "Unity of proof" should be required. The common issues must be susceptible to class-wide proof. Due process is denied when the claims of individual representatives do not really reflect other claims — whether because stronger, harming the defendant, or weaker, harming other class members. "[T]he underlying substantive claims are effectively altered and/or individual issues of proof render any trial of the case unmanageable." "Rule 23 should not be stretched to accommodate actions in a way that alters substantive rights by excusing proof of all the elements of a claim, or allowing putative class members to avoid defenses. This is how defendants are railroaded into high stakes settlements that have little or nothing to do with proper liability exposure." (His San Francisco testimony, Tr 159-160, echoes the theme: courts have been increasingly tempted "to see common issues where there really aren't sufficient common issues to justify a class. And when that happens, that has a substantive impact, because, instead of trying a case with all the elements that Congress has laid out, the case threatens to go to trial focusing only on a piece of the claim, and that distorts the substantive law." Mass torts demonstrate this problem.)

Brian C. Anderson, 96CV125: Classwide proof should be required, demanding that trial evidence of matters certified for class treatment be substantially the same as to all class members. Many courts require this now, as part of the commonality, typicality, and predominance requirements. Recent appellate decisions underscore the requirement, but some district courts may prove reluctant. If this is not made a separate and explicit requirement, at least it should be added to the Note. A good focus would be the factor (C) "maturity" part of the Note — in looking at other trials, the court could inquire whether the evidence of individual claims was highly individualized. (Specific Note language is suggested at p. 13. The same suggestion is repeated in his San Francisco testimony, Tr.

205-207.)

Richard S. Paul, 96CV129: Proposes adding a new factor (b)(3)(G): "whether plaintiffs have demonstrated their ability to prove the fact of injury as to each class member, without making individualized inquiries as to class member injury." The need is illustrated by an antitrust class action against Xerox that was certified despite the lack of any showing that classwide impact could be proved.

James N. Roethe (Bank of America), 96CV134: Endorses the proposals of John Beisner, 96CV086, and John W. Martin, Jr., 96CV103. "[O]nce a class is certified, the pressures on the judge at trial to eliminate the requirement for individualized proof establishing each element of a cause of action with respect to each class member, is often overwhelming." It should be required that the evidence likely to be admitted at trial regarding the elements of the claims is substantially the same as to each class member. Suppose, for example, a case in which it is alleged that a bank trust department purchased a real estate investment for thousands of personal trust accounts. Recovery by each trust class member will depend on individualized proof of the trust's investment objectives, time to liquidation, total assets, percent invested in this purchase, participation in the investment decision, and so on. The common questions are overwhelmed by these particular questions. For these cases, coordination or multidistrict proceedings are the proper approach, not class certification. (His San Francisco testimony is similar, Tr. 229.)

James J. Johnson, 96CV135(Supp.): Since 1966, "the defining characteristics of Rule 23(b)(3) class actions [have been] abandoned. In the beginning, common questions of law and fact had to clearly predominate." No more. Yet class actions cannot "fairly resolve claims which raise individualized issues of fact and law." "The advertising claims that Procter & Gamble has faced as class actions involve highly individualistic questions of fact that cannot be resolved fairly on a class basis. The claims turn on issues such as individual reliance, deception, intent, and interpretation * * *. Efforts to resolve these claims on a class basis obscure crucial factual differences."

Stephen F. Gates (Amoco Corp.), 96CV168: Supports the present proposals, but urges more far-reaching changes to end the present abuses of class-action procedure. One of the revisions that deserves consideration is "requiring class-wide proofs."

American Council of Life Ins., 96CV177: (Noted here; there are no specific suggestions for reform, apart from support for the proposals advanced by Sheila Birnbaum, 96CV 107, described in part above.) The statement is "a brief review of the recent devolution of this country's legal climate which has resulted in a predatory legal system consuming legitimate business." Lawyers solicit class-action plaintiffs in the want ads, by 800 numbers, and on the internet. Excessive compensatory and punitive damages are common; in calendar 1994, more than $200,000,000 of punitive damages were awarded in Alabama alone, and many more dollars were paid in settlements reached in the shadow of these awards. "Insurers, threatened with 'betting the company' on one unpredictable jury verdict, have entered into huge class action settlements.; one article discusses seven class action settlements by life insurers totaling at least $700,000,000.

William T. Coleman, Jr., Phil. Tr. 204: Summarized with mass torts. "Rule 23 should be made clearer as to what you really mean by common questions of law and facts." Trial of a few issues, followed by separate treatment of most issues in most individual cases, is a mistake.

G. Luke Ashley, Dal.Tr. 153-158: Experience with the Cimeno case demonstrates the inability of courts to handle mass torts through class-action procedures. The attempt to separate particular issues for class-wide disposition violates the right to jury trial. The Phase I jury, for example, was asked to set a multiplier to set all future punitive damages award as a multiple of individual damages findings, without any hint as to what the damages findings would be. Causation was resolved by looking to the amount of each defendant's product in each workplace, without recognizing that asbestos disease is a response thing in which increased exposure increases the prospect that an individual will contract an asbestos disease. This problem "has Constitutional dimensions in gasoline products doctrine." The suggestion in the Note that the proposed changes will make it more appropriate to certify a (b)(3) class in mass tort settings is wrong.

Samuel B. Witt, San F. Tr. 94-95: John Beisner's common evidence suggestion "makes eminent good sense." And it leads to the question whether mass torts belong in the system at all; when individual evidence of specific causation is required, mass tort class actions do not make sense.

Robert Dale Klein, 96CV113: The proposal does not address the problem of issues classes. Issues classes often are used to create otherwise impossible aggregations that become a settlement club. In almost any setting, some tiny common issues segments can be identified for this purpose. "[T]he issues typically have been so denuded of operative fact as to render them abstract; consequently, any 'common issues' determinations are more advisory in nature than based on the facts of any 'real' case." And there are no judicial economies, only expensive piecemeal litigation that drags on for years.

Patrick E. Maloney, 96CV090 & Supp.: For Defense Research Institute. "[M]ore strict pleading requirements and evidentiary standards should help trial courts in their determination of certification issues."

John W. Martin, J., 96CV093: Testifying as General Counsel of Ford Motor Company. The class plaintiff should be required to plead with particularity under Rule 9(b), "to spell out with specificity the factual and legal basis for" the class claims. Mere boilerplate allegations are too readily accepted now. The extraordinary burden and financial risks imposed by class actions justify this requirement. (Earlier in his testimony, Mr. Martin spells out the considerations that must be weighed by general counsel for a large corporation when a class action is filed, and observes that his company has determined to bear the costs and run the risks of defending against unfounded class claims because of the rapid proliferation of unfounded actions. He also speculates as to the reasons that may be feeding the sharp increase in class actions brought against his company.) (The same suggestion is made briefly in his oral testimony, Dallas Transcript 58.)

John W. Stamper, 96CV108: A particularized pleading requirement might be better than the preliminary look at the merits included in proposed factor (F). A pleading requirement would not present the discovery issues that arise from a preliminary look at the merits by other means. And it would, for example, support a determination "whether the claims of all members of the class can truly be proven through substantially common evidence."

Brian C. Anderson, 96CV125: "Many of these putative class action lawsuits are not well thought-out by the lawyers who file them. I have read hundreds of class action complaints * * * and find myself seeing the same boilerplate language over and over again. There seems to be a canned 'fill-in-the-blank' class action complaint floating around among the plaintiffs' bar * * *. [T]he allegations concerning why the case deserves class treatment are invariably boilerplate, with only minimal effort made to link the factual allegations of the particular case to the requirements of Rule 23." The proposed package of amendments will help. But more aggressive measures are needed to curb the abuses. "[T]he Rule could be amended to require all complaints containing class action allegations to be pleaded with particularity * * *."

Nicholas J. Wittner (Nissan North America), 96CV158: heightened pleading standards should be adopted.

William T. Coleman, Jr., Phil. Tr. 207: We should require "that the complaint should really lay out just what are these common facts and common cause of action. Too often we get a very scoundrel {sic — "skeletal?"} complaint, and that is way after discovery."

Opt-in Classes

John P. Frank, 96CV032: Urges that if the 23(b)(F) proposal is not adopted as proposed, at least it should be carried forward in a revised opt-in form. When the returns to individual class members are likely to be small, notice to the class should fairly describe the prospective recovery. The class would include only those members who cared enough to invest a 32-cent stamp to opt in. "There is no excuse at all for the doers of good in these small bore cases to do their good if the assumed beneficiaries don't want it."

National Assn. of Securities & Commercial Attorneys, 96CV059(Supp): An opt-in mechanism has no advantage, and indeed is not a class action at all. It does not achieve the efficiency and economy of litigation. It denies finality to defendants, and denies relief to plaintiffs. In Phillips Petrol. Co. v. Shutts, 1985, 472 U.S. 812-813, the Court recognized that opt-in procedures would impede the prosecution of small claims. The Court also observed that those with large claims who prefer individual litigation can opt out. Before 1966, the spurious class action was an oddity; one-way intervention denied defendants res judicata protection on success, but exposed them to enhanced liability on defeat. A class action does not depend on consent, but rather on adequacy of representation; see Hansberry v. Lee, 1940, 311 U.S. 32, 41-43. Rule 23(b)(1) and (b)(2) classes do not require notice or consent. In the Shutts case, the Court characterized as a "rara avis" the class member who is unwilling to opt out, but whose claim is so important to him that his consent cannot be presumed absent an opt out. As Professor Kaplan noted in his commentary on the 1966 rule, many small-claims plaintiffs will not choose to opt in because of ignorance or timidity. In the circumstances of (b)(3) classes, it is fair to treat silence as consent.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063 & Supp.: Urges that opt-in classes be adopted to replace present (b)(3) opt-out classes. The change is justified by "the fundamental indeterminacy of the substantive law applied in Rule 23(b)(3) class actions; three decades of sorry experience with (b)(3) classes; the revolution in communications technology; the advent of lawyer advertising; and perhaps most important, recognition that the (b)(3) class action has been stretched so far beyond its intended and reasonable limits that it has become an instrument of injustice, which now inflicts enormous unintended, adverse consequences on plaintiffs, defendants, courts, and society as a whole." Support is found in the 1972 report of the American College of Trial Lawyers Special Committee on Rule 23. That Report suggested several revisions. One would add to the (b)(3) factors consideration whether the likelihood that damages to be recovered are so minimal as not to warrant the intervention of the court; a related factor would allow consideration whether the probability of sustaining the class claim or defense is minimal. It also was urged that in many cases, it would be better to fashion equitable relief than to venture into small individual damages awards — the illustration is a "cy pres" reduction of future odd-lot trading charges rather than millions of small refunds to class members. Rule 23(c)(1) would be amended to require special findings of fact and conclusions of law when certifying a (b)(3) class. The opt-in recommendation was twofold: the court could initially limit the class to those who opt in, or could include all those who do not opt out in the class but then exclude any member who does not file a statement of injury and loss. Finally,

the party opposing the class would be allowed discovery against members of the class before a determination whether to certify the class. (The supplement adds that an opt-in class would remove the in terrorem effect of certifying an opt-out class with an unknown number of claimants. It is noted that a 1977 survey for this Advisory Committee found two-thirds of responding federal judges favored return to opt-in for (b)(3) classes.) (His San Francisco testimony, Tr. 280-287, urges careful thought whether opt-in classes should be adopted across-the-board, or only for (F) type cases. There is a risk that with opt-in classes available, a judge may certify an opt-in class when no class should be certified at all.

Leonard B. Simon, 96CV073(Supp): It would be wrong to move to an opt-in class structure. Former Reporter Kaplan explained the purpose of the (b)(3) opt-out structure: for "'small claims held by small people,'" "'ignorance, timidity, unfamiliarity with business or legal matters'" will deter opt-ins. "'The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government.'" Small claimants are protected by the opt-out structure. Defendants also would be harmed by the lack of res judicata protection. The economies of scale won by class certification are lost when substantial portions of the class are excluded. "I have no doubt that many class members will miss their opportunity to opt in." Experience with claims forms supports this prediction. Sizable numbers of class members come forward in virtually every class action after the claim period has passed, "complaining that they did not receive or did not understand the notice and wanted to file a late claim." "If sizable numbers of class members miss three or more notices under the current system, one can expect even larger numbers to miss their one opportunity to opt in under a new system." Opt-in is not a cure to the problems of small claims any more than proposed factor (F) would be. "Indeed, if the small claims are 'worth it,' asking for opt ins is least defensible in this context, as notice is less likely to get through on the first try, and persons with small claims are less likely to take the trouble to opt in in the face of a legalistic notice and claims form."

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: Most abuses would be eliminated if the opt-out class were dropped in favor of opt-in classes. "The only reason these suits are allowed to continue is because of the absurd presumption in Rule 23 that all members of the alleged class would choose to participate unless they affirmatively act to opt out. * * * Imposing an opt-in requirement would also reduce the membership of the class action bar. It would require that lawyers have real clients truly interested in pursuing a cause of action * * *. [I]t would do away with all res judicata and settlement class issues. Most importantly it would eliminate the coercive element inherent in Rule 23 * * *." An opt-in rule would have to address such issues as "the accuracy of solicitations to potential class members."

Lawrence W. Schonbrun, 96CV105: (Written as an objector to a number of class-action settlements.) Class actions too often yield high attorney fees "at the expense of advancing the rights of the members of the class." The default mechanism for (b)(3) should be changed from opt-out to opt-in. This would curtail abuses and protect the goals of class litigation. "An opt-in proceeding eliminates

the ability of class action attorneys to force settlements down the throats of, believe it or not, hapless defendants when sued on behalf of hundreds, thousands or millions of unnamed members of a class. These are persons who have demonstrated no interest or connection with the litigation and would, more than likely, be appalled if they realized the amount of attorneys's fees being obtained in their name."

Guy Rounsaville, Jr., for Wells Fargo & Co., 96CV120: Support John Frank's opt-in proposal. It is clear that the opt-out procedure was never intended to apply to classes with thousands of members. "The 'opt out' procedure is predicated on the fiction that all class members are presumed to want litigation. In fact, the opposite presumption is more likely true, and makes for better social, judicial and economic policy. * * * We should presume rational consumers, aware of the true costs of such litigation, would not want it."

Donn P. Pickett, 96CV128: "The simple, but meaningful change of converting all Rule 23(b)(3) classes from opt-out to opt-in so that a certification order binds only those putative class members who choose affirmatively to enter the action * * * will promote the resolution of real disputes between live parties, restore accountability and eliminate many of the existing abuses of the class action mechanism."

William S. Wells, 96CV130: In cases with an unfavorable cost-benefit ratio, the class could be limited to those who provisionally opt in and then do not opt out in the event of settlement "or pending adjudication." This could foster reality-based settlements.

James J. Johnson (Procter & Gamble Co.), 96CV135: An opt-in procedure should be considered for (b)(3) damages actions. "Requiring putative class members to affirmatively assert their interest in participating in the litigation moves class actions from the shadow world of the abstract to the concrete * * *. Defendants can more accurately define their potential liability and respond directly to the specific allegations made. * * * Just as important, it will help reduce, if not eliminate, the creation of frivolous claims that threaten to result in churning huge attorneys fees * * *."

Nicholas J. Wittner (Nissan North America), 96CV158: The opt-out provision of (b)(3) should be replaced by an opt-in requirement. "This would be a simple and elegant solution to the ethical and practical problems inherent in current 23(b)(3) litigation."

Stephen F. Gates (Amoco Corp.), 96CV168: "Far-reaching changes are needed." "[C]lass action abuses are pervasive and, fair or unfair, reflect poorly on the civil justice system and federal courts." The current proposals are only a start. The Committee also should consider the opt-in process urged by several commentators during this public comment period.

Washington Legal Found., 96CV171: "Many of the current abuses of the class action system" — which include not only the familiar litany, but also "legitimate and relatively high damage claims aggregated into a single, massive class action that defendants cannot possibly risk defending — grow directly out of the opt out provision. It is this provision that enables lawyers to file a class action on behalf of hundreds of thousands, or even millions, of people who know nothing about the lawsuit

and who would not wish to participate if they did learn of it. The presumption inherent in Rule 23 that all members of the alleged class would choose to participate unless they affirmatively opt out is simply wrong, and it is probably the single greatest cause of the proliferation of frivolous and oppressive class action lawsuits." An opt-in requirement would be a great improvement. Collateral issues must be addressed, but are relatively easy. Thus there is an issue as to the accuracy and efficacy of solicitations to potential class members.

Alfred Cortese, Phil.Tr. 289-290: An opt-in procedure "would solve all the problems." (b)(3) classes have become "engines of destruction."

Beverly C. Moore, Jr., S.F.Tr. 15: The opt-in procedure is an attempt to undo the 1966 adoption of Rule 23(b)(3). It is a mistake. "People just don't have an incentive to opt in when there is no pot of money there for them to get a share of, especially if the claims are relatively small."

Arthur R. Miller, S.F. Tr. 74-75: Opt-in "is not effective. Somebody earlier said the incentive structure isn't there. Look, we can't ignore the fact that no matter how widely you distribute notice, in this era of junk mail and people's reaction to junk mail, and people's reaction to advertising, that you are likely to give effective enough notice to a wide portion of your class members * * *." If a class member does not want to be a litigant, the safety valve is at the distribution back end. "Remediation, or distribution of a remedy, is a serious problem. But it is not a problem that should be fed back into the certifiability of the class." The number who might opt in to the Texas insurance rounding up settlement might be low. "Keep in mind that we live in a country in which linguistic facility is not evenly distributed."

Samuel B. Witt, San F. Tr. 97-98: "If you're going to maintain an (F) requirement, why don't you just require those people to opt in." "Shouldn't you make it clear that if you have an opt-in class, that there should be no opportunity for a sequential class, so people could just kind of pick and choose? Obviously, one way to do it is to simply differentiate the kind of claims that might be appropriate for opt-in and opt-out, and that, of course, is John Frank's approach. * * * The benefit of opt-ins is that it permits the value of a class action for settlement or trial purposes to be determined based on real and identifiable claims." "I think opt-ins would work for the same reason that (b)(3)(F) would work, and that is, the federal system is structured to process cases of a level of relative seriousness, which is measured primarily in dollar value, so that there has to be a methodology, it seems to me, for identifying, either through a judge's discretionary evaluation of costs and benefits, or the measured decision of a plaintiff to participate in the cases that are appropriate for a class."

Clyde Platt, San F. Tr. 234-247: Disapproval of (F) and rejection of an opt-in alternative are blended in this testimony. "Can't they just as easily opt out as opt in?" "Isn't it fundamentally contrary to the notion of aggregation to presume that members of a class who have been affected by the same course of conduct are not plaintiffs?"

Joseph Tabacco, San F. Tr. 250-252: Opt-in is not the answer. People will react to an opt-in notice the way they react to sweepstakes promotions. "Because most people, until you actually mail them the check that they can cash in the bank, don't do anything. It doesn't mean that they're not litigants;

it doesn't mean that they won't be mad about being ripped off." The question should be whether there really is a controversy, whether there really has been an injury.

William M. Audet, San F. Tr. 256-266: We need small claims actions to provide individual relief, and to enforce social policies that public agencies are not enforcing. An opt-in alternative will not work. It already is hard to convince people to make claims when there is an actual class award, "let alone to step forward to be a, quote, 'participant' in the litigation." Perhaps it would be sensible to make class members register. "If we have an opt-in class, what do we do? Let's say 50 percent of the people pt in. Does that mean that the company gets to keep the other 50 percent? * * * And do I have to convince those people, 'Please, opt in. You won't have to litigate it. You won't have to appear before the judge. You won't have to take depositions." When the claim is small, I prefer to distribute recovery directly to all identified class members without asking for claim forms.

Gerson H. Smoger, for ATLA, 96CV126: The ATLA Policy on Class Actions includes, ¶ 3, the policy that a right to opt out should be allowed "during a reasonable period of time following the date [a class member is] injured, could reasonably discover [the] injury, and could reasonably discover the causal link between the conduct of the wrongdoer and [the] injury."

David L. Shapiro, 96CV153: If the Supreme Court clarifies the nature of opt-out rights in Adams v. Robertson, the Committee should consider the possibility of providing for opt-out from (b)(1) and (b)(2) classes, as well as the possibility of denying opt-out from (b)(3) classes.

John Leubsdorf, Phil.Tr. 263-264: The right to opt out should extend to any case that involves significant monetary damages. It should not be defeated by certification under (b)(2). It "really doesn't make any sense, that when more relief is being sought for, the opportunity to opt out is less."

Samuel Issacharoff, Dal.Tr. 28-32: The Committee should reconsider (b)(1). It is being used in mass tort cases as an inferior substitute for bankruptcy. The central idea of an interpleader to a limited fund is attractive, but the (b)(1) cases in federal courts do not in fact involve that situation. We may need to recognize that (b)(1) is inconsistent with due process. Bankruptcy has more disciplined investigative proceedings. Judges can hold hearings to determine whether a defendant faces such massive liability as to make all of its assets a limited fund in relation to its exposure, but bankruptcy courts provide better protection than "the prearranged, presettled (b)(1) classes."

Fred Baron, Dal.Tr. 91-92, 95: Settlement classes are appropriate only if there is a clear and effective right for each individual class member to opt out, on the basis of an intelligent choice. For future members there must be a back end opt-out; the asbestos cases show many examples of victims who do not have any knowledge of injury. Indeed, there must be clear opt-out rights in any mass torts class.

Attorney Fees

John P. Frank, 96CV032: Something should be done about the ruling in *Jeff D. v. Evans*, 1986, 475 U.S. 717. Settlement of the class claims and approval of attorney fees should not be resolved at the same time. Simultaneous negotiation of class recovery and fees increases the conflict of interest between counsel and class, and exacerbates the risk of collusion between class counsel and defendants.

Stephen Gardner, 96CV034: The best way to avoid excessive fees is to pay counsel in consumer class actions on a lodestar basis. Most are brought under statutes that provide for fee-shifting in any event. Rule 23 should be amended to provide for a fee award only after actual distribution of all relief to class members; often the ostensible amount is not actually distributed, and the fee award is a much larger fraction of the amount distributed than the amount seemingly agreed upon. (And means should be found to increase actual distributions by providing for automatic distribution without requiring that claims be filed, or by making any claims process easy for claimants. Adequate notice should be ensured.) Class recovery should be determined without taking any account of "coupons" or other noncash recovery. It would be better to prohibit any discussion of fees until a binding agreement has been reached as to all class relief. It would be better to submit the fee matter to the court, but negotiation can be accepted. The maximum amount of possible fees should be disclosed in notice of the proposed settlement. Successful objectors should be entitled to apply for fees. (The same themes are touched in his Dallas testimony, Tr. 4-22.)

Lawrence W. Schonbrun, 96CV105: The problems of settlement are exacerbated by the practice, developed in the early 1990's, to bypass the traditional award of attorney fees from the class recovery in favor of a fee separately negotiated with — and paid by — the defendant. These fees are not linked to hours worked or to the amount recovered. It is argued that this method does not reduce the class recovery, but that cannot believed. No one would allow the attorney for a single plaintiff to settle the plaintiff's claim, and then accept a handsome fee from the defendant. The "official line" that settlement is reached before any discussion of fees is misleading. The settlement is made contingent on reaching agreement as to fees. "Class action lawyers routinely file affidavits declaring that neither side breathed a word about the quantum of attorneys' fees until after the class relief had been on. The common term is that no 'discussions' took place, which of course leaves open the possibility of other forms of signaling." All counsel seek to persuade the judge to rubber-stamp the agreement. None of their artful arguments are valid. And a few even have had the skill to persuade appellate courts that objecting class members lack standing to appeal, on the theory that any reduction of the fee award will simply revert to the defendant without benefitting class members.

Sheila Birnbaum, 96CV107: In conjunction with settlement classes, suggests that the Note to (b)(4) "should urge courts to restrict attorneys' fee awards in purported class actions that settle at an early stage, particularly those that yield only minimal awards for the individual class members."

Paul D. Rheingold, 96CV145: The proposals do not address "Serious fees and ethics problems." The GM pickup truck coupon settlement and other cases "have pointed up the unseeming [sic] problems

with ceding control to lead counsel; unethical conflict of interest positions; and excessive fees."

Nicholas J. Wittner (Nissan North America), 96CV158: Provision should be made for a fee award to a person successfully opposing a certification request.

Certificate Clearing Corp., 96CV172: (This firm makes markets for the exchange of coupon settlements.) Defendants effectively become administrators of their own liabilities under coupon settlements. Class counsel, having been paid, loses interest. One remedy is to create mechanisms that create incentives for class counsel, "such as holding back half of the attorney's fees until the settlement is over or make the attorney's fees contingent on the redemption rate of the coupon."

William T. Coleman, Jr., Phil.Tr. 208: Perhaps there should be discretion to award attorney fees to a defendant who successfully resists class certification. Litigation of the certification issue can take a long time, and be very expensive.

Charles Silver, Dallas Tr.43-44: Attorney fees should be tied to a percentage of the aggregate recovery.

Stephen Gardner, 96CV034: "In some instances, where the liability appears relatively clear, it is entirely appropriate to permit the trial court discretion to order that the defendant pay these costs * * *." (In his Dallas testimony, Tr. 18, he stated that he does not believe that there is any due process problem with this proposal.)

Richard B. Wentz, for Mortgage Bankers Assn., 96CV109: Rule (c)(2) should be amended "to require plaintiffs to bear the initial costs of class notification * * *. A defendant should not be forced to pay these costs before any finding of liability."

Gerson H. Smoger, for ATLA, 96CV126: "Notice requirements have almost uniformly been abridged in recent years in the name of expediency, and notice itself has been conducted in such a fashion that many prospective claimants do not even realize that they have received 'notice' of the existence of a civil action in which their rights to have their complaints adjudicated in court may be taken away."

David L. Shapiro, 96CV153: The Committee should revisit the costs of notice in small-claims actions. It is ironic that staggering notice costs may well defeat small-claims classes where the need for notice is minimized by the fact that individual class members are quite unlikely to pursue individual litigation nor to care about the opportunity to request exclusion. "Nothing in the Constitution * * * requires such an outcome." Sampling notice, or publication, are often sufficient. It is easy to amend (c)(2) by simply deleting "including individual notice to all members who can be identified through reasonable effort."

Certificate Clearing Corp., 96CV172: (This firm engages in making markets for the exchange of coupons issued to settle class actions.) "Notices of pendency generally create more confusion than clarity. * * * [C]lass members cannot decipher the contents of the notice, or worse, simply throw the notice into the garbage. In CCC's experience, countless class members do not understand the terms of the notice or the nature of their award. * * * By simply demanding that notices be structured in clear and concise terms, class members will be in a much better position to assess their options to object to the case, to accept the terms of the settlement, or to opt-out of the settlement class." "Often, class members that receive notice think they are being sued." Better mailing practices also should be used — in two described cases, 40,000 and 18,000 mailed notices were returned. In the first, normal postal procedures were used and located half the missing class members. No effort was made in the second.

Shirley Sarna, Phil.Tr. 242-244: From the perspective of the New York Attorney General's office, the "understandability of notice" should be addressed, at least by a Note stating that this is an important concern. "There's a very long distance between what is now typical at a notice and what might be achieved." 800 numbers may help, but "that benefit is reduced dramatically if the notice itself is so impenetrable that it doesn't even alert the reader that other follow-up questions need to be asked."

John Leubsdorf, Phil.Tr. 263-264: There should be a more adequate notice requirement. And for

future claimants, there must be a notice of the opportunity to opt out at a time and in a form that is reasonably likely to permit informed decision by the class member.

James N. Roethe (Bank of America), San F. Tr. 227-228: "The notices that come out are really sort of absurd. As a lawyer, I receive these notices at my home about class actions that I am supposedly a member of, and I have trouble figuring out what it's all about. It takes me two hours, three hours." "I'm confident that we can prepare notices that would be about half the length and said the same thing, if we really tried * * *."

William M. Audet, San F. Tr. 262-263: We can improve on notice. We should adopt simplified notice. Perhaps there should be notice forms. If notice goes out earlier, small recoveries will increase.

Lawrence B. Solum, San F. Tr. 274: "Neither opt-out nor opt-ins represents sort of the fully informed consent of the parties. We know that's true because we know that there is such a big difference, depending on which way you cast the default rule." The pre-1966 scheme also would make a difference.

Multiple Related Class Actions

Stephen Gardner, 96CV034: There is a problem with multiple class actions seeking the same relief for the same illegal conduct. The problem will be increased by the *Matsushita Electric Industrial Co.* decision, which will encourage more state filings. There is no mechanism similar to § 1407 to bring together multiple state actions. The "Good Old Boy system frequently prevails" in state courts. Proposed Rule 23(b)(4) "stretches these problems to the point of crisis" by fostering settlements reached by defendants with whichever competing class counsel offers the most attractive deal. The Committee should explore the possibility of amending the federal removal statutes "to permit * * * removal of an uncertified state court class action if identical class actions are pending in other state or federal courts."

Defense Research Institute, 96CV090 (Supp): "[A]mong the most pressing problems facing our nation's civil justice system relate to handling of class actions in some of our state court systems. * * * [S]ome type of relief, through procedural rule amendment or federal legislation, is appropriate."

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: More and more class actions are being brought in state courts, often in sparsely populated and remote areas. Representative plaintiffs are recruited from the defendant's state so as to defeat diversity removal. Some state judges seem to regard certification of a nationwide class as a civic duty, and at times have certified a class ex parte even before service on the defendant. Such actions are filed even after a federal action has been filed. "[O]ne class action reform that must be enacted is to limit the reach of any state's courts to the citizens of that state." Reform of Federal Rule 23 "will be for naught if the state courts remain a haven for the abuse of the class action process." One cure would be to limit state class actions to citizens of the forum state; the Committee should recommend legislation. (Similar remarks appear in his San Francisco testimony, Tr. 39, 42.)

Hon James G. Carr, 96CV104: This suggestion is described at length with the (b)(4) materials. It is that before even preliminary approval and notice to the class of a proposed settlement, the court should require notice to the representatives in any parallel class action, and provide them an opportunity to challenge the proposed settlement.

Stephen Gardner, Dallas Tr. 10: Suggests that the Committee should urge Congress to provide a means to remove to federal court class actions that are now locked into state court by joining one diversity-destroying party.

Samuel Issacharoff, Dal.Tr. 32: A real problem, beyond the Committee's competence, and perhaps beyond the judicial power, is rival state court proceedings. The rival claims of jurisdiction by two different state systems need to be addressed; perhaps the Committee could recommend consideration by Congress.

Sheila L. Birnbaum, San. F. Tr. 117-118: National classes in state courts are unconstitutional when they seek to "bind plaintiffs in other jurisdictions who don't want to be there, who get no individual notice, in most instances." There should be legislation, perhaps allowing removal in any state action

that purports to involve a national class. This problem will grow; as federal courts are taking a closer look at class certifications, plaintiffs will go to state courts in increasing numbers.

Regulatory Deference

Note: A number of regulatory-deference suggestions have been made in commenting on factors (B), (C), and (F) of subdivision (b)(3). In various forms, the common threads are that class certification should be postponed or denied if a government agency has jurisdiction to provide relief from the practices challenged by the would-be class action. The government power diminishes the interest in individual actions or relief, and may make the class claim not mature.

Alfred W. Cortese, Jr. & Kathleen L. Blaner, 96CV063(Supp): It should be required that a class-certification decision "be deferred until after the conclusion of any federal regulatory action based on the conduct challenged in the litigation." There is a serious risk of inconsistent results, premature findings not based on fully developed evidence or science, "and duplicative and overly harsh remedies." The worst risk is that the class action will stampede regulatory officials to make findings and take actions "that would never have been taken in the absence of the litigation. The disastrous breast implant controversy is an excellent but chilling example of the harm that can be done when premature class action litigation is allowed to affect the regulatory process."

Stephen F. Gates (Amoco Corp.), 96CV168: The Committee should consider more fundamental changes in class action procedure to defeat present abuses. Among them would be a rule "deferring class action certification until the conclusion of regulatory action."

William T. Coleman, Jr. Phil. Tr. 205, 208: If the federal government is already addressing a problem through regulatory measures, "there's no reason why you need a lawsuit." Too often these class actions simply follow government regulatory initiatives.

D. Dudley Oldham, 96CV083: These remarks reflect consultation with members of Lawyers for Civil Justice, a coalition of three defense bar organizations. Rule 23 needs further study, looking to greater reform that "would certainly encourage more innovative solutions needed to address the most egregious abuses of the class action device."

Richard B. Wentz, for Mortgage Bankers Assn., 96CV109: (1) Add a provision expressly permitting a discovery stay on certification or class-wide issues pending determination of motions to dismiss or for summary judgment. (2) Amend 23(e) to permit dismissal by the parties at any time before certification; no one else will be prejudiced. (3) Prohibit bonus payments to class representatives, in the model of the Securities Litigation Reform Act.

Paul D. Rheingold, 96CV145: The proposals do not address the most pressing problems of mass tort classes. (1) One is "futures" claimants. "Class actions need not seek to control the rights of persons who have yet to make a claim (let alone be injured), but in seeking to work out global settlements, resolution of the rights of the futures has often been attempted." I heartily endorse the 3d Circuit decision in Georgine. (2) The proposals also do not address conflict of laws problems, which present great problems for national tort classes. See my treatise, chapter 21, and also §§ 3.70, 3.78. (3) We need a separate mass torts rule.

Other

Kathleen Sweeney Ford, 96CV075: (This comment is addressed without further specification to "Proposed Changes in Federal Rules." If it includes the pending Civil Rules proposal, it must be addressed to some facet of the only published proposal — Rule 23 changes.) "Why bother? Here, in Florida, the local districts propound their own rules contrary to the spirit and intent of the existing Federal Rules. There is no Federal Court in Florida where an attorney can walk in knowing that this federal court will follow the Federal Rules."

John L. McGoldrick, San. F. Tr. 98-105: (This testimony is representative of much testimony. It is summarized here, rather than with one or another of the specific proposals, because it is not directly anchored in any of them. It is a worthy representative.) It is wonderful to say that "abuse" is what the other side is doing to you. But, despite its virtues, the class action device "is not working right." "The implacable arithmetic" forces settlements. I never tell a client that there is better than a 90% chance of winning on the merits, no matter how weak the claim. When the chance of losing is multiplied by tens of thousands of claims, or even more, there is an exposure. "It turns a case, which is often put to a jury, often — let me speak as I feel — with hired gun experts who do not represent the center of whatever learning it is that is being addressed by the jury — that becomes a lottery. And when business people look at that question, face that lawsuit, the accounting debits and credits will push one to a Harvard Business School decision, which is: Ransom is the smart answer." The "maturity" factor proposed in (b)(3)(C) is a help, but it does not solve the problem. "The arithmetic is there." Mass torts are the worst, but the problem appears in other contexts. Motions to dismiss and other defensive precertification devices still often entail great litigation expenses. "And that's the reality of it." At times we choose to fight. "But if we do that, we usually have to spend a very long period of time with very high transaction costs, with the same level of uncertainty and that arithmetic hovering." "Discretion, respectfully, does not solve the problem * * *. There are, in the

federal judiciary, people who, reasonably cavalierly, it seems to me, will certify, or at least hold out the threat of certification as a bludgeon. It's real."

Appendix A

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Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules

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Introduction

Federal Rule of Civil Procedure 23, an outgrowth of an equity rule, was promulgated in 1938 as part of the first Federal Rules of Civil Procedure.[1] The current version of the rule creates a procedure designed to permit representative parties and their counsel to prosecute or defend civil actions on behalf of a class or putative class consisting of numerous parties. Rule 23 was last amended in 1966. The Judicial Conference Advisory Committee on Civil Rules is currently considering proposals to amend Rule 23.

The Rule 23 Debate in Historical Perspective

Creating a workable procedural standard for class actions has challenged rule makers since the first draft was published in 1937.[2] The 1966 amendments to Rule 23 sparked a "holy war"[3] over the rule's creation of opt-out classes. Opinions became polarized, with class action proponents seeing the rule as "a panacea for a myriad of social ills" and opponents seeing the rule as "a form of 'legalized blackmail' or a 'Frankenstein Monster.'"[4]

Apparently anticipating debate about the 1966 amendments to Rule 23, Professor Benjamin Kaplan, then reporter to the advisory committee that drafted those amendments, was quoted as saying that "it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23."[5] Respect for Professor Kaplan's caution may have dampened any advisory committee interest in revisiting Rule 23.[6] Now, a generation has passed and the current advisory committee has returned its

1. Fed. R. Civ. P. 23, Advisory Committee Note to 1937 adoption (West ed. 1994). The U.S. Supreme Court adopted the Federal Rules of Civil Procedure on December 20, 1937, and ordered them to be reported to Congress at the beginning of the January 1938 session. Fed. R. Civ. P. at 8 (West ed. 1994).

2. *See* James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J. 551, 571 (1937) ("It is difficult, however, to appraise the various problems involved and state a technically sound and thoroughly workable rule" for class actions.).

3. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664 (1979).

4. *Id.* at 665.

5. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 52 (1967) (paraphrasing Professor Kaplan).

6. *See, e.g.*, Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process 1 (Apr. 21, 1995) (unpublished draft paper presented at NYU Research Conference on Class Actions and Related Issues in Complex Litigation, on file at the Research Division, Federal Judicial Center) (an unspoken barrier shielded Rule 23 from Advisory Committee scrutiny for many years). A later version of Professor Cooper's paper has been circulated and is expected to be published in a spring 1996 symposium on class actions in the NYU Law Review.

attention to the hotly debated policy issues underlying the procedural framework of Rule 23. This report to the advisory committee addresses many of the empirical questions underlying those policy issues.

After the 1966 amendments, the emergence of mass torts as potential class actions has added fuel to the debate because of the high stakes inherent in that type of litigation. But the issues remain similar.[7] Broadly stated, three central issues permeate the debate. First, does the aggregation of numerous individual claims into a class coerce settlement by raising the stakes of the litigation beyond the resources of the defendant?[8] Second, does the class action device produce benefits for individual class members and the public—and not just to the lawyers who file them? And, finally, do those benefits outweigh the burdens imposed on the courts and on those litigants who oppose the class?[9]

In 1985 a Special Committee on Class Action Improvements of the American Bar Association's Section of Litigation articulated a list of recommended revisions of Rule 23 and called it to the attention of the advisory committee.[10] The ABA special committee found that "the class action is a valuable procedural tool" and recommended changes so that such actions would not "be thwarted by unwieldy or unnecessarily expensive procedural requirements."[11] Recommended changes included collapsing the three categories of class actions into one, expanding judicial discretion to modify the notice requirements, authorizing precertification rulings on motions to dismiss and motions for summary judgment, and permitting discretionary interlocutory appellate review of rulings on class certification.[12]

In March 1991, the Judicial Conference of the United States acted on a report of its Ad Hoc Committee on Asbestos Litigation. The Judicial Conference requested "the Standing Committee on Rules of Practice and Procedure to direct its Advisory Committee on Civil Rules to study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation."[13] Given these developments, the advisory committee drafted a proposed revision of Rule 23, based primarily on the ABA special committee's 1985 recommendations. Professor Edward H. Cooper, reporter to the advisory committee, circulated this draft to "civil procedure buffs," including academics, lawyers, interest groups, and bar organizations.[14] Many of the responses

7. *See, e.g.*, Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 74 (raising issues of fairness to litigants and coercion of settlements in mass torts).

8. *See, e.g.*, Staff of the Subcomm. on Securities, Senate Comm. on Banking, Housing and Urban Affairs, 103d Cong., 2d Sess., Private Securities Litigation 7–8 (May 17, 1994) [hereinafter Senate Staff Report].

9. *Id.*; *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) (regardless of the merits of the claims on which they are based, settlements in securities class actions produce returns of only about 25% of the potential loss).

10. American Bar Association Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986) [hereinafter *ABA Special Committee Report*]. The House of Delegates of the ABA authorized the Section of Litigation to transmit the report to the Advisory Committee but neither approved nor disapproved its recommendations. *Id.* at 196.

11. *Id.* at 198.

12. *Id.* at 199–200.

13. Judicial Conference of the United States, Ad Hoc Asbestos Committee Report 2 (March 1991).

14. Memorandum from Professor Edward H. Cooper to "Civil Procedure Buffs" (Jan. 21, 1993) (on file at

questioned the need for change and suggested that changes might upset settled practices and make matters worse.[15]

Legislative proposals to modify Rule 23 have paralleled the rule-making policy debates over the past twenty years.[16] As a recent example, in December 1995, Congress overrode a presidential veto and adopted legislation designed to alter substantive and procedural aspects of securities class actions.[17] This legislation had bipartisan support and was an outgrowth of hearings and an extensive staff report in 1994.[18] Among other provisions, the statute tightens pleading requirements for securities class actions and directs district judges to stay discovery and all other proceedings until there is a judicial ruling on any pending motion to dismiss for failure to satisfy those heightened pleading requirements.[19] The statute also modifies the notice requirements applicable to the filing and settlement of securities class actions[20] and limits attorneys' fees to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[21]

The 1995 FJC Study

The Federal Judicial Center conducted the present study in 1994–1995 at the request of the advisory committee. In general, the committee asked the Center to provide systematic, empirical information about how Rule 23 operates. The study was designed to address a host of questions about the day-to-day administration of Rule 23 in the types of class actions that are ordinarily filed in the federal courts. The research design focused on terminated cases and did not encompass the study of mass tort class actions, which appear to occur relatively infrequently and remain pending for long periods of time.

This report describes the results of the study and addresses many of the issues in the continuing debate about class actions, including those raised by the ABA special committee's recommendations. The principal issues are:

- What portion of class action litigation addresses the type of class to be certified?
- Are judges reluctant to rule on the merits of claims before ruling on class certification?

the Research Division, Federal Judicial Center). A copy of the 1993 version of the Advisory Committee's proposed Rule 23 is attached as Appendix A. A copy of the November 1995 draft of proposed Rule 23 is included as Appendix B.

15. Cooper, *supra* note 6, at 1.

16. For example, the 95th and 96th Congresses considered proposals to amend Rule 23 at the behest of the U.S. Department of Justice, Office for Improvements in the Administration of Justice. *See* S. 3475, 95th Cong., 2d Sess. (1978), and H.R. 5103, 96th Cong., 1st Sess., Tit. I (1979). For further discussion of this proposal, see Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299 (1980) (evaluating H.R. 5103 to determine whether it satisfies the goals of improving the efficiency of small damage claim actions while protecting the interests of defendants and absent parties).

17. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

18. See Senate Staff Report, *supra* note 8, for a discussion of the issues raised at the hearings.

19. Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1(b) (West Supp. 1996).

20. *Id.* § 77z-1(a)(3), (a)(7).

21. *Id.* § 77z-1(a)(6).

- Does filing of a case as a class action or certifying a class coerce settlement without regard to the merits of the claims?
- How well does the notice process work and who bears its costs?
- In what ways do class representatives and individual class members participate in the litigation?
- In cases that settle, how do the benefits to the class compare to the benefits to the class attorneys? How extensive is the class action plaintiffs' bar?
- How well does the appellate process work and how might discretionary interlocutory appeals of rulings on class certification affect the fairness of the process?

Such questions—and more—are incorporated in Professor Edward Cooper's April 1995 report to the advisory committee and conferees at New York University Law School's Research Conference on Class Actions.[22] Our report parallels Professor Cooper's report in that we have presented study data and analyses to correspond with his questions as closely as possible.[23] Where relevant, we present general background on the state of the law, often focusing on recent decisions in the circuits where study cases were filed.

Study Design and Methods

We selected for analysis as class actions closed cases in which the plaintiff alleged a class action in the complaint or in which plaintiff, defendant, or the court initiated class action activity, such as a motion or order to certify a class. This report presents empirical data on all class actions terminated between July 1, 1992, and June 30, 1994, in four federal district courts: the Eastern District of Pennsylvania (E.D. Pa., headquartered in Philadelphia), the Southern District of Florida (S.D. Fla., headquartered in Miami), the Northern District of Illinois (N.D. Ill., headquartered in Chicago), and the Northern District of California (N.D. Cal., headquartered in San Francisco).[24]

We identified class actions meeting these selection criteria by a multistep screening process that included reviewing electronic court docket records, statistical records maintained by the Administrative Office of the U.S. Courts, and published opinions. We then reviewed all cases that were candidates for inclusion in the study.[25] For each case meeting study criteria, we examined court records and systematically entered appropriate case information into a computerized database. These data were then analyzed by the same attorney researchers who collected the data. In addition, we reviewed data about class

22. Cooper, *supra* note 6.

23. Our headings and subheadings generally follow the structure of Professor Cooper's paper, but occasionally we have adapted the titles or rearranged the parts to present the data more clearly.

24. Cases in the study represent a termination cohort, i.e., a group of cases that were selected because they were concluded within the same time period. Termination cohorts sometimes present problems of biased data if recent filing trends show fluctuations. Because of the limitations of class action filing data we have not been able to test filing trends as thoroughly as we would like. On the other hand, we have no reason to believe that the use of a termination cohort presents serious problems for these data. *See* Appendix D, Methods.

25. See Appendix D for details about the identification of class actions.

actions from the Federal Judicial Center's 1987–1990 district court time study;[26] those data are summarized at relevant parts of this report.[27]

We generally used the median (midpoint) to describe the central tendency of the data. We used this statistic because the mean (average) in many instances was inflated by a few extraordinarily large or small values ("outliers").

Nature of the Data

Several perspectives regarding—and limitations of—the data deserve special mention at the outset. The four districts were not selected to be a scientific sampling of class actions nationwide. Rather, we selected the four districts because available statistical reports on the frequency of class action activity in those districts indicated that we would have the opportunity to examine a relatively large number of cases in those districts. This high volume would allow us to observe a variety of approaches to class actions. Similarly, the selection of districts from four separate geographic regions would enable us to observe any regional differences in approaches and the selection of districts from four circuits would enable us to observe variations in case law. Because this study did not employ random sampling or control or comparison groups, our results cannot and should not be viewed as representative of all federal district courts nor should causal inferences be drawn from the data. On the other hand, we have no reason or data that would lead us to believe that these districts are unusual or that they present a picture that is radically different from what one would expect to find in other large metropolitan districts.

Each district should be viewed as a separate entity and the data from the four districts should be viewed as descriptive—four separate snapshots of recent class action activity. Generally, data from the four districts should not be aggregated. Occasionally, when the number of cases on a given subject is quite small, we discuss combined data from the four districts for descriptive purposes only, but no inference should be drawn that these data are necessarily representative of all courts.[28]

26. *See* Thomas E. Willging, et al., Preliminary Report on Time Study Class Action Cases (Feb. 9, 1995) (unpublished report on file with the Information Services Office of the Federal Judicial Center). The time study report includes national data derived from judges' records of the time they spent on the 51 class actions in the study. *See infra* § 2(d) and Table 19. See Appendix D for details about the time study.

27. The current report supplements Willging et al., *supra* note 26, and supersedes our preliminary presentation of data to the advisory committee concerning the first two districts studied. *See* Thomas E. Willging et al., Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992, and June 30, 1994 (rev. Apr. 13, 1995) (unpublished preliminary report on file with the Information Services Office of the Federal Judicial Center).

28. For example, when discussing subject matter (nature-of-suit) categories of cases in relation to infrequent events, we present the data in figures with a caution that no overall conclusions can be drawn from them.

Summary of Findings

Overall, we identified 407 class actions in the four districts. Of those, 152 were certified as class actions, 59 of which were certified for settlement purposes only.

1. Individual Actions and Aggregation. Across the four districts, the median level of individual recoveries ranged from $315 to $528 and the maximum awards ranged from $1,505 to $5,331 per class member. Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied.

Occasionally, other aggregative procedures were used in conjunction with a class action. District court consolidation of related cases occurred more frequently than multidistrict litigation (MDL) consolidation.

2. Routine Class Actions. Securities (b)(3) cases in the four districts exhibited a number of standard characteristics that suggest routineness in the way in which they are litigated and adjudicated. Such cases did not necessarily last longer than nonsecurities class actions, were about as likely to be subject to some form of objection to certification, and did not necessarily yield more dollars to individual class members. Securities cases were, however, more likely to be certified, to be subject to representativeness objections, to involve larger class sizes than nonsecurities cases, and to contain boilerplate allegations. Finally, numerosity objections were unlikely to occur in securities cases, but more likely to occur in other cases.

We did not find the above pattern of routine litigation practices in nonsecurities cases in which only a Rule 23(b)(2) class was sought. Nor did we find such a pattern in (b)(2) civil rights cases, a subset of the nonsecurities cases. Accordingly, we concluded that we cannot generalize about whether these types of (b)(2) cases represented routine applications of Rule 23.

Comparing class and nonclass settlement and trial rates as possible indicators of routineness, the settlement rate for other nonprisoner class actions was comparable to the settlement rate for nonprisoner civil actions, but no consistent pattern was detected across the four districts. The settlement rate for securities class actions was higher than for nonclass securities actions in three of the four districts. Trial rates (jury and bench), however, were generally about the same for all nonprisoner civil cases whether or not they were filed as class actions.

Despite similarities with nonclass cases in settlement and trial rates and despite some standardization of arguments and certification decisions in securities cases, class actions as a group do not appear to be routine cases according to two other measures. In three

districts, class actions took two to three times the median time from filing to disposition (15–16 months compared to 5–6 months). In a national time study, certified and noncertified class actions on average consumed almost five times more judicial time than the typical civil case. Both these measures suggest that class actions are not routine in their longevity or in their demands on the courts.

The most frequently certified class was the Rule 23(b)(3) or "opt-out class," which occurred in roughly 50% to 85% of the certified classes in the four districts. The second most frequently certified class was the Rule 23(b)(2) or "injunctive class," which occurred in 17% to 44% of the certified classes. Rule 23(b)(1) "mandatory" classes were certified in a total of fourteen cases in three districts.

A securities case was the most likely case type to be certified as a (b)(3) class, while civil rights cases of various types were most likely to be certified as (b)(2) classes. Certification under more than one 23(b) subsection occurred in about 10% of the certified classes. The most frequent multiple certification combination was (b)(2) and (b)(3).

3. Race to File. Multiple filings of related class actions might indicate a race by counsel to the courthouse, perhaps to gain appointment as lead counsel. We found the following multiple filings: intradistrict consolidations, MDL consolidations, and related but unconsolidated cases. At least one form of multiple filing occurred in 20% to 39% of the class actions in the four districts.

On a related issue, it did not appear that many class action complaints were filed quickly for the ostensible purpose of preserving discoverable information.

4. Class Representatives. We did not find any evidence of professional class action plaintiffs. Very few persons functioned as a class representative in more than one case and none served in that capacity in more than two cases in the study. There were, however, changes in class representatives in 8% to 33% of certified class actions. Many of the changes appeared to signify a significant shift in the litigation or the removal of a person in response to arguments of opposing parties or objections of nonrepresentative parties. A substantial minority (26% to 46%) of all certified class actions in which the court approved a settlement included separately designated awards to the named class representatives. The median award per representative was under $3,000 in three courts and $7,560 in the fourth.

5. Time of Certification. Counsel filed motions to certify—or courts issued show cause orders for sua sponte certification—in the four districts within median times of 3.1 months to 4.3 months after the filing of the complaint. Judges ruled on motions to certify within median times of 2.8 months to 8.5 months after the date of the motion.

Parties often filed motions to dismiss or for summary judgment and judges generally ruled on those motions in a timely fashion, often dismissing a case in whole or in part. These rulings on the merits often preceded rulings on class certification, with the rate of precertification rulings on motions to dismiss being higher than the rate for summary judgment motions (although there were some precertification rulings on summary judgment motions in all four districts).

Overall, approximately two out of three cases in each of the four districts had a ruling on either a motion to dismiss, a motion for summary judgment, or a sua sponte dismissal

order. Approximately three of ten cases in each district were terminated as the direct result of a ruling on a motion to dismiss or for summary judgment.

As to the timing of such rulings, defendants generally had an opportunity to test the merits of the litigation and obtained prompt judicial rulings on motions to dismiss. Not surprisingly, testing the factual sufficiency of claims via summary judgment took longer—sometimes more than a year—than obtaining rulings on motions to dismiss.

6. Certification Disputes. Across the four districts, 152 (37%) of the 407 cases filed as class actions were certified as such. Fifty-nine (39%) of the certified cases were certified for settlement purposes only. About 40% of the latter cases were settlement classes, that is, cases in which the parties submitted a proposed settlement to the court before or simultaneously with the first motion to certify a class.

In three of the four courts, opposition to certification was indicated in over half of the cases in which class certification was raised. Most arguments centered on traditional issues relating to the typicality, commonality, and named plaintiffs' representativeness. Opposition infrequently addressed the subtype of Rule 23(b) class to be certified; approximately 15% of judicial rulings granting class certification addressed the type of class certified. (See also sections 2 and 9 of this Summary.)

7. Plaintiff Classes. Defendants almost never sought certification of a plaintiff class and were successful in having a plaintiff class certified in only one instance. In half of the 152 certified cases, defendants acquiesced in a plaintiff class either by failing to oppose a motion to certify or by stipulating to certification.

8. Defendant Classes. Across the four districts, there were a total of four motions requesting certification of a defendant class, three filed by plaintiffs and one filed by defendants. One defendant class was certified, at plaintiffs' request, in a civil rights case.

9. Issues Classes and Subclasses. There were no issues classes in any of the four districts. Subclasses were infrequent, appearing in ten cases, five of which were securities cases.

The ability of the named plaintiff to represent the class was frequently disputed because of a potential conflict of interest with other class members. But disputes regarding the typicality of class representatives' claims were less frequent.

10. Notice. Notice of class certification or notice of settlement or voluntary dismissal was sent to class members in at least three-quarters or more of the certified class actions. Notice was delayed in a substantial number of cases. While the reason for the delays could not be determined, one consequence of the delays was to postpone notice expenses until the case had been resolved and such expenses could be shifted to the defendant. In a dozen cases, half of which were settlement classes, neither notice to the class nor hearing on settlement approval appeared to have taken place.

Parties and judges provided individual notice in almost all certified (b)(3) actions in which notice was issued. In at least two-thirds of the cases in each district, individual notices were supplemented by publication in a newspaper or other print medium.

The median number of recipients of notice of certification or settlement (or both) was substantial, ranging from approximately 3,000 individuals in one district to over 15,000 in another. In many cases plaintiffs and defendants shared the cost of notices. Across the four districts, the median cost of notice in the limited number of cases with data available

exceeded $36,000 for notice of certification or settlement or both. Litigation related to notice issues occurred in less than one-quarter of the certified cases in which notice was communicated to the class.

Settlement notices generally did not provide either the net amount of the settlement or the estimated size of the class. A class member typically did not have the information with which to estimate his or her individual recovery. Also missing from most notices was information about the amount of attorneys' fees, costs of administration, and other expenses. Usually, however, notices included sufficient information about plans to distribute settlement funds, procedures for filing claims, opt-out procedures, and the timetable for filing objections and participating in hearings.

11. Opt Outs. At the settlement stage, the percentage of cases with at least one member opting out was considerably higher than at the certification stage. The occurrence of at least one member opting out of a settlement ranged from 36% to 58% of the cases compared to 9% to 21% with at least one member opting out of a certification before settlement.

Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class; 75% of the opt-out cases had 1.2% or fewer of class members opt out. Settlements with small average individual recoveries had a higher number of cases with one or more opt outs than cases with larger average individual recoveries.

12. Opt Ins. None of the certified class actions required that class members file a claim as a precondition to class membership. Many cases in the study used a claims procedure to distribute any settlement fund to class members. Claims procedures were used routinely in securities class actions. The effect of combining a claims procedure with an opt-out class appeared to be that a class member who did not opt out or file a claim was nonetheless precluded from litigating class issues in the future.

13. Individual Member and Nonmember Participation. Attempts to intervene in cases filed as class actions occurred relatively infrequently. Following rulings rejecting an attempt to intervene, three prospective intervenors filed appeals challenging that decision, but none was successful. Prospective intervenors also filed three appeals addressing other issues—again without success. In addition, objecting class members filed appeals of settlements in two major consumer class actions.

Overall, about half of the settlements that were the subject of a hearing generated at least one objection. Nonrepresentative parties participated by filing written objections to the settlement far more frequently than by attending the settlement hearing. Courts approved approximately 90% or more of the proposed settlements without changes in each district. In a small percentage of cases, the court conditioned settlement approval on the inclusion of specified changes.

14. Settlement. In each district, a substantial majority of certified class actions were terminated by class-wide settlements. Certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified. Certified class actions were less likely than noncertified cases to be terminated by traditional rulings on motions or trials. The vast majority of cases that were certified as class actions had also been the subject of rulings on motions to dismiss or for summary judgment,

most of which did not result in dismissal or judgment. But noncertified cases were not simply abandoned; in each district, they were at least twice as likely as certified class actions to be disposed of by motion or trial (mostly by motion). Overall, about half of the noncertified cases were disposed of by motion or trial.

As to the relationship between class certification and settlement, many cases settled before the court ruled on certification. At the other end of the spectrum, a sizable number—a majority in three of the districts—settled more than a year after certification.

Special masters were never used to evaluate settlements and in only one case was a master used to facilitate settlement. Magistrate judges were used occasionally to evaluate a settlement and more frequently to facilitate settlement.

15. Trials. The number of trials in study cases was small; a trial began in only 18 (4%) of the 407 cases in the four districts combined. Plaintiff classes and individual plaintiffs did not fare well at trial. Except for one default judgment that led to a class settlement, no trial resulted in a final judgment for a plaintiff class. Of the three trials that found for individual plaintiffs, one judgment was vacated and remanded for dismissal, one judgment was vacated with a resulting $1 damage award for the plaintiff on remand, and one defendant's appeal was dismissed. Five of the 18 trials led to settlement during or after trial, including the default judgment case mentioned above, two certified cases that settled after partial judgments for the class, and two noncertified cases.

16. Fee-Recovery Ratios. Net monetary distributions to the class regularly exceeded attorneys' fees by substantial margins. In cases where benefits to the class can readily be quantified, the "fee-recovery rate" (fee awards as a percentage of the gross settlement amount) infrequently exceeded the traditional 33.3% contingency fee rate.

When a settlement created a fund for distribution to the class, three of the four districts calculated fees using the percentage of recovery method far more often than the lodestar method. Not surprisingly, courts generally used the lodestar method in cases where the class settlement produced nonquantifiable benefits. Judges appeared to attach special importance to actual benefits won for the class when calculating fees, either by using the percentage of the recovery method, considering fee objections, or adjusting the lodestar calculation.

Four or fewer appeals per district involved attorneys' fees issues. All fee-related appeals related to plaintiffs' counsel fees, including challenges to the amount of the award, denial of the fee request, or reduction of the fee request. For the four districts combined, only one of the fee-related appeals resulted in vacating a fee award. The other appeals ended in fee-award affirmance (two cases), appeal dismissal (two cases), reversal of denial of fees (one case), vacating the trial court's reduction of fees (one case), and remanding for reconsideration (one case).

17. Trivial Remedies; Other Remedies. We did not find any patterns of situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees. Nor did we find any (b)(2) cases that appeared to result in clearly trivial injunctive relief accompanied by high fees. The fee-recovery rate, as described above, exceeded 40% in 11% or fewer of settled cases, half of which included nonquantifiable benefits such as a permanent injunction. In the balance of cases with high fee-recovery rates, the settlement produced relatively small payments to the class as well as to attorneys for the class.

In five cases in two districts, a portion of the settlement funds was distributed to a charitable or other nonprofit organization.

18. Duplicate or Overlapping Classes. We found five duplicative or overlapping classes in related cases that were not consolidated with similar litigation pending in federal and state courts. Our review of the files indicated that those cases generated few difficulties for the court.

19. Res Judicata. No data were available.

20. Appeals. The rate of filing at least one appeal ranged from 15% to 34%. Noncertified cases were more likely to have one or more appeals than certified cases. Cases with trials showed even a higher rate of appeal. Few appeals led to altering the decision of the trial judge at the appellate level or on remand. Class certification before appeal, however, may have been one of the factors that led to settlement in cases that settled on remand.

Plaintiffs filed 75% to 85% of the appeals and were rarely successful in reversing or vacating trial court decisions. On the other hand, defendants rarely filed appeals; their appeals also did not lead to a high rate of reversal or vacation. Among appeals resulting in full or partial reversal on appeal, most reversals significantly changed the direction of the case. For appeals in cases that had been previously certified, reversal and remand generally resulted in a class settlement, although there were only seven such reversals in the study. On the other hand, reversal and remand in thirteen cases not previously certified generally did not lead to a successful outcome for the plaintiffs.

Parties rarely sought appellate review of district court decisions that dealt with the mechanics of the class action process, such as certification or class settlement. Litigants appealed certification decisions in seven study cases. Two cases involved certified classes. In one, the certification of a class was affirmed and, in the other, class certification was vacated. In the other five cases, putative class representatives appealed the denial of class certification. Three of these five appeals were unsuccessful. The fourth resulted in reversal and remand that led to class certification and the fifth resulted in dismissal with no class certified.

21. Class Action Attorneys. In 156 cases, 160 different law firms served as lead, co-lead, or liaison counsel, with more than 1 firm appointed in most cases. Twelve of these law firms served as lead or co-lead counsel in 4 or more cases. In total, these 12 firms appeared 95 cases, 63% of the certified cases in the study.

Findings

(1) Individual Actions and Aggregation[29]

(a) Average recovery per class member

Background. In this opening section, we report data on one alternative to class actions, namely, the filing and consolidation of individual cases. The ultimate question in this subsection is: How many members of certified classes would have maintained individual actions absent the class action? We cannot answer that question in exactly those terms, but even the highest level of recovery per individual class member that we found appears unlikely to support separate individual actions.

Data. Across the districts, the median level of the average recovery per class member[30] ranged from $315 to $528; 75% of the awards ranged from $645 to $3,341; and the maximum awards ranged from $1,505 to $5,331 (see Figure 1). Even assuming that an individual member might recover a higher award in a separate trial, the multiplier would have to be ten or more for an individual to meet the minimum jurisdictional amount for a diversity case. Cases seeking injunctive relief and cases brought under federal statutory authority could be brought as individual actions. However, without a substantial multiplier of individual damage awards, none of the awards would likely induce a private attorney to bring the case on a contingent fee basis or an individual to advance sufficient personal funds to retain an attorney to file the action. Nor is it clear how many, if any, individual actions would be supported by the hope for a statutory fee award (*see infra* § 16(b)).

The median net settlement per class member in the relatively few securities cases ranged from $337 to $447 (see Figure 2). The comparable medians for nonsecurities classes ranged from $275 to $1,472 (see Figure 3). Given the small numbers of cases with monetary settlements in each district, no firm conclusions can be drawn about the differences between securities cases and all other cases. It does appear, however, that neither level of recovery would have been likely to support individual actions.

29. *See generally* Judith Resnik, *From "Cases" to "Litigation,"* Law & Contemp. Probs., Summer 1991, at 5 (describing a trend toward aggregation).

30. We calculated the average recovery per class member by starting with the gross settlement amount, deducting expenses, attorneys' fees, and any separate awards to the named class representatives, and dividing that net settlement amount by the number of notices sent to class members.

Discussion at the advisory committee's November 1995 meeting raised a question about the incidence of the "two-dollar" individual recovery?[31] To address that question, we examined all class actions in the four districts that were certified solely under (b)(3) and that produced an average distribution per class member of less than $100 (see Table 1). There were nine such cases in the four courts. These data did not include any two-dollar cases, but they do tend to bridge the gap between the anecdotal evidence and our quantitative evidence. The absence of such nominal recoveries in the four districts suggests that the anecdotal cases on which the discussion was based, which presumably arose in other districts, may represent outlier cases at the bottom of the range of class action recoveries.

For these nine cases with monetary awards below $100 per member, the average award to the class was $2.63 million and the median award was $2.55 million (see Table 1). For those same cases, fee awards were generally based on a percentage of the gross recovery. Those percentages clustered around 30% and five of the nine awards were exactly 30% of the total recovery. The average size of the class was 45,055 and the median size was 45,920 members. Eight of the nine cases were securities cases. (*See also infra* § 17(a) for a discussion of (b)(3) cases in which the relief was relatively trivial in relation to attorneys' fees and for a discussion of nonmonetary relief in such cases.)

(b) Consolidation and related cases

Background. In the previous section, we concluded that individuals would be unlikely to file individual cases to recover damages. In this subsection, we look at the extent to which separate cases were filed in relation to the same transactions. An important distinction, however, is that the separate cases discussed in this subsection generally were filed as class actions and not simply as individual claims. Here, we look for "relationships . . . between aggregation and numbers of individual actions arising out of the same transactional setting."[32] We also address how often "individual actions proceed in the same court, or in different courts, without any attempt at aggregation."[33] We found what appears to be a modest amount of interdistrict and intradistrict consolidation and also found a smaller number of cases that the court declined, or was without authority, to consolidate.

On occasion, a court may find that "[c]laims identical or similar to those made in a class action may be the subject of other litigation, either in the same court or in other federal or state courts."[34] Individuals who have no interest in being class members may file their own separate suits either before or after certification. Under Rule 23(b)(3)(B), the court must consider the pendency of other litigation concerning the controversy, in both state and federal courts, by or against members of the class.[35] Further, under Rule

31. Advisory Committee on Civil Rules, Minutes at 22–23, Nov. 9–10, 1995.

32. Cooper, *supra* note 6, at 25.

33. *Id.*

34. Manual for Complex Litigation, Third, § 30.3, at 234 (Federal Judicial Center 1995) [hereinafter MCL 3d].

35. *Id.* § 30.15, at 219 & n.691 (citing Califano v. Yamasaki, 442 U.S. 682 (1979) (need to consider whether proposed nation-wide class would improperly interfere with similar pending litigation in other

23(c)(A)(4) common issues of fact or law may be carved out for class certification[36] on both an intradistrict[37] and on a nation-wide[38] basis. Federal courts use Federal Rule of Civil Procedure 42(a)[39] for intradistrict transfers and the MDL statute for interdistrict transfers.[40] There is no clear authority for a federal court to consolidate cases filed in state court with actions filed in federal court.

Data on consolidations. In all four districts, interdistrict consolidation of cases in which there was class action activity was relatively infrequent. The Judicial Panel on Multidistrict Litigation consolidated between 3% and 6% of cases with cases from other districts. The median time from filing the complaint in a case to MDL consolidation ranged from approximately four months in three districts to approximately six months in the other district (see Figure 4). Due to the small number of cases for different nature-of-suit categories, we are unable to observe any distinct patterns or draw any reliable inferences about, say, antitrust, securities, or civil rights cases. In this small subset of cases, the most common nature-of-suit categories were antitrust cases followed by securities cases (see Table 2).

District courts consolidated similar cases within their own districts more often (14% to 20%) than the judicial panel consolidated cases across district lines. The median number of cases within each consolidation ranged from two to four (see Figure 5). Among intradistrict consolidations, the most frequent nature of suit was securities (see Table 3).

courts)).

36. *Id.* § 33.262, at 324 & n.1067 (citing Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994) (negligence liability for infected blood), *mandamus granted, class certification denied, In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (district judge ordered to decertify the plaintiff class), *cert. denied*, 116 S. Ct. 184 (1995); *In re* Copley Pharmaceutical, Inc., "Albuteral" Prods. Liab. Litig., No. MDL 1013, 158 F.R.D. 485 (D. Wyo. 1994) (negligence, breach of warranty claims for contamination of bronchodilator), *defendant's motion to decertify plaintiff class denied, In re* Copley Pharmaceutical, 161 F.R.D. 456 (D. Wyo. 1995)).

37. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 855 F. 2d 1188 (6th Cir. 1988) (opt-out class of water contamination victims in vicinity of a landfill); Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (district-wide class of asbestos-injury claimants to resolve specific issues).

38. *See, e.g., In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir.) (nation-wide 23(b)(3) class of schools seeking compensatory damages associated with the presence of asbestos-containing building materials), *cert. denied*, 479 U.S. 852 (1986).

39. Fed. R. Civ. P. 42(a) states:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 42(a) permits partial or complete consolidation of related actions pending in the same district for both pretrial and trial purposes. *See* Lloyd v. Industrial Bio-Test Labs, Inc., 454 F. Supp. 807 (S.D.N.Y. 1978) (securities case where the court granted the defendant's cross motion for consolidation); Wellman v. Dickinson, 79 F.R.D. 341, 348 (S.D.N.Y. 1978).

40. Pursuant to 28 U.S.C. § 1407(a) (1988), the Judicial Panel on Multidistrict Litigation is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district for coordinated or consolidated pretrial proceedings upon its determination that transfer "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions."

Data on nonconsolidations. We also looked at how often courts do not consolidate cases even though they are related to other litigation pending in federal and state courts. On the federal level, nonconsolidation of related cases occurred in 5% to 23% of the cases in the four districts (see Figure 6). Securities was the most common nature of suit among the nonconsolidated cases (see Table 4).

On the state level, we identified nonconsolidation with pending state litigation infrequently, ranging from 1% to 3% of the study cases (see Figure 6). Among this small group, securities and other civil rights cases were the most common nature of suit (see Table 5).

Nonconsolidation of related cases can present difficulties for courts, especially during discovery. Other problems arise when multiple actions result in conflicting or overlapping classes that may produce, among other things, inconsistent adjudications. For details about the types of difficulties we found in eight cases that were not consolidated with related litigation pending in federal and state courts, see Tables 6 and 7. While the nonconsolidations presented difficulties for the court, they did not appear to be insurmountable. Of the eight cases, half were eventually disposed of via a class settlement approved by the court. Three of the remaining cases were terminated via a judicial ruling on a motion to dismiss, a stipulated voluntary dismissal, and a judicial ruling on a motion for summary judgment.

(2) Routine Class Actions

(a) What was the relationship, if any, between the "easy applications" of Rule 23 and the substantive subjects of dispute?

Background. Some have maintained that class actions in certain nature-of-suit categories are often "easy applications" of Rule 23. These cases are considered easy or routine because they frequently involve complaints with boilerplate allegations, similar class certification arguments, and standard settlements. In particular, some have viewed securities class actions as fitting into such standard molds.[41] To test these premises, we compared study cases in different nature-of-suit categories. Since the number of filings in most categories was small, we limited our analysis, where appropriate, to securities cases, nonsecurities cases, and civil rights cases (a subset of nonsecurities cases).

Data on Rule (b)(3) cases. First, we compared indicators of routineness in cases filed as Rule 23(b)(3) class actions,[42] starting with duration of the case from complaint to closing. Despite the perceived complexity of securities cases, they did not take much

41. *In re* Activision Sec. Litig., 723 F. Supp. 1373, 1374 (N.D. Cal. 1989) ("all too familiar path of large securities cases," including "lugubrious" pleading contests and "massive" discovery). A recent report found courts reacting to what some view as boilerplate shareholder allegations of officer/director fraud: "The increased [judicial] application of Rule 9(b) may stem from the courts' thinning patience with nearly identical 'boiler-plate' securities fraud complaints." Edward M. Posner & Karl L. Prior, *Motions to Dismiss Shareholders' Suits Against Officers and Directors* (ALI-ABA Course of Study: The Prosecution and Defense of Shareholder Litigation against Directors and Officers, Washington, D.C.), May 28–29, 1992, at 91, 109.

42. These include cases filed under Rule 23 (b)(3) alone or in combination with one or more other subdivisions of 23(b).

longer to settle and close than nonsecurities class actions. Study data for the four districts showed the median time period from filing the complaint to closing ranged from twenty-four to twenty-eight months for settled securities class actions. In comparison, median time periods for settled nonsecurities class actions were shorter in two districts (with medians of eleven and thirteen months) and longer in two others (with medians of thirty-six and fifty months) (see Table 8).[43] In particular, the median case lengths for (b)(3) civil rights actions were about the same as, or longer than, for settled securities cases in the three districts where civil rights cases settled.

Do these results indicate that securities cases are "routine"? To respond to that question, we looked at the rate at which (b)(3) classes were certified, finding somewhat distinctive results for securities and civil rights cases. A (b)(3) class was certified in 94% to 100% of the securities cases where a motion or sua sponte order on certification was filed. In contrast, for nonsecurities actions, the certification rates were 64% to 93% in the three districts with sufficient numbers of cases for meaningful comparison (see Table 9). Interestingly, the certification rate for (b)(3) civil rights cases was 100% in each of the three districts with (b)(3) civil rights class actions, but these constituted only two or three cases per district. Although these data are not sufficient to support broad conclusions, high rates of certification within the securities and civil rights categories could indicate that these are easy applications of Rule 23, at least with respect to the certification decision.

We next examined the bases for opposition to class certification and again found some distinctive patterns among securities cases. In two districts, disputes over certification in securities cases were about as frequent as for the other major nature-of-suit categories in those districts. In the other two courts, objections to certification were filed about 1.5 times as often in nonsecurities cases[44] as in securities cases.[45] Of special note is that objections on the basis of numerosity were absent from all (b)(3) securities cases in three districts and were present in only 25% of the certification disputes in the fourth district. In nonsecurities cases, however, numerosity generally was raised more frequently. In two districts, it was at issue in 33% and 50% of the certification disputes; the other two districts had only two or three such cases. These limited results could be viewed as indicating relatively "easy" sailing toward satisfying the numerosity requirement in securities cases.

However, another observed difference was in arguments concerning the representativeness of the principal plaintiffs. In all or nearly all securities cases in the four districts, defendants disputed the ability of named plaintiffs to represent the class, often basing their arguments on alleged conflicts or purportedly unique facts applicable to the representatives (*see infra* § 6(b)). Generally, these objections occurred less frequently in nonsecurities (b)(3) cases (see Table 10). Representativeness disputes were often harder fought battles than numerosity disputes and frequently involved complex issues and facts.

43. In addition, Figure 10, discussed *infra*, presents median duration periods for settled and nonsettled securities cases combined and compares class actions to nonclass civil actions.

44. Certification objections were filed in 58% and 59% of nonsecurities class actions in these two districts.

45. Certification objections were filed in 35% and 40% of securities class actions in these two districts.

The relatively high rates of certifying securities classes, however, indicates that these challenges were quite often overcome; for example, the class representative in some cases was replaced by one who was more "representative" (*see infra* § 4(b)).

We also compared the amounts distributed from settlement funds in certified b(3) cases where the court approved a settlement. As might be expected, securities cases had median net monetary distributions to the class ($1.7 million to $3.0 million) far greater than in nonsecurities cases ($1.1 million or less). Comparing median attorneys' fee awards for securities and other class actions showed similar disparities in all but one district. These figures are misleading, though, unless viewed in light of class size because securities classes are generally large. We considered class size by computing the net settlement per class member—dividing the total net monetary settlement amount by the number of notices sent to class members (*see supra* § 1(a)). The median net settlement per class member for securities cases exceeded that in nonsecurities cases in only one of the three districts with sufficient case counts to allow for comparison (see Table 11).

Discussion. In sum, the following general characteristics were found in many securities (b)(3) cases in the four districts: They did not necessarily last longer than most nonsecurities class actions; were about as likely, or somewhat less likely, to be subject to some form of objection to certification; and did not necessarily yield more dollars to individual class members. In addition, securities cases were more likely to be certified and subject to representativeness objections. Finally, numerosity objections were a rarity in securities cases, but a relatively frequent occurrence in other cases. Large class sizes in securities cases often made them distinctive when compared with most nonsecurities classes.

In addition, and somewhat understandably, the securities complaints contained more frequent use of boilerplate allegations when compared with the wide variety of other types of (b)(3) class actions. This appeared to be a factor of the governing law, the subject matter of the complaints, and the frequency with which securities cases were filed. Securities claims generally followed a recognizable pattern based on federal securities statutes and case precedent, whereas claims not dealing with securities often covered ground not as frequently traveled or charted new territory.

Data on Rule (b)(2) cases. We also compared similar indicators in nonsecurities cases in which only a Rule 23(b)(2) class was sought. In those cases that settled, the median time from complaint to closing ranged from fifteen to sixty months, not notably different from (b)(3) cases given the relatively small number of cases involved (see Table 12 compared to Table 8). The rate of (b)(2) certification ranged from 50% to 95% (see Table 13). In three of the districts, the (b)(2) certification rate was lower than for nonsecurities (b)(3) cases; in the fourth district it was higher (see Table 13 compared to Table 9). Looking just at the subset of (b)(2) civil rights cases showed a range of certification rates of 67% to 100%, with no notable patterns observed (see Table 13). We also found no recognizable patterns in the frequency of defendant opposition to motions to certify a (b)(2) class (see Table 14). We did, however, observe that the median fee award was considerably smaller for (b)(2) class counsel when compared to fees in nonsecurities (b)(3) cases (see Table 15 compared to Table 11). Given the disparate nature of these data, it is not possible to generalize about whether (b)(2) cases are easy or routine applications of Rule 23.

(b) How did class actions compare to other types of cases in terms of the type of outcome and the stage of the case at which the outcome occurred?

Background. In this subsection, we look at the routineness of class actions from a different angle, namely, how do class actions compare to other types of civil cases. Two related assertions are commonly made about class actions: that such cases generally settle and that they are rarely tried.[46] The underlying assumptions—sometimes explicitly stated[47]—are that the settlement rate for class actions is higher than that for other types of civil cases, and the trial rate is lower. In this section we will address that assumption by comparing the settlement and trial rates in the class actions we studied with such rates in nonclass action civil cases. The comparison group consists of all nonclass civil cases that were terminated in the four study districts during the same time period.

Data. Differences in data collection make it difficult to compare settlement rates in class actions and nonclass civil cases.[48] Allowing for such differences, it appears that the settlement rates for nonprisoner class actions were within approximately ± 16% of the settlement rates for nonprisoner nonclass actions (see Figure 7). It also appears that settlement rates were higher for securities class actions than for all nonclass securities cases in all but one district (see Figure 8).

The rate of trial (jury and bench) was about the same for class actions and nonclass civil cases in one district and the class action rate was slightly higher in two districts. In the fourth district, the trial rate for class actions was 5.5% and the rate for nonclass civil cases was 3.2% (see Table 16). In securities cases, there were too few cases to treat as other than anecdotal information. Because of the Judicial Conference Advisory Committee on Civil Rules's interest in the subject, we include the information for descriptive purposes only (see Table 17).

In comparison with nonclass civil cases, class actions are not routine in terms of their longevity. Overall, the median time from filing to disposition for class actions was two to three times that of other civil cases in three of the four districts, and in the fourth (S.D. Fla.), class actions took about four and a half months longer at the median (see Figure 9). The patterns were similar for securities cases, but the gaps between class and nonclass

46. *See, e.g.*, Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2098 (1995) ("Defendants' and plaintiffs' attorneys agree to settle virtually all class actions that survive motions to dismiss and motions for summary judgment."). *Cf.* Joel Seligman, *Commentary, The Merits Do Matter: A Comment On Professor Grundfest's "Disimplying Private Rights Of Action Under The Federal Securities Laws: The Commission's Authority,"* 108 Harv. L. Rev. 438, 448 (1994) ("A substantial portion of securities class actions have been resolved by judicial dismissal on the basis of a defendant's motion.").

47. Alexander, *supra* note 9, at 524 ("Though empirical data are hard to come by, it seems clear that securities class actions are resolved by adjudication significantly less often than are other civil cases.").

48. As noted in Figures 7 and 8, the settlement rate for class actions was based on our observations, derived from the case files. Settlement rates for nonclass cases were derived from data provided by each court to the Administrative Office of the U.S. Courts upon termination of a case. We used the categories "dismissed: settled," "dismissed: voluntarily," and "judgment on consent." The differences between Administrative Office data and our data for the same set of class actions suggest that differences between class and nonclass cases may simply reflect the differences in data collection methods.

securities cases were generally not as long as the corresponding gaps in nonsecurities cases (see Figure 10).

Discussion. Examining trial and settlement rates might lead one to conclude that class actions are routine, not very different from other cases terminated in the same courts during the same time span. But the length of time from filing to termination and, as we will see in *infra* § 2(d), the amount of judicial time required by class actions distinguish them from other cases.

(c) What was the frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes and how did these rates correspond with substantive areas?

In this subsection, we examine the frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes (and combinations thereof) and address how the rates correspond with different nature-of-suit categories.

Background. Under Federal Rule of Civil Procedure 23 a case may be certified pursuant to subdivisions (b)(1)(A), (b)(1)(B), (b)(2), or (b)(3).[49] Determining which subdivision under Rule 23 to use is not always clear.[50] There may also be instances where a class action may qualify under Rule 23(b)(3) as well as under (b)(1) or (b)(2).

49. Fed. R. Civ. P. 23(b) states in relevant part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision
> (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (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:
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> (D) the difficulties likely to be encountered in the management of the class action.

50. "The problem is that all class litigation, even litigation for damages, has the potential to affect a defendant's standard of conduct. For instance, a suit for nuisance damages may be won by some claimants and lost by others, thereby creating 'incompatible standards of conduct' for the defendant. Hence, damage actions, which are normally construed as (b)(3) actions, may also fall within the language of (b)(1)(A), and the court may deny notice, giving opportunity to appear or to opt out. The confusion from such amorphous language has resulted in inconsistent case law on what exactly constitutes a (b)(1)(A) class action and games in which the category is manipulated to avoid the time and expense of giving notice." Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform,* 73 Neb. L. Rev. 646, 673

If a (b)(3) class is sought and approved, class counsel is required to provide notice to all class members and an opportunity to opt out. The (b)(1) and (b)(2) subdivisions do not require notice of class certification and do not ordinarily allow opting out. "Because of the notice requirement and the frequent necessity of having to deal with individual damage claims, greater precision is required in (b)(3) actions than in those brought under (b)(1) or (b)(2)."[51]

If a proposed class action qualifies or fits the criteria of more than one of the (b) subdivisions, do parties or judges indicate a preference for class certification pursuant to Rule 23(b)(1) or (b)(2) over Rule 23(b)(3)?[52] Some believe that the increased burden of mandatory notice and other requirements[53] deter parties from seeking (b)(3) certification. Similarly, some courts have expressed reluctance to certify a (b)(3) class when an action also met the requirements of either a (b)(1)[54] or (b)(2) class.[55] One commentator recommends that "[i]f the court determines that both provisions [(b)(2) and (b)(3)] apply, then it should treat the suit as having been brought under Rule 23(b)(2) so that all class members will be bound"[56] because "[t]o hold otherwise would allow the members to utilize the opting out provision in subdivision (c)(2), which in some cases would thwart the objectives of representative suits under Rule 23(b)(2)."[57]

Data. Of the 138 certified classes for which information was available, 84 (61%) were (b)(3) classes, 40 (29%) were (b)(2) classes, and the remaining 14 (10%) reflected an equal number of (b)(1)(A) and (b)(1)(B) classes (see Figure 11). Below, we look at the

(1994) (footnotes omitted).

51. MCL 3d, *supra* note 34, § 30.14, at 217 & n.681 (citing Rice v. Philadelphia, 66 F.R.D. 17 (E.D. Pa. 1974)).

52. *See, e.g.*, Patrykus v. Gomilla, 121 F.R.D. 357 (N.D. Ill. 1988) (civil rights case certified under Rule 23 (b)(2) and (b)(3)); National Treasury Employees Union v. Reagan, 509 F. Supp. 1337 (D.D.C. 1981) (civil rights case certified conditionally under Rule 23(b)(1)(A) or (b)(2)); Bertozzi v. King Louie Int'l, Inc., 420 F. Supp. 1166 (D.R.I. 1976) (securities case certified pursuant to Rule 23 (b)(1) and (b)(2)); Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal.), *modified*, 73 F.R.D. 289 (N.D. Cal. 1976) (employment discrimination case certified under Rule 23(b)(2) and (b)(3)), *aff'd sub nom.* Alaniz v. Tillie Lewis Foods, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

53. Additional requirements include: (1) notice must be individual to all members who can be identified through reasonable effort; (2) absent class members have the right to exclude themselves from the class and from the binding effect of the judgment; and (3) absent class members have the right to enter their appearance through counsel. Rule 23(c)(2).

54. *See, e.g.*, Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977) (antitrust case where the court found a Rule 23(b)(1) preferable to a (b)(3) class so that opt-out privileges would be unavailable).

55. *See, e.g.*, Hummel v. Brennan, 83 F.R.D. 141 (E.D. Pa. 1979) (a labor action where the court certified a Rule 23(b)(2) class rather than a Rule 23(b)(3) class to insure that one litigation would dispose of the issue; court also indicated that procedural safeguards are unnecessary when a class is homogeneous, and that any unfairness caused by members' inability to opt out was outweighed by the preventing of repetitious suits). *See also* 1 Herbert Newberg & Alba Conte, Newberg on Class Actions § 4.20, at 4-74 n.232 (3d ed. 1992).

56. 7A Charles Alan Wright et al., Federal Practice and Procedure § 1775, at 491 & n.64 (2d ed. 1986 & Supp. 1995) (citing Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973) ("Although [the] suit could have been brought as a (b)(3) action, (b)(2) actions generally are preferred for their wider res judicata effects."); McGlothlin v. Connors, 142 F.R.D. 626, 640 (W.D. Va. 1992); Tustin v. Heckler, 591 F. Supp. 1049, 1068 (D.N.J. 1984)).

57. Wright et al., *supra* note 56 at 491–92 (footnotes omitted).

frequency and rate of certification of (b)(1), (b)(2), and (b)(3) classes among the different natures-of-suit categories. We present nature-of-suit information in response to the question raised, but with the caveat that the numbers are often so small that no general conclusion can be drawn from them.

Rule 23(b)(1)(A) and (b)(1)(B). Two of the four districts (E.D. Pa. and N.D. Ill.) certified a total of seven (b)(1)(A) classes.[58] Similarly, two districts (N.D. Ill. and N.D. Cal.) certified a total of seven (b)(1)(B) classes.[59]

Rule 23(b)(2). The four districts had a total of forty cases with certified (b)(2) classes. One district accounted for just over half of these cases. Civil rights cases of various types accounted for 50% of the (b)(2) classes. This is consistent with the advisory committee's note that describes various actions in the civil rights field as prototypes of a (b)(2) class,[60] without suggesting that subdivision (b)(2) is limited to civil rights cases. The second largest nature-of-suit category was ERISA, accounting for five of the forty cases (12.5%).

Rule 23(b)(3). The largest number of certified classes—eighty-four (61%)—were in the (b)(3) category. N.D. Ill. had the most, twenty-six (31%), followed by E.D. Pa. twenty-four (28%), N.D. Cal. twenty-three (27%), and S.D. Fla. eleven (13%). In the four districts combined, 64% of the certified (b)(3) classes were in securities cases (over 80% of certified (b)(3) classes in S.D. Fla., 74% in N.D. Cal., 62.5% in E.D. Pa., and 50% in N.D. Ill.).

Multiple Certifications. Multiple certifications were found in sixteen cases.[61] Three courts each had five cases and one court had one case (see Table 18). The most frequent combination was (b)(2) and (b)(3), occurring in five cases, including two ERISA actions, two civil rights actions, and one other statutory action. The second most frequent combination was (b)(1)(A) and (b)(2), occurring in three cases, one each of other statutory action, civil rights, and other personal property damage cases. The remaining eight cases contained a variety of certification combinations and involved securities, civil rights, ERISA, and constitutionality of state statute actions.

(d) How much judicial time did class actions take and how did that compare to other civil actions?

Background. Yet another measure of the relative routineness of class actions is the amount of judicial time required. Using data from a sample of cases in the Federal Judicial Center's most recent District Court Time Study,[62] we compared the judicial time ex-

58. The nature-of-suit categories were other personal property damage (1), civil rights (1), and Employment Retirement Income Security Act (ERISA) (1) in one district and securities (1), civil rights (1), ERISA (1), and other statutory actions (1) in the other.

59. N.D. Ill. certified five cases with the following nature-of-suit categories: ERISA (3), securities (1), and constitutionality of a state statute (1). N.D. Cal. certified the remaining two cases, which were securities actions.

60. Fed. R. Civ. P. 23 advisory committee's note (citing Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963), as some examples).

61. Includes three cases with combinations that included at least one (b) subdivision and an unspecified class type.

62. In the Federal Judicial Center district court time study (Willging et al., *supra* note 26), district and

pended on class actions with that of civil cases (including class actions) filed within the time study sample period.

Data. Based on case weights derived from time study data, the average class action demands considerably more judge time than the average civil case. We found this when we looked at the data for all subject matter (nature-of-suit) categories combined and when we looked at the data by nature-of-suit category. Case weights are scaled in relation to the weight of an average case, which is rated as a "1." Note that the case weights are based on data from all cases (including class action cases) in the entire time study sample. Case weights are based on average judicial time expenditures and take into account a wide range of cases and judicial activity, from summary dismissals to extended trials.

If class actions were treated as a separate category for case weighting purposes (which they are not), the hours demanded for the class action cases in the district court time study would justify a case weight of 4.71,[63] higher than any civil case type except death penalty habeas corpus (6.15). Racketeer Influenced and Corrupt Organizations (RICO) (3.02) is the next closest civil case type. As compared to criminal cases, an average class action case would require about as much judge time as an average case dealing with extortion, racketeering, and threats (4.62) and would require less time than the average criminal prosecution for bankruptcy or securities fraud (5.30). Note that these are averages that take into account all judicial activity in the sample cases, including trials and sentencing when applicable.

The case weights for the three nature-of-suit categories that were most prevalent in the class action study are: securities, commodities, and exchange, 1.96; other civil rights (filed originally in federal court), 1.61; and prisoner civil rights (not U.S. defendant), 0.26.[64]

The average amount of time required for the average class action of each of the above three types is more than three times the average amount required for the average civil case of the same type. Securities class actions required 3.2 times the judicial time spent on all securities cases; other civil rights cases, 3.3 times as long; and prisoner civil rights cases, 5.03 times.

Certified class action cases consumed considerably more judge time than cases filed as class actions but never certified. Still, noncertified cases required more judicial time than

magistrate judges maintained records of the time they spent on a random sample of 8,320 civil cases filed in 86 U.S. district courts between November 1987 and January 1990. Fifty-one of those cases (0.61%, an incidence of 6.1 class actions for every 1,000 cases filed) contained class action allegations. For a more complete description of the time study methods and a listing of case weights for all nature-of-suit categories, see Memorandum from John Shapard to Subcommittee on Judicial Statistics of the Committee on Judicial Resources 1 (July 20, 1993) (on file with the Research Division, Federal Judicial Center) [hereinafter Shapard Memorandum].

63. Shapard Memorandum, *supra* note 62, at 6–7. The 4.71 case weight for class actions was derived by aggregating the time required for all class action cases in the sample and comparing that time to the time required for the average case. *See* Memorandum from John Shapard to Mark Shapiro, Rules Support Office, Administrative Office of the U.S. Courts (February 8, 1994) (on file with the Research Division, Federal Judicial Center).

64. Shapard Memorandum, *supra* note 62.

the average civil case. In the eleven certified class actions in the time study, judges spent, on the average, eleven times more hours than they did in the average civil action. In the noncertified cases, judges spent twice the number of hours they spent on the average civil case (see Table 19).[65]

The above data indicate that class actions, on the average, are far from routine. However, some types of cases filed as class actions but not certified appear to be fairly routine. For example, other civil rights cases that were filed but not certified as class actions consumed less than one-third of the judge time consumed by all other civil rights cases. Likewise, securities cases that were filed but not certified as class actions consumed less than two-fifths of the judge time consumed by all securities cases. The low time demands of some of these noncertified cases may be accounted for by their consolidation into other cases that were not part of the time study.[66] In addition, the civil rights cases may have included some filings with frivolous class action allegations (e.g., by a pro se litigant who is not authorized to represent a class) combined with frivolous claims, leading to a prompt dismissal.

(3) Race to File

Background. Critics of the use of the class action rule, especially in the securities field, claim that lawsuits frequently are filed without an adequate investigation, immediately after a triggering event, such as a precipitous decline in a stock's value.[67] Reportedly, the purpose of such practices is to gain an advantage in the competition to be appointed lead counsel for the class. Some commentators wonder whether the claims of speedy filings of class actions might be explained by less venal considerations, such as an effort to preserve evidence, especially in tort cases.[68] We can supply only a modest amount of information relevant to the ultimate issue. We looked for multiple filings of class action claims and for information about efforts to preserve evidence, as indicated by a motion to expedite discovery or to preserve evidence.

Data on multiple filings. A race to the courthouse might be inferred from multiple filings of related claims. If so, the frequency and size of intradistrict consolidations (see Figure 12), the frequency and size of multidistrict litigation consolidations (*see supra* § 1(b) and Table 2), and the frequency with which we found related cases (*see infra* § 18 and Figure 13) represent potential races to the courthouse. The cumulative number of such cases is considerable: 32%, 22%, 20%, and 39% of the cases in the four districts had one or more of these three forms of multiple litigation (see Figure 14). Looking only at cases that led to either multidistrict or intradistrict consolidation indicates that from 13%

65. The calculation of the above hypothetical 4.71 case weight for class actions included both certified and uncertified cases. The average number of judge hours per case was approximately eleven for all class actions, but the amount of judge time for certified class actions was approximately three times that.

66. If a non–time study case became the lead case, judges were instructed not to count the time spent on the consolidated cases.

67. *See* Senate Staff Report, *supra* note 8, at 16–29; *see also*, *e.g.*, Greenfield v. U.S. Healthcare, 146 F.R.D. 118 (E.D. Pa. 1993), *aff'd sub nom.* Garr v. U.S. Healthcare, 22 F.3d 1274 (3d Cir. 1994).

68. Cooper, *supra* note 6, at 28.

to 22% of the cases involved multiple filings of cases that a district judge or the Judicial Panel on Multidistrict Litigation found to have common questions of law or fact.[69]

Data on expedited discovery. We also gathered information about whether class action complaints were filed for the ostensible purpose of expediting discovery or preserving discoverable information. Generally they were not, at least as measured by the frequency of requests for expedited discovery or preserving information in class litigation.

In seven cases in the four districts, plaintiffs moved for expedited discovery,[70] typically for the purpose of gathering evidence to support a motion for a preliminary injunction. Courts granted all but two of those seven requests. Otherwise, we found no evidence to support the claim that any early filings of class actions were for the purpose of expediting discovery or preserving information.

(4) Class Representatives

Call for research. In this section we address issues related to the selection and supervision of class representatives. Examining the full range of questions raised concerning class representatives would call for interviewing lawyers and class representatives about their relationships and, perhaps, going back to case files or other records to examine depositions and other discovery information concerning named representatives. Most of that research is beyond the scope of this study. We urge other researchers to pursue the issues raised and we stand ready to provide information to support such an effort.

Background. To assure that a class is adequately represented, the court has wide discretion in selecting the named representative and class counsel.[71] While the selection of the representative may be less critical than the appointment of counsel, the class representatives should be free of conflicts of interest with the class[72] and should present claims and raise defenses that are typical of the class claims and defenses.[73]

(a) How many "repeat players"?

Background. One of the questions asked was if there are "professional" representatives who appear repeatedly, at least in particular subject areas.

Data. We found few multiple appearances of named plaintiffs in the four districts. Pooling all the names of class representatives into one file with 353 names of class representatives from 141 cases, we identified duplicate appearances by four individuals and one corporation. In each instance, the representative appeared in two separate class actions. None of the class representatives appeared in more than two cases in the study. In no instance did the same name arise in two districts.[74]

69. Fed. R. Civ. P. 42(a); 28 U.S.C. § 1407 (1988).

70. Plaintiffs so moved in three (3%) of 117 cases in E.D. Pa., three (3%) of 102 cases in N.D. Cal., and one (1%) of seventy-two cases in S.D. Fla. In N.D. Ill., there were no such cases.

71. MCL 3d, *supra* note 34, § 30.16.

72. *Id. See generally* Downs, *supra* note 50, at 651–58.

73. Fed. R. Civ. P. 23(a)(3). *See also* General Telephone Co. v. Falcon, 457 U.S. 147 (1982); Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of* General Telephone v. Falcon, 54 Ohio St. L.J. 607 (1993).

74. But note that our data only include class actions that were terminated in four districts during a two-

One of the five sets of duplicate appearances involved two securities actions, two sets involved one securities action and another statutory action (ERISA, RICO, and "other"), one set involved an antitrust action and a civil rights action, and the fifth set involved an ERISA action and an "other statutory action."

(b) Did judges add or substitute representatives?

Background. The court has a continuing duty to insure that class representatives "remain free of conflicts and . . . 'vigorously pursue' the litigation in the interests of the class, including subjecting themselves to discovery."[75] The court may have to replace a class representative if "the representative's individual claim has been mooted or otherwise significantly affected by intervening events, such as decertification, or where the representative has engaged in conduct prejudicial to the interests of the class or is no longer interested in pursuing the litigation."[76] We examined the frequency with which representatives were changed in certified class actions.

Data. Changes in class representatives occurred in a considerable percentage of certified class actions in the four districts (21%, 8%, 21%, and 33%, representing ten, one, ten, and eleven cases, respectively) (see Figure 15). These differences in the rate of changes did not seem to have any direct relationship with the frequency of objections to certification based on the representativeness of the named plaintiffs in (b)(3) or (b)(2) cases (see Tables 10 and 14). Nor did the differences appear to have any direct relationship with the longevity of cases in those districts. The three districts with rates from 21% to 33% had approximately the same median times from filing to disposition (see Figure 9). Perhaps some unexamined feature of the local legal culture among the bar or bench in N.D. Cal. might help to explain the higher frequency of changes in that district.

For almost half of the changes, no reasons were evident in the case file. In three cases, the changes were to replace a deceased class representative. The remaining cases—also, almost half of the changes—were instances in which the change in representative appeared to reflect a significant change in the litigation. Seven changes involved explicit recognition that the representatives' claims were atypical of the class claims; five changes responded to situations affecting the ability of the class representative to continue to represent the class (e.g., conflict of interest; a redefined class did not include the representative); and three involved voluntary withdrawal from or opting out of the class. One change added representatives of a subclass of stock option holders.

(c) Did named representatives attend the approval hearing?

Background. Class representatives' "views may be important in shaping the [settlement] agreement and will usually be presented at the fairness hearing."[77] While representatives' views may be entitled to "special weight," they do not have veto power over a proposed settlement.[78]

year span.

75. MCL 3d, *supra* note 34, § 30.16, at 221 (footnote omitted).
76. *Id.* at 221–22.
77. *Id.* § 30.44, at 242.
78. *Id.*

Data. Attendance of representative parties at the settlement approval hearing was uneven across the four districts. In E.D. Pa. (where records of the settlement hearing were most complete) one or more class representatives attended the settlement approval hearing in 46% of the certified, settled class actions (*see* discussion at *infra* § 13(b) and Figure 53). The rates in the other districts varied from 11% to 28%.

(d) What was in it for the class representatives?

Background. "The propriety of 'incentive' awards to named plaintiffs has been rigorously debated. While a number of courts have approved such awards on the basis that class representatives take on risks and perform services, others have denied preferential allocation on the grounds that the named plaintiff may be tempted to settle an action to the detriment of the class or come to expect a 'bounty' for bringing suit."[79] A notice of proposed settlement should "disclose any special benefits provided to the class representatives."[80]

Data. A substantial minority of all certified, settled class actions in which the court approved a settlement included designated awards to the named class representatives.[81] In the four districts the percentages that included such awards were 26%, 46%, 40%, and 37% (see Figure 16). The median amounts of all awards to class representatives in the four districts were $7,500 in two districts, $12,000 in the third, and $17,000 in the fourth (see Figure 17). In many cases, there was more than one representative. The median award per representative in three courts was under $3,000 and in the fourth was $7,560 (see Figure 18). The median percentage of the total settlement that was awarded to class representatives was less than or equal to eleven thousandths of one percent (0.011%) in all four districts.

(5) Time of Certification

Introductory Data. Across the four districts we found a total of 286 cases with either a motion for or against class certification or a sua sponte show cause order regarding certification in the four districts. Of these cases, 93 (33%) were unconditionally certified, 59 (21%) were certified for settlement purposes only, 76 (27%) were denied certification, 6 (2%) were deferred, and 52 (18%) had no action indicated. In the following sections we discuss the process whereby decisions about certification were made.

(a) Timing of motions and certification decisions

Background. In this subsection, we examine the point at which motions to certify are filed and the length of time that elapses before the court rules to see if there is "any pattern to the point at which the first certification decision is made." We also examine (*see infra* §

79. 2 Newberg & Conte, *supra* note 55, § 11.38, at 11-80 to 11-82 and cases cited at nn. 209–11. *See also* Downs, *supra* note 50, at 692 ("Cases in the late 1970s and early 1980s abhorred such preferences, but recent cases permit such practices more freely." (footnote omitted)).

80. MCL 3d, *supra* note 34, § 30.212, at 228.

81. The data, of course, include only information that was available in the court file, the settlement, the notice to the class, or the motion for approval of the settlement and does not include any undisclosed preferences to class representatives. *See* Downs, *supra* note 50, at 692–93 (reporting that often the preferences are not disclosed to the class in the notice of settlement; also, finding that 37% of the cases studied in N.D. Cal. contained such preferences).

5(b)) "the effect of local rules requiring that a motion to certify be made within a stated period."[82] Federal Rule of Civil Procedure 23(c)(1) directs the court to determine "as soon as practicable" after the commencement of a case whether an action is to be maintained as a class action.

Data. How soon do counsel file motions to certify—or courts issue sua sponte orders regarding certification? Median times in the four districts ranged from 3.1 months to 4.3 months after the filing of the complaint.[83] Seventy-five percent (75th percentile) of the motions or orders were filed within a range of 6.5 months at one end to 16.3 months at the other (see Figure 19).

How soon do courts rule on motions to certify after they have been filed?[84] Three districts' median times ranged from 2.8 months to 4.1 months. The other district had a median time of 8.5 months. In 75% of the cases, courts ruled on class certification within 7.6, 15.8, 10.2, and 8.4 months after the filing of a motion to certify (see Figure 20).

(b) Local rules on the timing of certification motions

Background. As noted above, Federal Rule of Civil Procedure 23(c)(1) directs the court to determine class status "as soon as practicable," but the rule provides little specific guidance. To fill that gap and encourage early resolution or settlement, three of the four districts specify, by local rule, a definite time within which the plaintiff must file its motion for certification unless good cause is shown to extend the time. E.D. Pa. and S.D. Fla. require the filing of a motion to certify within 90 days,[85] and N.D. Cal. requires the filing of such a motion within 180 days.[86] N.D. Ill. has no local rule addressing the timing of motions to certify.

Data. In the previous section, we saw that in 75% of the cases the time from the filing of the complaint to the filing of a motion to certify ranged from more than 6.5 to more

82. Cooper, *supra* note 6, at 30.

83. In the time study, 64% of the motions or orders in fifty-one class action cases were filed within 100 days of the filing of the complaint. Preliminary Time Study, *supra* note 26, at 8–9.

84. For one standard of promptness, see 28 U.S.C. § 476 (motions pending for more than six months need to be included in a district court's semiannual report under the Civil Justice Reform Act). Note that the data reflect only those cases that contained both the certification motion filing date and the date of the court's ruling.

85. U.S. District Court for the Eastern District of Pennsylvania, Local Rule 27(c) (Aug. 1, 1980) states, in relevant part:

> Within ninety (90) days after the filing of the complaint in a class action, unless this period is extended on motion of good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Fed. R. Civ. P., as to whether the case is to be maintained as a class action.

U.S. District Court for the Southern District of Florida, Local Rule 23.1(A)(3) (Feb. 15, 1993) states:

> Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion of good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Fed. R. Civ. P., as to whether the case is to be maintained as a class action.

86. U.S. District Court for the Northern District of California, Local Rule 200-6(c) (rev. Nov. 1, 1988) states:

> The party seeking to maintain an action as a class action shall file a motion for determination whether it may be so maintained pursuant to Rule 23(c)(1) within six months of the filing of that party's first pleading, or at such later time as the assigned judge may order or permit.

than 16.3 months in the four districts. In E.D. Pa., the median time for filing a motion to certify was slightly longer than called for by the local rule, and in S.D. Fla., the median time was more than a month longer (see Figure 19). In N.D. Cal., the median time was in compliance with the 180-day limit, but the time for filing a motion to certify was longer than 180 days in at least 25% of the cases. N.D. Ill., which has no rule addressing how soon after the complaint a motion for certification must be filed, had the third shortest time span (8.2 months) between the two filings for 75% of the cases (see Figure 19). At the other extreme, N.D. Cal., with a 180-day filing requirement, had the longest time span between the filing date of the complaint and the filing date of the motion to certify (see Figure 19).

We found no relationship between the local rule and the time within which judges rule on motions to certify once filed. For example, judges took more time to issue 75% of their rulings (between seven and fifteen months) in the two districts with rules requiring early filing of motions to certify than in the district with a rule requiring filing within 180 days (see Figure 20).

Further, the time to settlement of the case did not appear to have any relationship to the local rules or the absence of a local rule. Our data revealed that neither the length of time from the court's ruling on certification to settlement of the case nor the length of time from filing of the case to settlement appeared to be influenced by the presence, absence, or provisions of a local rule. For example, in one district with a 90-day rule, 75% of the cases took approximately three-and-one-half years from the filing of the complaint to settlement, a figure higher than that of N.D. Ill., which has no rule. Cases in N.D. Cal. (180-day rule) were disposed of more quickly than cases in one jurisdiction with the 90-day rule (see Figure 21). On the other hand, E.D. Pa. (90-day rule) disposed of 75% of its cases approximately one year faster than the other three courts.

The time from ruling on certification to settlement followed similar paths. However, it must be noted that there was a substantial amount of missing data regarding settlements in two districts, and our conclusions are based solely on the limited available data. Overall, courts settled 75% of their cases in a range of fourteen to thirty-eight months after certification (see Figure 22; *see also infra* § 5(c)). Again, early filing practices did not correspond with quicker resolution of cases. It took over three years for one district with an early filing rule to dispose of its cases. But E.D. Pa. again settled its cases more quickly after certification than the other three courts.

Data on the time from filing to termination in two districts with the ninety-day certification rule showed termination of 75% of the courts' cases in just over two years. Termination rates were the same for the other district with the early certification rule and the district with no rule. Data showed that 75% of those cases were terminated in 34.1 months (see Figure 23).

Discussion. There has not been substantial compliance with the presumptive time limits of the local rules. However, it should be noted that each local rule has a clause "unless extended for good cause." Moreover, delays in judicial rulings on motions to certify can thwart the apparent intent of the local rules. Finally, prompt settlement of the case appears to be affected by many factors other than a rule regarding the starting point of the class certification process. In all three of these areas one might reasonably expect other

factors, such as the workload of the court or the number of judicial vacancies, to affect the court's output. Lack of compliance with the rules in the first instance suggests that in many cases judges and litigants do not see such rules as necessary to the management of the litigation before them.

(c) Decisions on merits in relation to certification

Summary. In this rather lengthy subsection we present data on the frequency and type of rulings on motions to dismiss and motions for summary judgment. We also address the key issue of the timing of such rulings in relation to rulings on class certification. Many assume that class action litigation proceeds directly from certification of a class to settlement without judicial examination of the merits of the claims. The data presented in this section indicate otherwise. Parties often filed motions to dismiss or for summary judgment and judges generally ruled on those motions in a timely fashion, often dismissing a case in whole or in part. These rulings on the merits often preceded rulings on class certification.

Background. As noted above, Federal Rule of Civil Procedure 23(c)(1) directs the court to determine "[a]s soon as practicable" whether an action is to be maintained on behalf of or against a class. The rule is silent on the timing of rulings on class certification in relation to rulings on motions to dismiss or for summary judgment. The proposed amendment to Rule 23 that the advisory committee on civil rules circulated in January 1993 contained a new provision in 23(d)(1)(B) authorizing a court to "decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay."[87]

Some argue that it would be more economical for a court to rule on the merits of a putative class action before committing resources to certifying and managing the case as a class action and before imposing an obligation to notify the class.[88] For the same or similar reasons, the advisory committee is currently considering a procedure that would require a preliminary assessment of the merits as part of a (b)(3) certification decision (see Appendix B, § 23(b)(3)(E)). As the data below show, many judges in the four districts have not seen themselves as lacking authority to rule on a motion to dismiss or to issue a sua sponte dismissal order before ruling on class certification. Nor, apparently, did judges in a prior empirical study of (b)(3) class actions show any reluctance to rule on the merits before ruling on certification.[89] Having explicit authority to so rule, however, might influence any judge who has felt constrained to avoid ruling on such motions prior to class certification.

87. Appendix A, § 23(d)(1)(B); *see also* Appendix B, § 23 (d)(1).

88. Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo. L.J. 1123, 1145 (1974) ("A judge concerned with the most efficient use of court time may be reluctant to consider certification and notice without some belief that the case is strong on the merits.") [hereinafter *Georgetown Empirical Study*].

89. *Id.* at 1144 ("In the preliminary stages of litigation, the court showed no reluctance to dismiss or grant summary judgment to defendants on the merits without consideration of the class issues."). The study examined all Rule 23(b)(3) class actions filed in the U.S. District Court for the District of Columbia between July 1, 1966, and Dec. 31, 1972.

Federal courts of appeals have taken divergent views on whether a ruling on a motion to dismiss or motion for summary judgment may precede a ruling on class certification. Some courts have interpreted the U.S. Supreme Court's ruling in *Eisen v. Carlisle & Jacqueline*[90] to mandate that the determination of class status is to be made before the decision on the merits.[91] The reasoning of such courts is that Rule 23(c)(1) requires that a class action seeking damages be certified before a determination on the merits in order to prevent one-way intervention or opting out by class members, who would know the outcome of the ruling on the merits.[92] Other courts have approved precertification rulings on the merits, reasoning that a party filing a pretrial motion to dismiss or for summary judgment may explicitly or implicitly waive the protection.[93] As noted above, of the courts of appeals for the four district courts involved in this study, the courts of appeals in the Third and Ninth Circuits have approved the practice of issuing precertification decisions on the merits, the Seventh Circuit has generally disapproved the practice,[94] and the Eleventh Circuit has no published ruling on this point. Based on the rulings in each circuit we would expect that there would be few, if any, precertification[95] rulings on the merits in N.D. Ill. and that E.D. Pa. and N.D. Cal. would have more such rulings.

Data. In three districts in the current study—putting aside N.D. Ill., which we will discuss separately below—the rate of precertification[95] rulings on motions to dismiss exceeded 70%. In cases in which there were rulings on both motions to dismiss and motions to certify, approximately 80% of the motions to dismiss were decided before the motions to certify (see Figure 24).[96] In all four districts, the rate of precertification ruling on motions for summary judgment was lower than the rate of precertification rulings on motions to dismiss (see Figure 25), but this may be a function of the differences between motions to dismiss and motions for summary judgment. One would expect, for example, that the need for discovery would delay the filing of summary judgment motions. In all courts, more than 20% of the rulings on summary judgment preceded the class certification ruling, and in N.D. Cal., 67% (ten of fifteen) of the summary judgment rulings preceded the class certification ruling (see Figure 25).

90. 417 U.S. 156 (1974).

91. *Id.* at 177–78. *See, e.g.*, Nance v. Union Carbide Corp., 540 F.2d 718, 724 n.9 (4th Cir. 1976) (quoting Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975)), *vacated*, 431 U.S. 952 (1977).

92. Hudson v. Chicago Teachers Union, 922 F.2d 1306, 1317 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991). *See also* Peritz v. Liberty Loan Corp., 523 F.2d 349, 353–54 (7th Cir. 1975).

93. Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.) (en banc) (explicit waiver; use of "test case" procedure before certification ruling), *cert. denied*, 419 U.S. 885 (1974); Wright v. Schock, 742 F.2d 541 (9th Cir. 1984) (implicit waiver where defendant "assumes the risk" of a limited effect of its summary judgment motion).

94. *See* cases cited *supra* notes 92 & 93. *But see* Roberts v. American Airlines, Inc., 526 F.2d 757, 762 (7th Cir. 1975) (dictum that defendants by filing a motion for summary judgment before a ruling on class certification "assumed the risk that a judgment in their favor would not protect them from subsequent suits by other potential class members"), *cert. denied*, 425 U.S. 951 (1976).

95. We use the term "precertification" to mean before a *ruling* on certification, whether or not the ruling is to grant or deny certification.

96. These data do not include rulings on motions to dismiss that terminated the case without the need for a ruling on class certification.

The data partially support the expectation that N.D. Ill. would have fewer precertification rulings because of case law in its court of appeals disapproving that practice. In fact, N.D. Ill. had the lowest rate of precertification rulings on motions to dismiss (twenty-eight of forty-six, or 61%; see Figure 24) of the four districts but the second highest rate of precertification rulings on motions for summary judgment (eleven of twenty-seven, or 41%; see Figure 25). Nevertheless, N.D. Ill. judges issued a substantial number of precertification rulings on both types of motions, which suggests that the law of the circuit regarding precertification rulings has not been the only factor affecting the district judge's decision about when to rule on motions to dismiss or for summary judgment.[97]

As discussed in the last subsection, three of the districts have local rules regarding the timing of motions to certify a class; E.D. Pa. and S.D. Fla. require filing a motion to certify a class within 90 days and N.D. Cal. requires filing within 180 days.[98] Still, in E.D. Pa., the percentage of precertification rulings was substantial for motions to dismiss (thirty-one of forty, or 78%; see Figure 24), though not for motions for summary judgment (eight of twenty-six, or 31%; see Figure 25). In N.D. Cal., the percentage of precertification rulings was higher for both motions to dismiss (twenty-six of thirty-two, or 81%; see Figure 24) and for motions for summary judgment (ten of fifteen, or 67%; see Figure 25).

Again, as discussed in the last subsection, compliance with the rules did not appear to have been strict. Whether the local rules had an effect seemed doubtful. Assuming that there is any effect of the local rules, one might expect that requiring a prompt motion to certify would have more impact on the generally slower and more deliberate summary judgment process than on motions to dismiss. As one might expect, under the 180-day deadline for filing of motions to certify in N.D. Cal., rulings on summary judgment more often preceded rulings on certification than under the 90-day deadline in E.D. Pa. But the timing may say more about the nature of summary judgment than about the effects of the two local rules.

Whether a motion to dismiss was ruled on before or after a motion to certify did not appear to be related to the grounds cited in the ruling on dismissal. At both stages, such motions generally referred to Federal Rule of Civil Procedure 12(b)(6) or 12(b)(1) (see Table 20), which were the most frequently cited grounds in motions to dismiss generally (see Table 21). Note, however, that, in all districts but N.D. Ill., a motion to dismiss for failure to state a claim (Rule 12(b)(6)) was far more likely to be ruled on before certification. In N.D. Ill., such a motion was almost equally likely to be ruled on before or after certification. Perhaps the law of the circuit has some influence.

97. Note that Fed. R. Civ. P. 56(a) allows the filing of a motion for summary judgment "at any time after the expiration of 20 days from the commencement of the action . . . ," and Fed. R. Civ. P. 12(b) calls for the filing of a motion "before pleading." Neither rule sets a standard for when such motions should be decided.

Note also that case law in at least two other circuits has concluded that the parties may waive their right to a ruling on certification or may assume the risk that a precertification ruling on the merits may not have class-wide effect. *See* discussion at *supra* notes 93 & 94.

98. *See supra* notes 85 & 86.

In our preliminary report to the advisory committee,[99] we discussed the greater likelihood of a motion being denied before rather than after a ruling on certification. We observed what appeared to be a pattern of denying precertification motions to dismiss more frequently in E.D. Pa. and in the time study sample of cases. This phenomenon also occurred to a minor extent in N.D. Ill., but not in N.D. Cal. or S.D. Fla. (see Table 22). If there is any relationship between the timing of certification and the denial of motions to dismiss, it might be subject to local variations. Note also that the disproportionate denial of precertification motions compared to postcertification motions also extended to summary judgment rulings in E.D. Pa., but not in the other courts (see Table 23).

(i) Outcomes of rulings on dismissal and summary judgment and impact on the litigation

Background. In this subsection we present data about the outcomes of motions to dismiss and motions for summary judgment and in the following subsection we will present data as to the timing of the filings and rulings on such motions. Critics of the class action device, especially critics of shareholders' securities class actions, frequently referred to such cases as "strike suits."[100] While it is difficult to find a definition of a strike suit that crisply distinguishes it from most other types of litigation,[101] two essential ingredients seem to be the frivolity of the allegations and the difficulty of obtaining a ruling on the merits. The ultimate test of the strike element seems to be whether settlements are seen as being coerced because the defendants do not have a cost-effective opportunity to litigate the merits (*see infra* § 14(a)).[102]

The timing and outcome of rulings on motions to dismiss and motions for summary judgment are relevant to the question of whether the class action device is used as a strike suit. Examining such rulings should illuminate whether and when litigants in class actions have an opportunity to address the merits or frivolity of a claim. Motions to dismiss generally test the sufficiency of the underlying legal theory of the case as applied to the facts alleged in the complaint, regardless of whether or not those facts can be proved. Motions for summary judgment generally test the sufficiency of the factual basis for each element of the claim for relief, as shown through affidavits, depositions, and other documentary materials. In general, if a claim for relief survives a motion to dismiss, its legal claims are probably not frivolous. Likewise, if a claim survives a motion for summary judgment, its material factual allegations are probably not frivolous.

99. *See* Willging et al, Preliminary Report, *supra* note 27, at 31–33.

100. *See, e.g.*, Senate Staff Report, *supra* note 8, at 18 ("Each of the corporate executives described what they characterized as 'strike suits' that were filed against their companies, generally following an adverse earnings announcement and resulting stock price drop.").

101. *See, e.g.*, Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 Dick. L. Rev. 355, 357 n.1 (1994) ("The term 'strike suit,' coined in the 1930s, refers to a derivative action whose nuisance value gives it a settlement value independent of its merits."); Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits, in Derivative Litigation: The ALI Drops the Ball*, 77 Minn. L. Rev. 1339, 1341 n.5 (1993) ("'Strike suits' are 'those based on reckless charges and brought for personal gain.'") (quoting Robert C. Clark, Corporate Law § 15.2 (1986)).

102. *Georgetown Empirical Study, supra* note 88, at 1136 (evidence that defendants gained dismissal or summary judgment indicates that they did not feel "forced to settle even if the plaintiff's claim is weak"). We discuss the issue of whether class actions lead to coerced settlements *infra* § 14(a).

The timing of rulings on such motions is relevant to the cost of obtaining a ruling on the merits. If rulings can be obtained promptly, whether before or after class certification, parties opposing the class have an opportunity to resolve the claims on their merits without being forced to settle.

Data on outcomes. Overall, approximately two out of three cases in each of the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or a sua sponte dismissal order (see Table 24). In three of the four districts, more than one out of six cases included both rulings on dismissal and summary judgment, and in the fourth approximately one case in nine had both types of rulings (see Table 24).[103]

Of the cases in which a motion to dismiss was filed, rulings were issued in from 73% to 81% of the cases depending on the district. That rate of ruling approximates the rates found in three studies of motions to dismiss in general litigation.[104] Rulings in which all or part of the complaint was dismissed amounted to 47%, 49%, 76%, and 77% of the rulings in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal., respectively (see Table 25). Overall, about half of the cases in each district included rulings dismissing all or part of the complaint.

The vast majority of motions for summary judgment were, as is typical,[105] filed by defendants (see Figure 26 and Table 26). In two districts, rulings on such motions were issued approximately 85% of the time and in the other two districts about 60% of the time (see Figure 27), data that are comparable to and, overall, somewhat higher than the rate of rulings in a study of general civil litigation.[106] Such motions were granted in whole or in part in more than half of the rulings (54%–68%) in three of the four districts studied. In the fourth, such motions were granted in whole or in part 39% of the time (see Table 26).

Combining all dismissals and summary judgment rulings for all cases in the four districts, we find that approximately two of five cases were dismissed in whole or in part or had summary judgment granted in whole or in part in two districts and that approximately three out of five cases were so treated in the other two districts (see Figure 28). But note that granting dismissal or summary judgment does not necessarily end the litigation because an amended complaint may be filed or the summary judgment may be partial or may not apply to all parties.

What effect do these rulings have on the litigation as a whole? In examining each class action file we identified the event or events that resulted in terminating the litigation. The effects of motions in each of the districts were strikingly similar: Approximately three out

103. An unknown number of those cases had multiple rulings on motions to dismiss and on motions for summary judgment filed on behalf of various defendants. To keep the demands of the study manageable we limited our motions study to identifying the filing of the first motion of a given type and examining the outcome of the first ruling on each type of motion.

104. Thomas E. Willging, Use of Rule 12(b)(6) in Two Federal District Courts 6–8 (Federal Judicial Center 1989) (finding a rate of 83% and reporting rates of 77% and 56% from two other studies).

105. *See* Joe S. Cecil & C. R. Douglas, Summary Judgment Practice in Three District Courts 5 (Federal Judicial Center 1987) (defendants filed 59%, 71%, and 80% of the motions for summary judgment in the three district courts studied).

106. *Id.* (finding that about two-thirds of the motions for summary judgment produced rulings).

of ten cases in each district were terminated as the direct result of a ruling on a motion to dismiss or for summary judgment (see Table 27; see also Table 39).

(ii) Timing of rulings on dismissal and summary judgment

Data on timing. One general standard of promptness is that motions should be decided within six months or a reason given for the delay.[107] Looking at the time from the filing of the first motion to dismiss to the first ruling on dismissal, the median time for rulings on motions to dismiss ranged from 2.6 months to 7.4 months. Three of the four courts had a median response time of less than four months (see Table 28). Because the median time is a measure of the central tendency (i.e., the middle of the data) and we wish to discuss a wider range of the data, we also calculated the time by which 75% of the motions had been decided and found that they were resolved in 4.7, 13.7, 8.6, and 5.4 months (see Table 28).

The timing of rulings on summary judgment follow a similar pattern, but involve generally longer time spans than the rulings on motions to dismiss. The median time from the filing of the first motion for summary judgment to the first summary judgment ruling was less than four months in two courts and more than seven months in the other two courts (see Table 29). Seventy-five percent of all motions for summary judgment were resolved in 7.9, 15.4, 16.8, and 5.2 months in the four courts (see Table 29). The two slower courts were also slower in ruling on motions to dismiss.

Discussion. In analyzing the issue of whether large numbers of class actions are strike suits, our data yield mixed results. On the one hand, motions to dismiss are filed and granted more frequently in class action litigation than in ordinary civil litigation.[108] Such data indicate that a relatively large number of cases are found to be without legal or factual merit, or both. Comparison with data from a 1974 study of (b)(3) class actions indicates, however, that the rate of dismissal and summary judgment is lower in the current study than it was during 1966–1972 in one federal district court.[109]

On the other hand, defendants generally appear to have had an opportunity to test the merits of the litigation and obtain a judicial ruling in a reasonably timely manner, particularly for motions to dismiss. Testing the factual sufficiency of claims via summary judgment, however, may take more than a year for some rulings in some courts.

107. 28 U.S.C § 476 (1990) (motions pending for more than six months need to be included in a semiannual report under the Civil Justice Reform Act).

108. In an empirical study of the use of Fed. R. Civ. P. 12(b)(6) in two federal district courts, that rule was found to account for the disposition of 2% to 4% of all cases in the sample. Willging, *supra* note 104, at 7–9. Motions were filed in 13% of the cases in the sample and approximately 23% of the rulings resulted in a total disposition of the case. *Id.* An earlier study by the Center found higher rates of filing (40%) and disposition (65% compared to 52% in the later study), as well as a higher rate of granting of motions (40%) in a sample of cases in six federal district courts. *Id.* at 5–6 (citing Paul Connolly & Patricia Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980)).

109. *Georgetown Empirical Study, supra* note 88, at 1136 (showing that 55% [44 of 81] of class actions were disposed of favorably to defendants by dismissal or summary judgment). Excluding four voluntary dismissals which we would not have counted as rulings on dismissal, the rate is 49% (40 of 81), compared to our rate of approximately 33%.

For at least one-third of the cases in our study, judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise. The settlement value of other cases was undoubtedly influenced by rulings granting motions for partial dismissal or partial summary judgment and by rulings denying such motions. Such merits-related influences on settlement value, however, seem not to fall within the broadest definition of a strike suit.

(d) Simultaneous motions to certify and approve settlement

Background. The question is how frequently do courts approve settlements which include the initial certification of a class? As a general principle, settlement negotiations in class actions are deferred until the court has ruled on class certification. However, on occasion, parties will enter into settlement agreements before a class is certified. Because of their advantages courts have sometimes approved settlement classes.[110] But settlement classes generally warrant closer judicial scrutiny than settlements where the class certification has been litigated.[111]

Data. Across the four districts, a total of 152 cases were certified in some form or fashion. Of this total 93 cases (61%) were certified unconditionally and 59 cases (39%) were certified for settlement purposes only. Of those 59 cases, 28 (47%)—approximately 18% of all certified class actions—contained information or docket entries indicating that a proposed settlement was submitted to the court before or simultaneously with the first motion to certify.

The twenty-eight cases with simultaneous motions to certify and approve settlement were filed in three districts. One district had fourteen cases or 50% of all cases, eight of which were securities cases. The next district had seven cases (25%), four of which were other statutory actions. The third district also had seven cases (25%), four of which were civil rights actions (see Table 30). In twenty-four of the twenty-eight cases (86%), the court approved the settlement without changes. In the remaining cases, the court approved the settlement but with some changes. (*See also infra* § 14(b).)

Are there differences in the two types of classes certified for settlement purposes, that is, cases certified with or without a simultaneous settlement? Our data were especially limited in this area because information was missing for numerous cases, and as a result no reliable conclusions can be drawn from them. We found that the (b)(3) class was the most frequently certified class in both types of scenarios. The (b)(2) class was the second most frequently certified class (see Table 31). These results parallel our finding that the (b)(3) class is the most frequent type of class sought and certified. (*See supra* § 2(c).)

(e) Changes in certification rulings

Background. In this subsection we look at the frequency with which courts change the definition of the class or the direction of their certification rulings. The *Manual for Complex Litigation, Third,* indicates that "[w]hether a class is certified and how its member-

110. *See, e.g.*, Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982); *In re* Beef Indus. Antitrust Litig., 607 F.2d 167 (5th Cir. 1979). *Cf.* Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982); *In re* Franklin Bank Sec. Litig., 574 F.2d 662 (2d Cir. 1978).

111. MCL 3d, *supra* note 34, § 30.45.

ship is defined can often have a decisive effect not only on the outcome of the litigation but also on its management. It determines the stakes, the structure of trial and methods of proof, the scope and timing of discovery and motion practice, and the length and cost of the litigation."[112] The *Manual* also warns that "[u]ndesirable consequences may follow when an expansive class, formed on insufficient information, is later decertified or redefined."[113]

Data. Of 152 *certified* cases, counsel in 23 (15%) cases filed either a motion to reconsider the court's decision or a motion to decertify the class. The courts' responses to these motions varied.[114] In 9 (39%) of the 23 cases the court affirmed its certification ruling. In 5 (21%) of the 23 cases the court denied reconsideration of the matter altogether (see Table 32).

Of the districts' *noncertified* cases, in only 4% did counsel file a motion to reconsider the court's decision. The court denied the reconsideration motion in 72% of those cases. In the remaining 28% of the cases, the court either took some other action or did not rule on the request.

(6) Certification Disputes

In this section we first address the questions: How much time is spent contesting certification? Are there correlations between the subjects of litigation and certification disputes? Is much effort devoted to contesting the choice between (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of the litigation?[115]

(a) How many certification contests were there and how much time did counsel spend opposing certification?

Background. Pursuant to Federal Rule of Civil Procedure 23, class certification is left to the sound discretion of the district court.[116] Because judicial discretion is not immutable, disputes inevitably arise. At this stage, the court does not have the responsibility of adjudicating the merits of the class or individual claims (*see supra* § 5(c)).

Data. In three of the four study courts, defendants opposed certification in slightly over 50%[117] of the cases with a motion or sua sponte order regarding class certification. Defendants opposed 40% of the motions or orders in the other district (see Figure 29).

We have no reliable measure to estimate the time counsel spend contesting certification. Some have suggested that the length of the brief is an adequate indicator, but it is far from clear that more pages equates to more time, especially when the subject matter has become routinized (*see supra* § 2(a)). Notwithstanding this, because of the expressed in-

112. *Id.* § 30.1, at 212.

113. *Id.* § 30.11, at 215.

114. Outcomes included: denying reconsideration, affirming certification, reversing certification, modifying certification deferring reconsideration, taking no action, and lastly, taking some other form of action.

115. Cooper, *supra* note 6, at 30.

116. Zeidman v. Ray McDermott & Co., 651 F.2d 1030, 1038–39 (5th Cir. 1981); 7B Wright et al., *supra* note 56, § 1785.

117. This percentage is lower than the time study figure, which was 60%. *See* Willging et al., *supra* note 26, at 10.

terest in time spent on certification contests, we looked at brief lengths and at whether there appeared to be a relationship between the length of the opposition brief and the outcome of the certification dispute, that is, whether the case was certified.

We found that in at least 70% of cases where opposition to certification was indicated counsel in the four districts submitted opposition memoranda (see Figure 30). Further, in cases for which information was available, 75% of the opposition brief lengths ranged from twenty-seven pages or less in one district to sixty-one pages or less in another, with median lengths ranging from twelve pages to twenty-six pages. Briefs supporting certification in disputed cases were somewhat longer; 75% ranged from thirty-five pages or less in one district to seventy-six pages or less in another, with median lengths ranging from eighteen to forty pages (see Figure 31).

A relationship, although modest, appeared to exist between opposition brief lengths and whether a case was eventually certified. In 75% of the cases in three districts, opposition brief lengths were longer in certified cases (with differences of three pages in one district, 9.5 in the second, and thirty-one in the third).

How does the length of judicial opinions in contested cases that were ultimately certified (certified dispute cases) compare to contested cases that were not certified (noncertified dispute cases)? Should we expect to find lengthier opinions in certified cases? The length of opinions in certified dispute cases were somewhat lengthier than those in noncertified cases, but not dramatically so. We found that in 75% of the certified dispute cases, opinion lengths ranged from thirteen to twenty-four pages as compared to three to nineteen pages for noncertified cases (see Figure 32).[118]

Opposition to certification was indicated in twenty-seven different nature-of-suit categories in the four districts. In twelve of these different case types, opposition to certification appeared only once. Not surprisingly, because of the amount in controversy in many securities cases and because of their overall prevalence in the four districts, in two of the four districts opposition was most prevalent in these cases. In the third district, the number of securities and prisoner civil rights cases were the same and in the fourth district most opposition arose in other civil rights cases (see Table 33). When we combined civil rights cases—other civil rights, jobs, accommodations and welfare—they accounted for the most opposition in two districts (see Table 34). In another district, opposition was found equally in prisoner civil rights, securities, and other civil rights cases.

(b) Was there a relationship between disputes over certification and the nature of suit?

Data. Most of the contested cases included arguments about three of the four traditional Federal Rule of Civil Procedure 23(a) issues: typicality, representativeness, and commonality. Disputes addressing representativeness and typicality occurred with almost equal frequency. Arguments about the other traditional issue, the size of the class (numerosity), occurred less frequently (see Figure 33). Most disputes, except numerosity,

118. Time study data revealed that the average amount of judicial time spent on certification rulings was about five hours. The average ruling was approximately seven pages. The median length was one page but some were as long as twenty-five to thirty-five pages. Willging et al., *supra* note 26, at 13.

arose in securities, civil rights, and labor cases. Numerosity disputes arose most frequently in civil rights and labor cases. Looking at each type of dispute separately, we found:

Representativeness disputes. Disputes regarding the ability of the representatives to adequately represent the class occurred most often, appearing in 89 of the 141 cases (63%) in which there was opposition to certification. Most of these disputes arose in securities (27 cases, or 30.3%), civil rights (23 cases, or 25.8%), and labor (15 cases, or 16.8%) cases.

Typicality disputes. Disputes addressing the typicality of the class representatives' claims arose in eighty-seven cases (61%) and similarly appeared most often in securities (twenty-six cases, or 29.8%), civil rights (twenty-four cases, or 27.5%), and labor (thirteen cases, or 14.9%) cases.

Commonality disputes. Disputes about the presence of common issues of law and fact appeared in seventy-four cases (52%) and again were generally found in securities (twenty-one cases, or 28.3%), civil rights (nineteen cases, or 25.6%), and labor (twelve cases, or 16.2%) cases.

Numerosity disputes. Numerosity disputes arose less frequently than the other types of disputes, occurring in forty-nine cases (34%). Such disputes generally appeared in civil rights (twenty-one cases, or 42.8%) and labor (six cases, or 12.2%) cases.

(c) How much effort was devoted to the choice between (b)(1), (b)(2), and (b)(3) classes and did the effort vary by nature of suit?

Background. One of the assumptions set forth in the September 1985 report of the American Bar Association's Section of Litigation Special Committee on Class Action Improvements is that disputes over the type of class to be certified are frequent and problematic.[119] As a result of these disputes, the committee indicated that "[t]he trifurcation created by present subdivision (b) places a premium on pleading distinctions with important procedural consequences flowing to the victor."[120] Further, the committee recommended eliminating the three subsections of subdivision (b) "in favor of a unified rule permitting any action meeting the prerequisites of Rule 23(a) to be maintained as a class action if the court finds 'that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"[121]

119. ABA Special Committee Report, *supra* note 10, at 203 ("With such procedural consequences at stake, it is no surprise that enormous amounts of energy and money are often devoted to the characterization battle, and difficult questions command the attention of the courts as the parties struggle at the outset of a case to decide whether the presence of an 'individual issue' defeats a claim to (b)(1) status . . . ."). *See also* Tober v. Charnita, Inc., 58 F.R.D. 74 (M.D. Pa. 1973); Contract Buyers League v. F & F Inv., 48 F.R.D. 7 (N.D. Ill. 1969).

120. ABA Special Committee Report, *supra* note 10, at 204.

121. *Id*. The Committee Note of Proposed Rule 23 (see Appendix A) suggests that the rationale behind the collapsing of categories or proposing a unified rule was simplification:

> This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on whether and how the case should proceed as a class action.

A central feature of the preliminary draft proposal of Rule 23 circulated by the Advisory Committee on Civil Rules in January 1993 was the merger of current subdivisions (b)(1), (2), and (3) into a unitary standard.[122] This standard would have applied a single set of certification factors to all cases and allowed trial judges discretion in designing class actions suited to the needs of particular cases, including "the power to certify different class actions for different parts of the same case," less stringent forms of notice for (b)(3) classes, some form of notice in a (b)(1) or (b)(2) class action, and an opt-out right in (b)(1) or (b)(2) class actions.[123] "This new power over opt-out should make it easier for trial judges to experiment with novel opt-out structures. For example, a judge might certify a mandatory class for liability and an opt-out class for damages on the theory that the damage phase triggers a weightier litigant–autonomy interest than liability or on the theory that [permitting an] opt-out for damages is necessary to protect high stakes plaintiffs from exploitation."[124]

Not everyone agrees that there should be a collapsing of categories as set forth in the 1993 draft proposal. Some argue that the elimination of the Rule 23(b) categories would (1) have ramifications both for the opt-out provisions and the notice requirements of the existing rule and (2) impact the legitimacy lent by the traditions established by (b)(1) classes and the moral tones established by the civil rights cases' uses of (b)(2) classes. Additionally, others believe that the current subdivisions have historical roots that enable the courts to draw upon the jurisprudence developed from those cases. A change in the rule could very well lead to unpredictable results.

If the language of the 1993 draft proposal were adopted, courts would be able to allow class members to opt out of (b)(1) and (b)(2) classes, and might deny members the opportunity to opt out of a (b)(3) class, thereby preventing individuals from pursuing individual litigation. Additionally, "[e]liminating the three categories is likely to create greater procedural complexity because the court must then determine in every case whether notice and opt out requirements should apply, and if so, under what conditions."[125] "This subjective standard . . . would invite protracted procedural battles about what the parties consider to be 'superior,' 'fair' and 'efficient.' The standard's inherent subjectivity would also practically assure that different judges applying their own views of superiority, fairness and efficiency would render decisions that litigants would inevitably find to be inconsistent and confusing."[126]

Some courts have experimented with their application of Rule 23 and have employed judicial discretion in applying the subsections of Rule 23(b) more flexibly.[127]

122. Cooper, *supra* note 14.

123. Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 Rev. Litig. 79, 83 (1994).

124. *Id.* at 84 n.15 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 925–30 (1987) (analyzing various conditions on opt out)).

125. Lawyers for Civil Justice et al., Comments on Federal Rule of Civil Procedure 23, at 1, 2 (Apr. 22, 1993) (unpublished report) (on file with the Research Division, Federal Judicial Center).

126. *Id.* at 7.

127. *See, e.g.*, Bell v. American Title Ins. Co., 277 Cal. Rptr. 583 (Cal. Ct. App. 1991); Boggs v. Divested Atomic Corp., 141 F.R.D. 58 (S.D. Ohio 1991).

Data. We examined the extent to which the parties and the courts address the class-type issue and found that in all four districts the parties infrequently address the issue. In the 122 cases for which information was available, the parties' arguments in 95 cases (78%) did not address whether one type or another should be certified. In 20 cases (16%) the portion of the briefs devoted to such arguments was less than 25% of the size of the briefs. In the remaining 7 cases arguments regarding class type were less than 75% of the size of the briefs in 6 cases and between 75% to 99% in the remaining case.

Courts address the type of class to be certified less frequently than the parties.[128] In the 140 cases for which information was available, in approximately 85% of the cases the court did not address the class-type issue at all. However, in the 27 cases where counsel did raise the class-type issue, the courts in 21 of those cases (77%) addressed the issue. Of those 21 rulings, 20 devoted less than 25% of the opinion to the class-type issue and 1 devoted 50% to 74%.

Discussion. Data collected from the four districts do not support the American Bar Association's earlier stated assumption that disputes over the type of class to be certified are frequent. We cannot tell from these data whether the disputes over the type of class in this minority of cases might be problematic. Whether or not having disputes over the type of class in 22% of the opposition briefs and in about 15% of the judicial opinions supports a proposed rule change is clearly a question for the special committee.

(7) Plaintiff Classes

(a) Did defendants ever seek and win certification of a plaintiff class?

Data. Defendants almost never sought certification of a plaintiff class. In less than 1% of the motions filed was the defendant seeking such certification. Our data uncovered one such motion in a tort (personal property-other fraud) case which was subsequently certified. In approximately 79% of the cases with certification motions, plaintiffs were seeking to certify a plaintiffs class. In over 12% of the remaining cases (see Figure 34, other category), the parties generally stipulated to a plaintiff class or settlement class.

(b) How frequently did defendants acquiesce in certification of a plaintiff class by failing to oppose or by stipulating to class certification?

Data. In half of the 152 certified cases, defendants acquiesced in certification of a plaintiff class by either failing to oppose the motion or sua sponte order for certification or by stipulating to class certification. Our data did not reveal defendants' basis or rationale for acquiescing.

128. *Cf. Georgetown Empirical Study, supra* note 88, at 1143 ("Orders granting certification seldom specif[y] which category of rule 23 (b) . . . [is] involved.").

(8) Defendant classes[129]

Background. The core questions are: How common are defendant classes? Are there identifiable but narrow settings in which they are most likely?[130] Case law and commentary give us more information than the empirical data in the study, which simply confirms that use of defendant classes is rare. Defendant class actions have been long recognized as a valid procedural device "whereby an entire class of defendants can be bound to a judgment although some individual members did not participate in the litigation but were represented by named class representatives."[131] It appears on its face that Rule 23 allows for the certification of both defendant and plaintiff classes.[132] However, certification of defendant classes is presumed to be uncommon.[133]

Though perhaps uncommon, case law and commentary show that defendant classes have been used in various types of cases. The most common use is reported to be "in suits against local or state enforcement officials challenging the constitutionality of state law or practice."[134] Defendant classes have also been employed "in patent infringement cases in which a common question of patent validity is litigated against a defendant class of alleged infringers."[135] Case law also reveals that defendant classes have been upheld in civil rights,[136] criminal justice,[137] mental health,[138] and securities cases.[139]

129. Note, *Defendant Class Actions*, 91 Harv L. Rev. 630, 637 (1978):

> The traditional defendant class action is limited to the resolution of issues that are perfectly common to all the class members. As such, it is essentially a device that permits the offensive assertion of collateral estoppel on the common issues against non-parties, rather than a method of conducting a unitary proceeding that determines the rights and liabilities of each class member represented in the suit.

130. Cooper, *supra* note 6, at 30–31. Professor Cooper also asks a number of questions about how defendant classes work. Given the paucity of data on the subject, we are unable to respond meaningfully to those questions.

131. Robert E. Holo, *Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution*, 38 U.C.L.A. L. Rev. 223, 223 (1990).

132. Fed. R. Civ. P. 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties. . . ."

133. *See* DeAllaume v. Perales, 110 F.R.D. 299, 303 (S.D.N.Y. 1986) ("Although Rule 23 provides for defendant as well as plaintiff classes, certification of a defendant class is rare.").

134. 1 Newberg & Conte, *supra* note 55, § 4.50, at 4-196.

135. *Id.* at 4-197 (citing Dale Elecs., Inc. v. RCL, Inc., 53 F.R.D. 531 (D.N.H. 1971); Research Corp. v. Pfister Associated Growers, Inc., 301 F. Supp. 497 (N.D. Ill. 1969); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714 (N.D. Ill. 1968)).

136. *See, e.g.*, Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972); Doss v. Long, 93 F.R.D. 112 (N.D. Ga. 1981); Florida Businessmen for Free Enter. v. Florida, 499 F. Supp. 346 (N.D. Fla. 1980), *aff'd sub nom.* Florida Businessmen for Free Enter. v. Hollywood, 673 F.2d 1213 (11th Cir. 1982).

137. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975); Marcera v. Chinlund, 91 F.R.D. 579 (W.D. N.Y. 1981).

138. *See, e.g.*, Institutionalized Juveniles v. Secretary of Public Welfare, 78 F.R.D. 413 (E.D. Pa.), *rev'd on other grounds*, 442 U.S. 902 (1978); Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975).

139. *See, e.g.*, *In re* Alexander Grant & Co. Litig., 110 F.R.D. 528 (S.D. Fla. 1986). The plaintiff successfully sought certification of a defendant class in an action charging violation of federal securities and RICO laws; court indicated that the "certification of defendant classes has gained considerable acceptance in securities fraud litigation." *Id.* at 533. *See also In re* Itel Sec. Litig., 89 F.R.D. 104 (N.D. Cal. 1981) (court indicated that the existence of a plaintiff class often enhances the likelihood of certification of a defendant class).

Data. Our data support the earlier assertion that defendant classes are not common. In the four districts, there were a total of four motions requesting certification of a defendant class, three filed by plaintiffs and one filed by defendants. Of the 152 certified cases in the four districts, N.D. Ill. was the only one with a certified defendant class. Certification had been sought by the plaintiffs in a civil rights case. After reviewing that case file we were unable to determine whether the defendant was a willing representative for the class, nor could we ascertain the extent of compensation for such an undertaking.

(9) Issues Classes and Subclasses

In this section we address the questions: How frequently, and in what settings, are issues classes [i.e., cases in which some but not all of the issues are certified for class treatment] used? Subclasses? How diligent and sophisticated is the inquiry into possible conflicts of interest within a class . . .?[140] We found no issues classes and few subclasses. We also found that the ability of the representative to represent the class was frequently disputed on the ground that the named plaintiffs had a potential conflict of interest with other class members.

Background on issues classes and subclasses. Rule 23(c)(4) authorizes the court (1) to allow a class action to be maintained with respect to particular issues, or (2) to divide the class into appropriate subclasses.[141] Subdivision (c)(4) is helpful in assisting the courts with the ability to restructure complex cases in order to meet the other requirements for maintaining a class action, such as the superiority and manageability requirements.[142]

All four of the districts, E.D. Pa.,[143] S.D. Fla.,[144] N.D. Ill.,[145] and N.D. Cal.,[146] have case law reflecting the courts' willingness to certify an issues class if the other Rule 23 requirements are fulfilled.

140. Cooper, *supra* note 6, at 31. On this topic, Professor Cooper also raised a series of questions about how issues classes work. Given the absence of issues classes in our study, we cannot address those questions.

141. *See* 7B Wright et al., *supra* note 56, § 1790, at 268.

142. *Id.*

143. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 109 (3d Cir. 1979) (finding certification of the class for purposes of determining liability entirely proper in an action seeking injunctive relief against the continued maintenance of state school and hospital facility catering to persons suffering from mental retardation); Samuel v. University of Pittsburgh, 538 F.2d 991, 995 (3d Cir. 1976) (finding decertification of a class action in a case attacking a state-wide residency rule to be in error when the court could have used Rule 23(c)(4)(A) and (B) to better manage the class); McQuilken v. A&R Dev. Corp., 576 F. Supp. 1023, 1028, 1032 (E.D. Pa. 1983) (utilizing Rule 23(c)(4)(A) to limit the issues in a class action to recover damages to class members' property by construction activity); Griffen v. Harris, 83 F.R.D. 72, 74 (E.D. Pa. 1979) (holding that in light of Rule 23(c)(4)(A) the district court should reconsider its prior ruling on class certification, in an action challenging the Department of Housing and Urban Development administration of rent supplement program, as it pertains to damages); Swarb v. Lennox, 314 F. Supp. 1091, 1099 (E.D. Pa. 1970) (ordering class certification for a limited class with limited issues in a case involving the legality of the Pennsylvania judgment by confession practice), *aff'd*, 439 U.S. 1012 (1979).

144. Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985) (reversing the district court's decision to deny class certification in a suit brought for the denial of Medicaid benefits; court should have considered Rule 23(c)(4)); *In re* Nissan Antitrust Litig., 577 F.2d 910, 913 (5th Cir. 1978) (affirming district court's decision to separate out certain issues for class treatment in an antitrust action), *cert. denied*, 429 U.S. 1017 (1979).

Additionally, case law also reveals that subclasses have been used in E.D. Pa.,[147] S.D. Fla.,[148] N.D. Ill.,[149] N.D. Cal.[150] and in a variety of substantive case types.

145. Denberg v. United States, 696 F.2d 1193, 1207 (7th Cir. 1983) (finding that although the district court did not have jurisdiction over the action challenging decision of the Railroad Retirement Board to deny benefits to husbands of retired railroad workers, it was appropriate for the district court to utilize Rule 23(c)(4)(A) in order to separate out particular issues for class treatment), *cert. denied*, 466 U.S. 926 (1984); Barkman v. Wabash, Inc., No. 85-C-611, 1988 U.S. Dist. LEXIS 421, at *2, 8 (N.D. Ill. Jan. 19, 1988) (finding the use of Rule 23 (c)(4)(A) appropriate in a securities action); Skelton v. GMC, 1985-2 Trade Cas. (CCH) ¶66, 683 (N.D. Ill. 1985) (holding that the common issue appropriate for class-wide treatment in a warranty case is the issue of whether a design or manufacturing defect breached the implied warranty of merchantability). *But see In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir. 1995) (reversing district court's decision to certify a class action as to the issue of negligence only in a product liability/negligence suit because district judge "exceed[ed] the permissible bounds of discretion in the management of federal litigation"), *cert. denied*, No. 95-147, 1995 U.S. LEXIS 6153 (Oct. 2, 1995).

146. Valentino v. Carter-Wallace, Inc., No. C94-2867, 1995 U.S. Dist. LEXIS 9938, at *1-2 (N.D. Cal. Mar. 15, 1995) (certifying pursuant to Rule 23(c)(4)(A) specific common issues for class treatment in a product liability/negligence suit); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 453 (N.D. Cal. 1994) (excluding plaintiff's deterrence claims for class certification in a case under the Americans with Disabilities Act); *In re* Activision Securities Litig., 621 F. Supp. 415, 439 (N.D. Cal. 1985) (certifying defendant underwriter class with respect to particular issues); *In re* Gap Store Sec. Litig., 79 F.R.D. 283, 308 (N.D. Cal. 1978) (certifying defendant class of underwriters as to particular issues); I.M.A.G.E. v. Bailar, 78 F.R.D. 549, 559 (N.D. Cal. 1978) (bifurcating issues in a civil rights action pursuant to Rule (c)(4)(A)). *But see In re* Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 855 (9th Cir. 1982) (holding that "the few issues that might be tried on a class basis in this case balanced against issues that must be tried individually, indicate that the time saved by a class action may be relatively insignificant"), *cert. denied*, 459 U.S. 1171 (1983).

147. Samuel v. University of Pittsburgh, 538 F.2d 991, 996 (3d Cir. 1976) (holding that the district court abused its discretion by not investigating into the possible usefulness of subclasses before decertification was ordered); Williams v. Philadelphia Hous. Auth., No. 92-7072, 1993 U.S. Dist. LEXIS 8826, at *29 (E.D. Pa. June 30, 1993) (certifying a subclass in a case against the Housing Assistance Program); Troutman v. Cohen, 661 F. Supp. 802, 813 (E.D. Pa. 1987) (certifying subclasses for class action involving challenges to the Medical Assistance Skilled Care Regulations); Pennsylvania v. Int'l Union of Operating Eng'r, 469 F. Supp. 329, 391 (E.D. Pa. 1978) (certifying subclasses for a discrimination class action); Santiago v. City of Philadelphia, 72 F.R.D. 619, 629 (E.D. Pa. 1976) (certifying subclasses in a civil action class action); Dawes v. Philadelphia Gas Comm'n, 421 F. Supp. 806, 826 (E.D. Pa. 1976) (certifying subclasses in an action challenging certain policies and practices of the Philadelphia Gas Works); Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 66 F.R.D. 581 (E.D. Pa. 1975) (certifying subclasses in a Sherman antitrust class action); Dorfman v. First Boston Corp., 62 F.R.D. 466, 476 (E.D. Pa. 1973) (certifying two subclasses in a securities class action).

148. Appleyard v. Wallace, 754 F.2d 955 (11th Cir. 1985) (vacating district court's decision to deny class certification and suggesting that the court should have considered using Rule 23(c)(4)). *But see* Mathews v. Diaz, 426 U.S. 67, 71 (1976) (finding that the district court in the Southern District of Florida lacked jurisdiction over the class action involving the Social Security Act and the class and subclass as certified were too broadly defined).

149. Williams v. State Bd. of Elections, 696 F. Supp. 1559, 1560 (N.D. Ill. 1988) (certifying subclasses in a civil rights class action); Technograph Printed Circuits, Ltd. v. Method Elec., Inc., 285 F. Supp. 714, 725 (N.D. Ill. 1968) (certifying subclasses in a patent class action).

150. American Timber & Trading Co. v. First Nat'l Bank, 690 F.2d 781, 786 n.5 (9th Cir. 1982) (finding subclassification appropriate in a usury class action suit); Valentino v. Carter-Wallace, Inc., No. C94-2867, 1995 U.S. Dist. LEXIS 9938, at *1 (N.D. Cal. March 15, 1995) (certifying subclass in product liability/negligence class action); Sullivan v. Chase Inv. Serv., Inc., 79 F.R.D. 246 (N.D. Cal. 1978) (certifying

Data on issues classes and subclasses. Our results uncovered no issues classes in the four districts. The cases that were certified appeared to encompass all the issues in question. We had, for example, no mass tort cases where issues of fault and general causation might be suitable for class treatment, leaving other issues, for example, proximate cause or damages, to be determined on a case-by-case analysis. Finding no issues classes is not surprising from a judicial economy standpoint because issues classes can create additional litigation and courts are likely to use issues classes only when the advantages outweigh the disadvantages of promoting additional litigation.[151]

Our data revealed a total of ten subclasses in the four districts. Each district except for one certified three subclasses. Securities cases had the largest number of subclasses—five. Four of the remaining five subclasses were found in civil rights cases (see Figure 35). In these cases subclasses were often used to separate out different class members who either purchased stock under different circumstances than the rest of the class or were discriminated against by a defendant during a different time than the class period.

Our data showed that judges have used subclasses but not issues classes. It appears that courts, or at least the ones in the four districts, were more comfortable in certifying subclasses in cases where members held divergent or antagonistic interests. Allowing such subclasses in effect brings to closure all issues in a class, thereby terminating the entire litigation.

Background on conflicts of interest. As a general principle, class representatives' interests should not conflict with the interests of the class.[152] Pursuant to Federal Rule of Civil Procedure 23(a)(3) "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ." In some instances a party's claim of representative status will only be defeated if the conflict goes to the very subject matter of the litigation.[153]

subclasses in class action against brokerage houses). *But see* Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981) (finding that the district court had no authority to create a subclass in a Section 1983 class action violation); Mendoza v. United States, 623 F.2d 1338, 1349–50 (9th Cir. 1980) (affirming district court's decision to deny plaintiffs' subclass motion), *cert. denied*, 450 U.S. 912 (1981); Wilkinson v. FBI, 99 F.R.D. 148 (N.D. Cal. 1983) (denying subclass in constitutional class action challenge for failure to satisfy the numerosity requirement).

151. For a discussion of the advantages and disadvantages of issues classes, *see* 7B Wright et al., *supra* note 56, § 1790, at 271.

152. *But see* Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 407 (D.N.J.1990) (the court found that the "[f]act that the named plaintiff in a securities fraud action purchased her stock through a broker who was her stepfather and who resided in the same household with her did not produce a conflict of interest between her and other members of the class nor show that she had access to inside information not available to the general public, and did not preclude finding that her claims were typical of those of members of the class.")

153. 7A Wright et al., *supra* note 56, § 1768, at 327 & Supp. 1995 (citing Michaels v. Ambassador Group, Inc., 110 F.R.D. 84 (E.D.N.Y. 1986) ("any conflict of interest arising between members of proposed class in an action for alleged violations of Securities Exchange Act section 10(b), from different times of purchase and sale, was minimal when compared to substantial questions common to all members of class, and any conflicts were too peripheral to mandate denial of class certification motion"); United States v. Rhode Island Dep't of Employment Sec., 619 F. Supp. 509, 513 (D.R.I. 1985) ("[T]he fact that the class

Data on conflicts of interest. In the majority of cases where typicality of the class was disputed, defendants generally contended that plaintiffs' claims were distinct from those of the class they sought to represent, or were subject to a defense unique to the representative. Arguments addressing actual conflicts of interest between the representative and class members occurred infrequently. Such arguments were raised in general terms and usually addressed the possibility of conflicts between class representatives and absent class members or alleged conflicts in plaintiffs' proposed class definition.

Under Rule 23(a)(4), a representative party is expected to fairly and adequately protect the interest of the class. In some instances, defendants might allege that a representative cannot satisfy the requirements of Rule 23(a)(4) if a potential conflict of interest exists with the other class members. The ability of the representative to represent the class was often disputed on the ground that the named plaintiffs had a potential conflict of interest with other class members. The general types of conflicts found in our study included but were not limited to:

1. Cases generally alleging inadequacy of representation due to antagonistic interests of the class representatives to class members whose rights and interests they purport to represent (e.g., named plaintiffs wanted to withdraw their pension contributions whereas other members wanted to wait for monthly retirement benefits).
2. Cases where the conflict centered around some class members not being entitled to the same relief.
3. A case where the dispute centered around the competition between lead counsel and another plaintiff's lawyer to represent the class. Lead counsel for the class submitted a proposal to continue to serve as lead counsel that included a $325,000 cap on costs and expenses to be reimbursed from the fund. Plaintiff's counsel argued that the cap committed counsel to seek an early settlement and represented a powerful incentive to settle the case and that lead counsel had bought an interest in the litigation and that interest conflicted with the class.
4. A case where counsel sought to act simultaneously as the class representative and as class counsel. A potential conflict of interest existed between her duty as representative to the class and her economic interest in attorneys' fees.

Courts addressed these conflicts in a variety of ways, sometimes substituting class representatives (*see supra* § 4(b)), sometimes denying class certification, and sometimes overruling the objection.

(10) Notice

(a) What types of notice, in what time frame, have been required in (b)(1), (b)(2), and (b)(3) actions?

Background. Two different situations may call for notice: class certification and settlement. Regarding notice of certification, Federal Rule of Civil Procedure 23(c)(2) mandates that, "[i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, in-

representative may be entitled to back pay in an amount different from that owed other class members does not automatically destroy the adequacy of her representation, nor create any conflict among class members going to the 'very subject matter of the litigation.'")).

cluding individual notice to all members who can be identified through reasonable effort." In (b)(1) and (b)(2) actions, district judges have discretion to provide notices whenever they deem it necessary "for the protection of the members of the class or otherwise for the fair conduct of the actions."[154] The *Manual for Complex Litigation, Third* indicates that notice of certification "may at times be advisable for (b)(1) and (b)(2) classes."[155]

Regarding notice of settlement, Rule 23(e) provides, without exception, that "notice of the proposed dismissal or compromise shall be given to all members of the class . . . ." Courts and commentators have concluded that "notice of [voluntary] dismissal or compromise is mandatory in all cases under Rule 23."[156]

Rule 23 does not specify a time within which notice must be sent, but the *Manual for Complex Litigation, Third* suggests that "notice should ordinarily be given promptly after the certification order is issued."[157] In some instances, class members or their representatives and, perhaps, defendants may have found it to be in their interests to delay notice, for example, when a settlement[158] or disposition of the liability issues is imminent. If the class prevails on liability, the ruling might have the effect of shifting the burden of paying the cost of notifying the class.[159] If the case settles, the parties can use the settlement agreement to specify their allocation of notice costs. If the class does not prevail on liability, however, the ruling will not bind class members who did not have notice of class certification.[160]

In its 1985 study, the ABA Section of Litigation's Special Committee on Class Action Improvements observed that Rule 23 imposes notice requirements exceeding those demanded by the Constitution and that Rule 23(c)(2) "frequently obliges a court to require the class representative to advance huge sums of money as a precondition to further prosecution of the action."[161] The proposed amendment to Rule 23 that the advisory committee circulated in 1993 would give the district judge discretion to require "appropriate notice" (see Appendix A, Proposed Rule (1993) 23 (c)(2)). In making that decision, the judge would be directed to take into account a host of factors, including "the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice."[162] In this subsection we will present data on the current practices

154. Fed. R. Civ. P. 23(d)(2). *See* 7B Wright et al., *supra* note 56, § 1786, at 196.

155. MCL 3d, *supra* note 34, § 30.211, at 224. The purpose of the notice is to "help bring to light conflicting interests or antagonistic positions within the class . . . and dissatisfaction with the fairness and adequacy of representation." *Id.* Similarly, Newberg and Conte assert that notice in such cases is "frequently advisable." 2 Newberg & Conte, *supra* note 55, § 8.05, at 8-18.

156. 7B Wright et al., *supra* note 56, § 1797, at 365 & n.48.

157. MCL 3d, *supra* note 34, § 30.211, at 224.

158. *Id.* at 224–25.

159. 2 Newberg & Conte, *supra* note 55, § 8.09, at 8-33.

160. Failure to give adequate notice may mean that members of the class will not be bound by the judgment. 7B Wright et al., *supra* note 56, § 1789.

161. ABA Special Committee Report, *supra* note 10, at 208 (citing Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974)).

162. Cooper, *supra* note 14.

in the four districts, relate those practices to the current rules, and discuss the relevance of the data to proposed reforms.

Data. Notice of class certification or of the settlement or voluntary dismissal of a class action was sent to class members in at least 76% of the certified class actions in each of the four districts (see Figure 36). Although notice of certification before settlement is not required in (b)(1) and (b)(2) actions, the majority of such cases included some notice (see Table 35). Generally the notice in those cases was notice of settlement, but a sizable minority included personal notice of class certification.[163] As noted above, Rule 23(e) calls for notice of settlement in all certified class actions. In six settled (b)(2) class actions, however, no notice to the class or hearing regarding the settlement was indicated on the record.[164]

In the (b)(3) certified class actions, notice of certification or settlement was sent in all but six of the cases in the study.[165] As we discuss below in this subsection, notice appeared to have been delayed in sixteen certified (b)(3) actions in which the first notice was a notice of settlement. Our data do not reveal reasons for the lack of notice, but there are any number of possibilities, ranging from concerns about the cost of notice to the parties' inadvertence or neglect. In five of the six cases, the failure to notify the class of the certification appears to have deprived class members of an opportunity to participate in the action before a settlement or a ruling on the merits[166] and may as well have deprived the defendants of a final judgment of class-wide effect.[167] For further discussion of notice in settlement classes, *see infra* § 14(a).

Discussion. Failure to provide notice to the class in these cases seems to violate Rule 23(c)(2)'s mandate that notice be provided promptly in all cases. The omission may be the result of a conscious litigation strategy. In the words of one commentator, postponing notice may represent "litigation strategy and ingenuity," designed to obtain a ruling on the merits before providing notice.[168] In this way, class representatives might avoid the

163. In all four districts notice was issued in 37 cases certified in whole or in part under (b)(1) and (b)(2). Data was available regarding the event associated with notices in 31 cases. Of those, 23 were notices of settlement and eight were notices of certification. Only two of the eight cases with notices of certification had been certified in part under (b)(3). All eight cases included personal notice and four of those also included notice by publication. *See also* discussion of (b)(1) and (b)(2) classes *infra* § 11(b).

164. In four of the cases injunctive relief was included in the final order and in one of those cases a $10,000 payment to the named plaintiff was part of the settlement. In one of the other two cases, the court simply noted that the parties "settled out of court." The other case was dismissed "for statistical purposes" while the parties worked out the details of their settlement, with the parties to report to the court if there was any difficulty reaching settlement.

165. One of the six cases was terminated by remand to the state court. One was dismissed by stipulation without any damages or other remedy indicated and without any indication of court approval. The other four cases, one of which was certified as both a (b)(2) and a (b)(3) class, had been terminated by dismissal or summary judgment.

166. One of the purposes of the notice is to give the absent class member an opportunity to "enter an appearance through counsel." Fed. R. Civ. P. 23(c)(2).

167. *See supra* note 160.

168. 2 Newberg & Conte, *supra* note 55, § 8.09, at 8-33.

burden of paying the cost of notice[169] and both parties might avoid the expense and inconvenience of providing two sets of notices to the class. Delays in notice could also, of course, be the result of any number of other factors, such as the need to gather information about the class, inadvertence, neglect, the press of business, or any of the myriad reasons for delays in litigation.

Data. To examine the extent of delays in notice, we looked at the length of time between class certification and the first notice to the class (other than a notice of settlement). We found some variation. In the fastest of the four districts on this point, the median time span was 2.2 months between certification and notice, but 25% of the cases in that district took more than 16.3 months (see Figure 37). In the other districts, the median times were 3.3, 3.8, and 8.3 months (see Figure 37). In all four districts at least 25% of the certification notices were issued more than six months after the class was certified. We have no direct data on the reasons for those delays.

The time from ruling to notice of settlement may shed additional light on the extent to which settlement avoids the need for the class representatives or their attorneys to advance the costs of notice. In 27 (38%) class actions that were certified and later settled (i.e., excluding settlement classes), the first notice sent to the class was a notice of the settlement. Overall, 16 (59%) of those 27 cases had been certified as (b)(3) classes. The median elapsed time between certification and notice was almost three years in one district, more than a year in two other districts, and about three months in the fourth. The number of cases in which such time gaps occur is a relatively small proportion—less than 13%—of all certified and settled class actions. Nevertheless, the numbers are sufficient to show that the practice occurs and that the time gap between certification and notice of settlement can be quite wide.

Discussion. The combined effect of finding no notice at all in six certified (b)(3) actions and finding delayed notices in sixteen certified (b)(3) cases that eventually settled suggests that the lack of a precise timetable or guideline in Rule 23(c)(2) has in some cases allowed the parties to postpone or avoid notice. Such omissions thwart the intent of the advisory committee that class members be notified promptly of the class certification so that they can effectively exercise their rights to participate or opt out of the action.[170] Omitting notice also has the effect of avoiding the preclusive effect of a judgment for a defendant against a class.

These practices may be an effort to achieve informally, without a rule change, the result that the ABA Section of Litigation's special committee also sought, namely, recognition of notice costs as potential barriers to access to the courts and flexible allocation of the cost of providing notice. Addressing the merits of a case before certification might provide a mechanism for allocating the costs of notice.

169. *Id.*

170. *See, e.g.*, Frankel, *supra* note 5, at 41 ("But it seems obvious that if notice is to be effective—if class members are to have a meaningful opportunity to request exclusion, appear in the action, object to the representation, etc.—the invitation must go out as promptly as the circumstances will permit."); 2 Newberg & Conte, *supra* note 55, § 8.09, at 8-32 to 8-33.

(b) In what form was the notice issued, who paid the cost, and does the cost of notice discourage legitimate actions?

Background. Rule 23(c)(2) requires individual notice in (b)(3) actions for class members "who can be identified with reasonable effort." Others are to be given "the best notice practicable under the circumstances." The *Manual for Complex Litigation, Third* states that "[p]ublication in newspapers or journals may be advisable as a supplement."[171] As discussed (*see supra* text accompanying note 161), *Eisen v. Carlisle & Jacqueline*[172] requires that class representatives be responsible for the cost. The *Manual for Complex Litigation, Third* points out that "[t]he manner of giving notice can encourage or discourage the assertion of certain claims, or can be so costly and burdensome as to frustrate plaintiffs' ability to maintain the action."[173] Commentators have asserted that the effect of *Eisen* "is to make the initiation of class actions more burdensome, particularly when they are brought under Rule 23(b)(3) and thus require individual notice to all identifiable class members."[174]

Data. The data indicate that the parties and judges follow the dictates of the *Eisen* line of cases by providing individual notice in almost all certified (b)(3) actions in which any notice was provided (see Table 36).[175] In at least two-thirds of the cases in each of the districts, the individual notices were supplemented by publication in a newspaper or other print medium. Other forms of notice, such as broadcasting or use of electronic media, were rarely or never used. A number of cases involved posting of notices at government offices, a form of notice that was particularly prevalent in (b)(2) actions.

The median number of recipients of notice of certification or settlement or both was substantial, ranging from a median of approximately 3,000 individuals in one district to a median of over 15,000 in another (see Figure 38). In all districts the number of notices sent to individuals equaled or exceeded the estimated number of class members. Generally, parties estimated the size of the class during the certification process, before notices were sent.

Data on the costs of implementing notices were difficult to obtain. Whether the data are representative of all cases in the four districts is doubtful. In three of the four districts we were unable to obtain cost data for half or more of the cases. Across the districts, in the cases for which data were available, the median costs of distributing notices exceeded $36,000 per case and in two of the districts the median costs were reported to be $75,000 and $100,000 per case.[176] In at least 25% of the cases in each district, the cost of notice

171. MCL 3d, *supra* note 34, § 30.211, at 225.

172. 417 U.S. 156 (1974).

173. MCL 3d, *supra* note 34, § 30.211, at 226.

174. 7B Wright et al., *supra* note 56, § 1788, at 234.

175. In only one case was it clear that notice other than individual notice was used. In that case, notice was communicated to an estimated 1 million Sears Auto Center repair customers by newspaper publication and by posting notices at all Sears repair centers. In another case, the file was incomplete, but there was no record of notice other than by publication.

176. These costs refer to notice of certification or settlement or both, depending on what type or types of notice were issued in each case.

exceeded $50,000 per case and in two of the districts, such costs exceeded $100,000 per case. These data are best viewed as a collection of anecdotes and estimates.

Who paid the costs? The short answer is that both plaintiffs and defendants paid. The practices varied in the four courts, but overall defendants paid more than plaintiffs in two courts, slightly less than plaintiffs in one, and considerably less in the fourth. Defendants paid all or part of the costs in 62%, 27%, 58%, and 46% of the cases in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal., respectively. The data are consistent with the data on the timing of notice (discussed *supra* in § 10(a)). Delays in issuing notice apparently led to shifting the cost of notice from plaintiff to defendant. Our data cannot tell us whether the delays reflected a desire to avoid notice costs or some other motivation.

Do these requirements discourage the pursuit of class actions as the editors of the *Manual for Complex Litigation, Third* and Professors Wright, Miller, and Kane assert? The available data on costs suggest that the costs in some cases are high enough to deter litigants or law firms from pursuing class actions, especially where a number of small claims are spread among a large number of class members. Costs of notice may also induce plaintiffs to define a class more narrowly than if costs were not a factor. The larger the class, the costlier the notice. The data on lack of notice in some cases and delays in others suggest that the impact of the cost is sufficient to give parties an incentive to avoid notice, but we do not have direct data showing that the cost of notice is the source of that problem.

(c) How much litigation of notice issues occurred?

Data. In each of the four districts, litigation of notice issues occurred in less than one-quarter of the cases in which notice of certification or settlement was communicated to a certified class (see Figure 39). Overall, twenty-one objections were filed in 18 cases, fourteen by class members, two by class representatives, three by defendants, and two by others.

The most frequent type of objection, occurring eleven times, was to the content of the notices, that is, the failure to include information about an item the objector deemed important. Three of those eleven objectors complained specifically about the lack of information concerning attorneys' fees. Others had more general complaints that the information in the notice was inadequate to inform class members. Six objections complained that the notice had not been received in a timely manner, sometimes arriving after an opt-out period had expired or the hearing on settlement approval had been held. Two objectors complained about the exclusion or inferior treatment of a subgroup. (Objections to the substance of the settlement that were presented at the settlement approval hearing will be addressed in § 14(c), *infra*.)

Courts responded to all but six of the twenty-one objections. Seven were heard and rejected, six were heard and accepted in whole or in part, one was withdrawn, and one was handled through correspondence from the plaintiffs' attorney.

Discussion. Overall, the number of objections as well as their tenor and force was not great. Whether that is a sign that the process is working or not is hard to judge. Objections to notice do not appear to represent a significant mechanism for addressing or correcting the types of errors and omissions discussed *supra* in § 10(b) or *infra* in § 10(d).

(d) Did the notices of proposed settlements contain sufficient detail to permit intelligent analysis of the benefits of settlement?

Background. The *Manual for Complex Litigation, Third* recommends that a notice of proposed settlement include a description of the essential terms of the settlement, information about attorneys' fees, disclosure of any special benefits for class representatives, specification of the time and place of the hearing, and an explanation of the procedure for allocating and distributing the settlement.[177] A combined notice of certification and settlement, as the first notice to the class, should include information about opt-out rights and deadlines as well as sufficient information to allow the recipient to make an intelligent choice about opting out. A notice of settlement that is the second notice—that is where the class has already been given notice of certification and the opportunity to opt out—should communicate sufficient information to support an intelligent appraisal of whether to accept or oppose the settlement and whether to file a claim.

In either of the above instances, the putative or actual class member would need sufficient information to assess the impact of the settlement on the member's personal situation. The ultimate question in a rational, economic analysis would be: What can I expect to recover? The class member needs to know this to compare actual losses and determine whether to participate in the settlement or oppose it. To estimate a personal recovery, one needs to know at least the net dollar amount of the settlement and the estimated size of the class with which one can expect to share the net settlement.[178] Newberg and Conte state that it is "unnecessary for the settlement distribution formula to specify precisely the amount that each individual class member may expect to recover."[179] Courts have not demanded precision but have called for estimates of monetary benefits, fees and expenses, and individual recoveries.[180]

Language in a notice should be clear and direct.[181]

Data. We examined the settlement notices in all of the certified settled cases to determine whether they communicated the type of information described above. Settlement notices in the cases did not generally provide either the net amount of the settlement or the estimated size of the class. Rarely would a class member have the information from which to estimate his or her individual recovery. In only five cases, all of which were in two districts, did the notice include information about the size of the class. As to the net amount of the settlement, in one district a third of the notices included such information,

177. MCL 3d, *supra* note 34, § 30.212, at 228. *Cf.* 2 Newberg & Conte, *supra* note 55, § 8.32, at 8-105.

178. An estimate of the individual shares in the settlement or the percentage of damages to be compensated would, of course, serve the same purpose.

179. 2 Newberg & Conte, *supra* note 55, § 8.32, at 8-107.

180. Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir.) ("the notice may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses"), *cert. denied*, 423 U.S. 864 (1975); Boggess v. Hogan, 410 F. Supp. 433, 442 (N.D. Ill. 1975) ("the notice should . . . include the best available information concerning fees and expenses together with an estimated range of unitary recovery").

181. *See, e.g.*, Avery v. Heckler, 762 F.2d 158, 165 (1st Cir. 1985) (affirming "a judicial decision that favors plain and direct English" in a proposed notice). *See generally* 2 Newberg & Conte, *supra* note 55, § 8.39 (discussing the language and content of notice, emphasizing the need for clear, objective language).

in two districts, a fifth did, and in the fourth district, a tenth. Notices included information about the gross amount of the settlement in 64% to 90% of the cases (see Figure 40).

Missing from most disclosures was information about the dollar amount of attorneys' fees, costs of administration, and other expenses. In only one district did more than half of the notices include the dollar amount of attorneys' fees; at the other end of the range, in one district only 10% of the notices included such information (see Figure 41). In all four districts, however, more than two-thirds of the notices included information about either the percentage or the amount of attorneys' fees (see Figure 41). If the fees are calculated as a percentage of the gross settlement and not as a percentage of the net amount (practices differ), then information about the fee percentage and the gross amount of the settlement would suffice because a class member could calculate the fees by multiplying the gross settlement by the percentage to be allocated to fees. Information about the costs of administration and other expenses, including the attorneys' legal expenses for discovery and other pretrial activity, are infrequently included in the notice of settlement (see Figure 42).[182]

Notices generally included sufficient information on the nonmonetary aspects of the settlement. In each district, more than 75% of the notices presented information on a plan of distribution for the proceeds and also included information and forms for submitting a claim. When equitable relief was included in the settlement, it was generally summarized in the notice. Opt-out rights, where applicable, were stated in the vast majority of notices and all notices in all four districts specified the date and time for a hearing on approval of the settlement.

Discussion and call for research. Notices did not appear to include sufficient information for an individual class member to appraise the net value of a settlement to the class or to calculate an expected personal share in the settlement. Is it reasonable to expect that additional information could be provided? It appears that much of the needed information was available at other stages of the litigation and might have been calculated or estimated in the notice of settlement. For example, the exact size of the class might not have been determined until after notices had been sent, yet the parties frequently offered estimates of class size in seeking certification. The Rule 23(a)(1) requirement that "the class be so numerous that joinder of all members is impracticable" demands that the parties and the court consider the size of the class. Moreover, in cases where notice of certification had been sent before a settlement, information about actual class size was available based on the number of notices sent and opt outs received.

What about attorneys' fees? The parties might argue that information about attorneys' fees was not available until after the settlement has been approved and the court entered an order awarding fees. This is technically true. An estimate, with caveats, may have been the most that could have been presented. But courts generally awarded attorneys' fees in the amount requested by the plaintiffs[183] and those requests were generally submitted to the court before the settlement approval hearing. Including the amount of the

182. The median percentage of the gross settlement devoted to administrative costs was 2% across the four districts.

183. *See* discussion and data at *infra* § 16(d).

fee request in the notice might call for earlier calculation of the estimated fees. Where the fees are a percentage of the settlement, the actual calculation—or a clear statement of the formula—would avoid any problems a class member might have in applying the formula.

Notices generally included the technical information about distribution plans, claims procedures, opt-out rights, hearings, and objections. Counsel in these cases often followed routine formats for developing notices and presenting settlement approval information to the court.[184] Because the practice appears to be routinized, one would expect that counsel would follow any explicit guidelines established through the rule-making process.

Having read the notices in these cases presses us to make an additional observation. Many, perhaps most, of the notices present technical information in legal jargon. Our impression is that most notices are not comprehensible to the lay reader. A content analysis of the samples could test this impression. For any researchers who wish to take up this call for further research, we can make available a file of most or all of the notices we encountered in the four districts. Courts and commentators have agreed that notices should communicate the essential information in "plain English."[185]

(11) Opt Outs

(a) Number of opt outs and relationships with subject areas and size of claims

Background. The questions in this section are: How frequently do members opt out of (b)(3) classes? Is opting out related to specific subject areas or size of typical individual claims? The background question, which our data cannot answer directly, is: Why do class members opt out?

The choice of opting out may arise in two distinct contexts: after certification but before settlement or after a settlement has been proposed. As the discussion of notice indicates (*see supra* § 10), notice of certification was often deferred until after a settlement had been reached. We examined the rates of opting out at each stage separately and in combination and noted some characteristics of cases with large numbers of settlement opt outs.

Data. At the *certification stage*, the percentage of certified (b)(3) class actions with one or more class members opting out was 21%, 11%, 19%, and 9% in the four districts (see Figure 43). The number of cases in any single nature-of-suit category was too small for meaningful analysis. Because the advisory committee has asked for data on nature of suit, we present the information (see Figure 44), but with the caveat that differences among the categories cannot support any generalizations.

At the *settlement stage*, the percentage of cases with one or more opt-out members was considerably higher than at the certification stage. Those percentages ranged from 36% in two districts to 43% in the third and 58% in the fourth (see Figure 45). Again, the

184. 2 Newberg & Conte, *supra* note 55, § 8.32, at 8-105 ("[R]ule 23(e) notices are becoming standardized in format . . ."). For sample forms, see *id.* at Appendix 8-2. *See also* MCL 3d, *supra* note 34, § 41.4.

185. *See supra* note 181.

number of cases in each nature-of-suit category does not support detailed analysis of differences (see Figure 46).

Combining the opt outs at the certification and settlement stages yields percentages of certified (b)(3) class actions with one or more opt outs ranging from 42% to 50% in the four districts (see Figure 47). These percentages are somewhat lower than the percentage of opt outs observed in the Georgetown study.[186]

How many class members opted out in these cases? In all four districts, the median percentage of members who opted out was either 0.1% or 0.2% of the total membership of the class and 75% of the opt-out cases had 1.2% or fewer class members opt out. Again in all four districts, 75% or more of the cases with opt outs had fewer than 100 total opt outs. This left seven cases in the study with more than 100 opt outs.[187] Two cases had 2,500 and 5,203 members, respectively, who opted out. In both of these cases, objectors who were represented by attorneys appeared at the settlement hearings, a sign that they might be planning further litigation.[188] Overall, three of the seven cases with more than 100 class members who opted out were securities class actions.[189]

Data regarding opt outs at the settlement stage suggest that there may be a relationship between the average net amount of the settlement and the presence of one or more opt outs (see Figure 48). The number of cases is too small to yield definitive results and other factors certainly may have affected the decision to opt out, but the direction and magnitude of the relationship in all four districts was similar. The data suggest the possibility that the smaller the average individual portion of the settlement the larger the number of cases in which one or more parties opt out.

186. *Georgetown Empirical Study*, *supra* note 88, at 1161 (58% of cases in national study had one or more opt outs).

187. In five of those seven cases, objectors or class members other than the official representatives appeared at the settlement approval hearing. Objections filed in the seven cases included objections to the attorneys' fees (five), insufficiency of the settlement amount to compensate for losses (three), insufficient deterrence (two), disfavoring particular groups in the class (two), and a host of miscellaneous objections, including a single allegation of collusion among the parties.

188. The case with 5,203 opt outs was the *General Motors Pick-Up Truck Litigation. In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995). In that case many of the objectors were represented by a public interest organization, the Center for Auto Safety, or by government attorneys; the settlement approval was reversed on appeal. In the other large case, 2,500 (16%) of 15,818 class members opted out of a securities class action settlement of $4,119,000 after objecting, through an attorney, that the amount of the settlement was insufficient. Hooker v. Arvida/JMB, No. 92-7148 (N.D. Ill. filed Oct. 27, 1992). No appeal was filed in that case and there was no indication in the case file of further litigation, but the presence of the attorneys and the large number of opt outs indicate the possibility of further litigation by the opt-out members.

189. One of those cases was described in the previous note. In another, *In re* Oracle Sec. Litig., No. 90-931 (N.D. Cal. filed March 29, 1990), 115 members (0.0007%) of a class estimated at 164,000 opted out. The only objections filed in that case were to the amount of attorneys' fees. The other securities case, Mogul v. Nikken, Inc., No. 92-946 (N.D. Cal. filed March 4, 1992), involved a class of independent distributors of a networking marketing program, not a public securities offering; 360 (0.01%) members of a class of 28,533 opted out. In that case no objections were presented at the hearing and there is no indication of an independent action by the opt-out members. The settlement included a mandatory (b)(1)(B) class for refunds for products and an opt-out (b)(3) class for claims based on economic loss arising from the marketing program.

Discussion. Intuitively, one might expect one of two relationships between the net monetary award and the decision to opt out. For very large awards, say in a products liability case involving serious personal injuries, one would expect the opt-out rate to increase as the size of the expected award increases because individuals with more serious than average injuries would be able to obtain representation and pursue a larger individual award. None of the cases in the study, however, had median awards of that magnitude (*see supra* § 1(a)). The largest average net individual award was $5,331 and the great majority of the awards were below $1,000 (*see supra* § 1(a)).

For the type of awards in this study—none of which seem high enough to support individual lawsuits on a contingent fee basis (*see supra* § 1(a))—one might expect that class members would have more incentive in the larger cases to remain in the class and recover an award in the thousands of dollars. As the size of the net average settlement decreases, members have less incentive to file a claim. If totally dissatisfied with the amount of the recovery, some members may choose to protest by opting out. Without additional research, we cannot know whether this happened in our study, but the data in Figure 48 are compatible with such a scenario.

Comparison of the opt-out rates in this study with those in the Georgetown study, published more than twenty years ago, showed no increase in the rate of opting out.[190] The levels of opting out reported in the Georgetown study, in fact, indicate that opting out may have declined considerably.[191]

(b) Opt outs in (b)(1) or (b)(2) classes

Data. As a practical matter, putative class members do not opt out in (b)(1) or (b)(2) classes, with one minor exception.[192] In addition, there were four settled class actions with opt outs that were certified under either (b)(1)(B) (one case) or (b)(2) (three cases) as well as (b)(3). At least in those cases, the certification of a class on mandatory grounds was not used as a way to evade the opt-out requirements of Rules 23 (b)(3) and 23 (c)(2).

We also looked for cases that had not been certified under (b)(3) yet appeared to be damage actions. In four cases, classes were certified under (b)(1) or (b)(2), but not (b)(3), and damages were awarded on a class-wide basis. None of the cases, however, appeared

190. *See* discussion of *Georgetown Empirical Study, supra* note 88. This portion of the Georgetown study was based on a national study of selected class actions, more than half of which were securities and antitrust cases. *Id.* at 1157–59.

191. In the national portion of their study, the Georgetown authors reported that in 31 of the 36 cases for which information was available, 10% or less of the class opted out. *Id.* at 1161. In the instant study more than 75% of the class actions in each district had fewer than 1.2% of the class opt out. Only two cases in the entire study had opt-out rates above 10%.

192. In one case certified as a (b)(1)(B) class for settlement purposes only, the case file included three letters from class members indicating their desire to opt out of the settlement. That settlement consisted of an agreement from a corporate entity to provide supplemental funding if needed to satisfy the terms of a loan to an employee stock ownership plan and did not include a monetary distribution. One objection to the settlement was to the scope of the language in the release given to defendants. There is no indication that the opt-out letters from these class members had any effect, because the class was defined as a mandatory class and because there was no monetary settlement. The effectiveness of the notice of opting out would be tested if the opt-out members filed suit against the defendant, but there was no evidence that this occurred.

to represent distortions of the mandatory class categories to evade (b)(3) opt-out requirements.[193]

(12) Opt Ins

(a) Opt-in classes

Background and Data. The question raised is whether devices are employed to create what are essentially opt-in classes, by such means as defining the class to include only those members who file claims. The Georgetown study found that judges in three cases required an opt-in procedure and found that it reduced the class size by 39%, 61%, and 73%.[194] In that study the opt-out procedure generally reduced class size by 10% or less. Plaintiffs' attorneys raised concerns that the opt-in procedure excluded unsophisticated consumer class members.[195] Along similar lines, Newberg and Conte report a small number of opt-in cases that were approved under state court rules.[196]

None of the certified class actions in this study defined the class as requiring the filing of a claim as a precondition to becoming a member of the class, but many used a claims procedure that, as a practical matter, limited the number who shared in the common fund (*see infra* § 12(b)).[197] Combining an opt-out class with a claims procedure appears to have the effect of precluding further litigation by class members who do not opt out or file claims.

(b) Claims procedures

Background and data. A large number of cases in the study used a claims procedure to distribute the proceeds of a settlement fund to class members. Only those class members who filed claims shared in the benefits of the settlement, but all class members—as defined in the class certification order—who did not affirmatively opt out were bound by the judgment. Unfortunately, the parties generally did not report the number of claims received; thus, our data on claims received are too incomplete to present.

193. In all four cases, notice of settlement was provided to the class, but opt-out rights were not provided in the notice. Three of these cases were ERISA cases involving relatively small retirement funds, each of which appeared to qualify as a limited fund. The fourth case involved a class of claimants who had filed complaints with a state fair employment commission and whose complaints had not been processed. The relief consisted of an order that the commission process the complaints for all who wished and that they pay $350 to those who chose that remedy. Thus, one might conclude that the injunctive relief was the primary remedy.

194. *Georgetown Empirical Study, supra* note 88, at 1148–51.

195. *Id.* at 1149–50.

196. 3 Newberg & Conte, *supra* note 55, § 13.22.

197. We encountered a few cases filed as statutory opt-in class actions under 29 U.S.C. § 216(b) (1988) of the Fair Labor Standards Act (FLSA) and under 29 U.S. C. § 626(b) (1988) of the Age Discrimination in Employment Act (ADEA), both of which employ an opt-in procedure. Notice of filing a complaint is sent to all potential class members at the outset and they are given an opportunity to file a written consent to join the class. We did not include these cases in the study because they did not invoke Rule 23 and their structure did not match well with our study design. A separate study of FLSA and ADEA cases might provide data that would be useful for assessing the viability of a Rule 23 opt-in procedure.

Claims procedures were used in 80% of certified, settled class actions in one district; 77% in another; 45% in the third; and 42% in the fourth (see Figure 49). Claims procedures were a standard modus operandi in securities class actions, being used in between 80% and 100% of these cases in the four districts (see Figure 50). Other types of cases that typically generate monetary awards also used claims procedures. For example, all three antitrust settlements in the study did so, as did three of the five employment discrimination cases. On the other hand, only four of twelve ERISA cases and one of eleven "other civil rights" cases established such procedures. An advantage of using a claims fund is that once the total number of claims is known, the entire fund can be distributed on a pro rata basis.[198]

(13) Individual Member Participation

(a) Participation before settlement

(i) Attempts by class members to intervene

Background. The question is how frequently do nonrepresentative class members seek to intervene before the settlement stage? Intervention by putative class members can proceed under either Federal Rule of Civil Procedure 24(a) (intervention of right when granted by statute or when necessary to protect an interest of the prospective intervenor), Federal Rule of Civil Procedure 24(b) (permissive intervention when a statute provides for conditional intervention or there are common questions of law or fact), or Federal Rule of Civil Procedure 23(d)(2) (court may require that notice be given to class members to allow them "to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action"). The main purposes of allowing intervention in class actions are to assure "that the class is adequately represented" and "to enable those class members on the outside of the litigation to function as effective watchdogs."[199]

Data. Attempts to intervene in cases filed as class actions occurred relatively infrequently in the study, in 11%, 0%, 9%, and 5% of the cases in the four districts (see Figure 51). Overall, judges granted about half of the requests (see Figure 51). The most frequently cited basis for intervention was Rule 24(b) (permissive intervention) (see Figure 52). Rule 23(d)(2) was cited in only three cases. The authority cited for intervention did not appear to make a difference in the outcome of the application (see Figure 52).

Data on intervention activity was spread among a wide assortment of nature-of-suit categories and no meaningful conclusions can be drawn about differences among the categories (see Table 37).

(ii) Attempts by nonmembers to intervene

Data. In all four districts, a total of six nonmembers of an alleged class attempted to intervene in the class actions. Aside from representing special interests, there was no pat-

198. For an illustration of a formula for allocating the fund according to the proportion of each claimant's damages, *see* 3 Newberg & Conte, *supra* note 55, § 12.35, at 12-85 to 12-86.

199. 7B Wright et al., *supra* note 56, § 1799, at 438–39.

tern to their applications.[200] Courts granted two of the six applications. All four of those that were denied intervenor status participated in the case at a later stage. In each case the would-be intervenors objected to the settlement and in three cases they filed an appeal, each of which was unsuccessful.[201] In addition to appeals from the denial of an application to intervene, three proposed intervenor–plaintiffs filed appeals on the plaintiffs' side from a denial of an injunction, a denial of class certification, and a summary judgment for the defendant. All three decisions were affirmed on appeal.

(b) Class member participation in settlement by filing objections and attending settlement hearings

The question raised is: How frequently do nonrepresentative class members appear to contest settlement, and with what effect?[202] Objections may be presented by any class member who has not opted out of the litigation, any settling defendant, or any shareholder of a settling corporation.[203] Generally, a written objection must be filed before the hearing, and an objector need not appear at the hearing to have an objection considered by the court.[204]

Data. Our data permit us to document the objections raised by class members and other objectors and, within limits, to document their attendance at settlement approval hearings. Except in E.D. Pa., however, we were generally unable to obtain transcripts of the settlement approval hearings, so our report of attendance in the other three districts is based on clerical entries that seem likely to undercount the participation of class members and objectors.[205] With this caveat, court files indicate that nonrepresentative parties were

200. Two involved local labor unions, one of which successfully intervened on behalf of its members in a Title VII action (Stender v. Lucky Stores, No. 88-1467 (N.D. Cal. filed April 22, 1988)) and the other of which was denied intervention on the side of a class of abused and neglected children who were served by union members. The other successful intervenor was permitted to intervene in a securities class action for the limited purpose of maintaining an interpleader action. Sullivan & Long, Inc. v. Scattered Corp., No 93-4069 (N.D. Ill. filed July 7, 1993). Two other unsuccessful attempts are described in the next footnote.

201. In one case, a bankruptcy trustee for a corporate defendant sought to insure that the corporation did not waive its claims against accountants and other professionals. The trustee later filed objections to the attorneys' fee request and filed an appeal from the fee award, serving as the nominee of several class members. That appeal was pending at the time of our data collection. Weiner v. Southeast Banking Co., No. 90-760 (S.D. Fla. filed March 22, 1990). In another case, a pro-life coalition sought to intervene as a defendant in an abortion rights case against a defendants' class of state attorneys general. The court denied the application and the denial was affirmed on appeal, Keith v. Daley, 764 F.2d 1265 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985). *See also* discussion of appeals *infra* at §§ 13(c) & 20(a).

202. Cooper, *supra* note 6, at 33.

203. 2 Newberg & Conte, *supra* note 55, § 11.55, at 11-132 to 11-133.

204. *Id.* § 11.56, at 11-137.

205. But, in a recent article, the author asserted that an empirical study of terminated class actions in N.D. Cal. from 1985 to 1993 showed that "class representatives did not participate in 100% of the cases." Downs, *supra* note 50, at 691. Our study, however, found that one or more class representatives attended nine of 32 settlement approval hearings in N.D. Cal. and that the nine hearings were held between June 18, 1992, and December 17, 1993. The difference appears to be that we counted as an appearance any notation on the clerk's minute entry that one or more class representatives were present. Professor Downs did not count such entries as indicating presence because, in his experience, clerks place in the minute entry what the lawyers say in court. Thus, the minute entries may simply represent instances where a lawyer for the class announced

recorded as attending the settlement hearing infrequently, with 14% in E.D. Pa. being the high mark and the other three districts showing 7% to 11% rates of participation (see Figure 53). Attendance of representative parties was also mixed. Again, E.D. Pa. had the highest rate, 46%, and the other districts varied from 11% to 28% (see Figure 53; *see also supra* § 4 (c)).

Participation by filing written objections to the settlement was far more frequent than participation by appearing at the settlement hearing. Generally, objectors filed their objections in writing before the hearing. Typically, the parties addressed the objections in the final motion for approval of the settlement. Overall, about half of the settlements that were the subject of a hearing generated at least one objection. The percentage of cases in which there was no objection ranged from 42% to 64% in the four districts (see Table 38).

The most frequent type of objection was to the amount of attorneys' fees as being disproportionate to the amount of the settlement; in 14% to 22% of the cases in the four districts, objectors raised this point (see Table 38). The next most frequent objection related to the insufficiency of the award to compensate class members for their losses. Next in line were objections that the settlement disfavored certain subgroups. A wide variety of objections were grouped in a miscellaneous category. Many of the miscellaneous objections raised serious concerns that were difficult to categorize.[206]

How did the courts respond to the objections? Approximately 90% or more of the proposed settlements were approved without changes in each of the four districts. In a small percentage of cases, the court approved the settlement conditioned on the inclusion of specified changes. Overall in the four districts, judges made changes in nine settlements before approving them. In seven of these cases, objections had been raised and the changes may have been responsive to those objections, but our data do not permit us to examine that relationship systematically.[207]

an appearance "on behalf of [a class representative]" who was not present. Telephone conversation with Professor Downs (Jan. 2, 1996). Whatever view one takes of the N.D. Cal. data, the data derived from transcripts in E.D. Pa. appear to be the most reliable data available.

206. For example, in *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied*, No. 94-2137, 1995 U.S. LEXIS 5538 (Oct. 2, 1995), an extensive number of complaints were filed and heard at the settlement hearing, including complaints that the settlement did not properly address safety concerns. In two ERISA cases, pensioners raised questions about the effect of the settlement on their retirement benefits. In one case, shareholders raised a claim that the recovery was excessive and would diminish the value of their stock. Schlansky v. EAC Indus., No. 90-854 (N.D. Ill. filed Feb. 13, 1990). At least three miscellaneous objections raised questions about the scope of the release and at least four raised questions about the substantive terms of the proposed settlement.

207. In one case the connection between the objection and the changes in the settlement was clear. Objectors complained that certification of a mandatory class was inappropriate and that parties should be given an opportunity to opt out. The court's approval of the settlement included an opportunity to opt out. McKenna v. Sears Roebuck, No. 92-2227 (N.D. Cal. filed June 12, 1992). In another instance, the change consisted of lowering the percentage of attorneys' fees awarded and changing the formula for calculation of fees and expenses, but it was unclear whether the change was responsive to a specific objection. Nathanson, IRA v. Tenera, No. 91-3454 (N.D. Cal. filed Oct. 2, 1991). In another case, the court's action in initially rejecting a settlement appeared to arise sua sponte. The court determined that a settlement of the derivative action had not been properly approved by disinterested members of the corporate board and, for that reason,

Similar results were obtained for specific objection to the amount of fees requested. Overall, in twenty-one cases, objections to the amount of attorneys' fees were filed. In nineteen of those twenty-one cases the court awarded 100% of the request and in the other two the court awarded less than the full fee request.[208] (For a comprehensive discussion of the courts' treatment of attorneys' fees in the study cases, *see infra* § 16.)

Our study was not designed to trace the responses to each objection, but our general impression is that the parties summarized and discussed most objections in a motion for settlement approval. The parties generally filed such a motion after the deadline for filing objections had passed, shortly before the settlement approval hearing. Many of the settlement approval orders, which were typically prepared by the parties for the judge's signature, specifically addressed objections.

Discussion. Objections represent an outside source of information about the substance of the settlement and its impact on class members. The settling parties at this stage have little or no incentive to present negative information about the settlement, so objections from class members and others may be a crucial source of information about defects in the settlement.

In approximately half of the settlements, there was some level of participation by nonrepresentative class members and others. The process channels participation into written filings that the parties review, filter, and present to the court. The objections, in the form received, are generally appended to the parties' filings for the court to read.

Appearances at hearings are infrequent and changes in the settlement as a result of objections are even less frequent. But, there are no data from other studies to suggest what one should expect.[209]

(c) Nonrepresentative class member participation by filing appeals

Data. As noted in *supra* section 13(a)(2), three prospective intervenors filed appeals from the denial of their application to intervene. Prospective intervenors, together with one or more named plaintiffs, also filed appeals addressing other issues in three cases, one involving the denial of an injunction, another the denial of class certification, and the third, the granting of summary judgment for the defendant. In all three instances the trial court's judgment was affirmed.

In addition, objecting class members filed appeals in two major consumer class actions. One of those appeals, the *General Motors Pick-Up Truck Litigation,* resulted in a decision that vacated the order certifying a settlement class and remanded the case to the district court for further proceedings. In the other case, a class member filed an appeal

the court disapproved that settlement. Because settlement of the class action was contingent on court approval of the derivative settlement, the class action settlement was disapproved until the parties reached a proper settlement of the derivative action. *In re* Oracle Sec., No. 90-931 (N.D. Cal. filed March 29, 1990).

208. In E.D. Pa., 58% of the fee request was awarded in one case and 100% in the other five cases in which objections to fees were filed. In N.D. Ill., 94% was awarded in one case and 100% in the other four cases with objections. In the other two districts 100% of the requested fees were awarded in all cases with objections to fees.

209. The Georgetown study did not examine participation or objections. *Georgetown Empirical Study, supra* note 88. *See also supra* note 205.

from the district court's approval of a $3 million attorney fee award in a case in which the class remedy was to provide $50 coupons toward the purchase of specified automotive equipment to replace prior purchases of similar equipment.[210] That appeal is pending.

(14) Settlement

(a) Did certification coerce settlement of frivolous or nearly frivolous claims?

Background. Earlier (*see supra* § 5(c)(i)), we observed that one indicator of a "strike suit" is the power of the *filing* of a case to coerce a settlement without regard to the case's merit or lack thereof.[211] In this section we carry that discussion further by examining the relationship between class certification and the settlement of cases. The central question is: Does the act of *certifying* a class coerce settlement of frivolous or nearly frivolous claims? We cannot address this question directly with our data because we have no way of knowing, from the written court file, what factors influenced the parties to settle and whether class certification played so dominant a role as to be considered coercive. Such questions might be addressed by other methods, such as interviews.

One indirect, limited approach is to compare the outcomes of certified class actions (other than those certified for settlement purposes only) to cases in which certification was denied or not ruled on. If it is the class action device that coerces settlement, one would expect that certified cases would achieve settlements more frequently than cases that are not certified as class actions. Viewed from another angle, certified class actions would be less likely to be disposed of by noncoercive means, such as rulings on the merits via motions or trials. Such merits-related dispositions are the traditional ways for litigants to avoid being coerced to settle. These two tests overlap because cases that settle have by definition not been disposed of by rulings on the merits.

(i) Outcomes of certified classes compared with outcomes for noncertified cases

Data. Table 39 compares the various motion, trial, and settlement outcomes of all certified and noncertified class actions. Cases certified for settlement purposes only were not included in the above analysis because generally the settlement in those cases was reached before the court ruled on certification. Thus, the settlement could not be said to be a product of a certification ruling.

Across the four districts, a substantial majority of certified class actions were terminated by class-wide settlements. In the four districts, the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals)[212] for cases not certified ranged from 20% to 30% (see Table 40). Certified class actions were more than two times more likely to settle than cases that contained class allegations but were never certified (see Table 40).

210. McKenna v. Sears Roebuck Co., No. 92-2227 (N.D. Cal. filed June 12, 1992).

211. *See* discussion *supra* § 5(c).

212. Stipulated dismissals were not included as class settlements because a stipulation of dismissal does not satisfy the Rule 23(e) requirement of obtaining court approval for a class settlement. On the other hand, a stipulation of dismissal is an acceptable way of indicating a nonclass settlement.

The converse proposition—that certified class actions are less likely to be terminated by traditional rulings on motions or trials—is also true. For the most part, this finding follows directly from having a high percentage of settlements that terminated the litigation. Combining the motion and trial categories in Table 39 yields a range of nonsettlement dispositions from 13% to 37% for certified class actions compared to a range of 45% to 62% for cases filed as class actions but never certified as such (see Table 41). In each of the four districts, noncertified cases were at least twice as likely as certified class actions to be disposed of by motion or trial. These data confirm empirical data from an earlier study of class action activity in N.D. Cal.[213]

What do those data tell us about whether settlement was coerced? Without examining the options available to the parties, whether those options were pursued successfully or unsuccessfully, one should not rush to conclude that the cases settled simply because they were certified. For example, if a case settled after a ruling on summary judgment or in the face of a trial date, that settlement might be seen as primarily the product of the ruling or the setting of the trial date. In the following section we will look at the data on these alternatives.

(ii) Frequency of rulings on motions to dismiss, motions for summary judgment, trial dates scheduled, and trials held in certified class actions

Data. The vast majority of cases that were certified as class actions were also the subject of rulings on motions to dismiss, motions for summary judgment, or the setting of a trial date. Approximately a third of those cases in one district, 50% in two districts, and more than 80% in the fourth were the subject of rulings on at least one motion to dismiss (see Figure 54). The percentage of cases with rulings on motions for summary judgment ranged from 30% to 67%, with the middle two districts showing 43% and 44% (see Figure 55). Finally, trial dates were set in percentages ranging from 17% to 56% in the four districts (see Figure 56).

Overall, from 72% to 94% of the cases certified as class actions received either a ruling on a motion to dismiss, a ruling on a motion for summary judgment, or the setting of a trial date (see Figure 57). Looked at from the other side, at most 6% to 28% of the certified class actions in the four districts could possibly have settled without a ruling on the merits or the setting of a trial date.

Of the three factors discussed, the effect of setting of a trial date seems somewhat ambiguous and difficult to interpret because we have no way of measuring whether the date was firm or realistic enough to have an impact on settlement. Local practices may have clerks enter the settings in a semiautomatic fashion. But even eliminating the setting of a trial date as a factor does not change the data very much. More than two-thirds of the certified class actions in the four districts had rulings on either a motion to dismiss, a motion for summary judgment, or both (see Figure 58).

213. Bryant G. Garth, *Studying Civil Litigation Through the Class Action,* 62 Ind. L.J. 497, 501 (1987). Garth and his colleagues found a 78% settlement rate for certified class actions compared to a 15% settlement rate for cases filed as class actions but not certified. Seventy percent of the uncertified cases were disposed of by motion to dismiss or by summary judgment.

Discussion. The data indicate that certified class actions receive considerable attention from judges or their staff in the form of ruling on motions and setting trial dates. Data from the time study[214] reinforce this finding. Judges spent about eleven times more time on class actions than on the average civil case in the time study (*see supra* § 2(d)). Judicial rulings and active case management, including the setting of trial dates and holding pretrial conferences (see Table 19), cannot be said to eliminate the possibility of coerced settlements, but their prevalence in this study of class actions greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency. The data show that a district judge examined the merits of the great majority of cases and that the parties pursued some, if not all, of the litigation alternatives available to them. One might reasonably conclude that rulings on motions and the case management practices limited the ability of a party to coerce a settlement without regard to the merits of the case.

Another perspective on the relationship between certification and settlement is to view certification as a "settlement event," that is, an event that would "affect substantially the potential value of a settlement," "clarify uncertainty about the value of the case," and "let lawyers gauge the approach of the judge."[215] From this angle, the certification decision can be expected to have a direct impact on settlement, just as a ruling on summary judgment or an arbitration award might have. The impact, though, seems to arise from implicit judicial recognition of the plausibility of the claims and the multiplication of those claims by the size of the class. In other words, the impetus to discuss settlement may flow from an assessment of the total liability the litigation might impose.

(iii) Timing of settlements in relation to class certification

Background. Another indicator of the relationship between certification and settlement is the timing of the two events. If settlement occurs before or simultaneously with certification or long after certification, the possibility of any connection between the two seems remote. Unless settlement follows reasonably promptly after certification, the settlement would not seem to be directly related to the certification. While simultaneous settlement and certification might be seen as anticipating the probability of certification if no settlement was reached, there is no judicial ruling that can be said to coerce settlement. (For discussion of the effect of the filing of the complaint on settlement, *see supra* § 5(c).)

Data. The time from certification to settlement varied widely (see Table 42). The median times in the four districts ranged from 9.2 to 18.9 months. The majority of the cases in one district settled before certification and in the other three districts, 15%–37% of the cases settled before certification. In three districts, at least a quarter of the certified class actions settled within two months after certification. A large number of these cases were settlement classes which were certified simultaneously with the preliminary approval of a proposed settlement. At the other end of the scale, at least a quarter of the cases in all four districts took more than a year after certification to settle. In three districts, this quarter of the cases took approximately two to three and one-half years or more.

214. Willging et al., *supra* note 26.
215. Garth, *supra* note 213, at 504.

Discussion. The data on timing of settlements did not support any inference of a relationship between certification and settlement. Many cases settled before the court ruled on certification and a sizable number, a majority in three of the districts, settled more than a year after certification.

(b) Notice

Background. When certification is first sought at the settlement stage, the question raised is: How effective is the attempt to ensure compliance with notice and certification requirements? As noted in section 10(a), *supra,* Rule 23(e) requires notice of settlement or compromise in all class actions, regardless of the type. Thus, all cases certified for settlement purposes would be expected to have a notice of the certification combined with a notice of the settlement and communicated to the class.[216] In section 10(a), however, we found that six settled (b)(2) classes received no notice of settlement. Our analysis in this section overlaps with that analysis. We also found in section 10(a) that five certified (b)(3) classes received no notice of certification before being disposed of on the merits (four) or by stipulation (one). We also found a tendency to delay notice after certification until a settlement was reached, perhaps to shift the costs of notifying the class to the defendant or a settlement fund or perhaps for other reasons, such as to gather information about the class.

Settlement classes are difficult for the court to evaluate because of the lack of an adversarial proceeding on class certification.[217] Complicated issues, such as conflicts between class counsel and counsel for individual plaintiffs or the need to protect future claimants, may challenge the court.[218] The approval process generally involves two steps: a preliminary evaluation of fairness and a later review, after notice, at a fairness hearing.[219]

Data. In two districts, notice of settlement was disseminated to the class in all class actions certified for settlement purposes. In the other two districts 13 of 16 (81%) and 12 of 15 (80%) settlement classes included notice to the class (see Figure 59). Overall six cases in the latter two districts did not include notice of the approval of a settlement class. In all of those cases, the court explicitly approved the proposed class settlement without requiring any changes. In none of the six cases did the file indicate that the classes were (b)(3) classes or that class damages were included in the settlement. All involved some form of injunctive relief. Nevertheless, Rule 23(e) requires notice to the class prior to the settlement of these cases so that class members have an opportunity to review the proposed settlement and participate in the review process.

In those same settlement class actions, the court issued a preliminary approval of the settlement in more than 80% of the cases in three districts and in 50% of the cases in the remaining district (see Figure 60). Overall there were twelve settlement classes, eight in one district, that did not appear to include a preliminary approval ruling (see Figure 60).

216. When a settlement is presented to a court that has not ruled on certification, generally the court's order preliminarily approving the settlement includes a ruling on class certification.

217. MCL 3d, *supra* note 34, § 30.45, at 243–44.

218. *Id.* at 244.

219. *Id.* § 30.41, at 236–38.

Three of these cases involved class damages and all three of those cases had a subsequent fairness hearing. Seven settlement classes had neither evidence of preliminary approval nor of a later fairness hearing (see Figures 60 & 61). None of those seven cases was certified as a (b)(3) class and none involved money damages.

Discussion. A handful of cases in the study had no notice to the class of a class-wide settlement, generally for injunctive relief. Most of these same cases did not have either the preliminary approval of the judge or a hearing to examine the fairness of the settlement. All had the final approval of a judge. Rule 23(e) and the guidance of the *Manual for Complex Litigation, Third* make it clear that more is expected for a settlement class. Without notice to the class and the reaction of class members to the settlement, the judge might not have sufficient information to assess whether the settlement is fair and reasonably responsive to the interests of the class.

Nor does the fact that the cases involved injunctive relief and not money damages diminish the need for notice and a hearing. Injunctive relief sometimes weighs more heavily in the lives of class members than a modest share in a pecuniary settlement. For example, one of the settlements was on behalf of a class of persons who use wheelchairs, crutches, or similar aids and wish to attend sporting events at a specific facility. The injunctive relief provided that defendants would better accommodate such persons and stop denying floor level seating to the class. One assumes that some class members have a serious interest in the shaping and implementation of this relief and that notice to the class would assist the court in affirming or rejecting the rather vague proposed remedies. Notice and a hearing might generate information about whether the proposed remedy addressed all the barriers faced by class members.

Another example from this set of cases involved injunctive relief on behalf of a class of mentally retarded individuals who were misplaced in facilities for the mentally ill. The settlement provided for identifying all misplaced individuals and for funding 100 appropriate placements in community settings across the state. Class members, their family members, attorneys, or caseworkers would presumably be able to contribute information about whether the settlement would be likely to meet their needs.

In proposing a settlement class, the parties usually intend to bar future claims. Ironically, the lack of notice and a hearing leaves the settlement open to collateral attack by class members who were not notified of its provisions.[220]

Why might a court and the parties bypass notice and a hearing in this context? While there may be darker motives, a plausible reason may have been to save time and money, either for the parties or the court, or both. Individual notice to a huge class might forestall a worthwhile settlement because neither side can afford the notice costs. And, of course, the economy could be false if class members later successfully challenge the settlement.

That some courts and parties evaded the clear mandate of Rule 23(e) in this handful of cases raises the question of whether bypassing notice and a hearing might in some cases be meeting a need of class representatives or the court or both. If so, a rule allowing truncated notice (e.g., to a sample of class members or by posting at offices or locations

220. 2 Newberg & Conte, *supra* note 55, § 11.23, at 11-32.

where the problems arose) on explicit findings of financial hardship and high cost–benefit ratios might warrant the advisory committee's consideration.

(c) Attendance of nonrepresentative parties at settlement approval hearings

This topic was discussed in *supra* section 13(b).

(d) Provisions favoring named representatives

This topic was discussed in *supra* section 4(d).

(e) How often did magistrate judges or special masters evaluate settlements?

Background. The proposed revision to Rule 23(e) "clarifies that the strictures of [Federal Rule of Civil Procedure] 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement."[221] Rule 53(b) provides that a special master is to be appointed only in jury trials involving complicated issues, in nonjury trials upon a showing of some exceptional condition, or, if a magistrate judge is to be appointed, upon the consent of the parties.[222]

The proposed revision to Rule 23(e) also authorizes referring settlement or dismissal proposals to magistrate judges for evaluation. Currently, in civil litigation generally, district judges assign a variety of duties to magistrate judges.[223] These judicial officers perform duties that range from resolving discovery disputes to presiding, with the consent of the parties, over civil trials.

The principal reason for these proposed rule changes is to clarify that the court has the authority to appoint an independent master to investigate the fairness of dismissal or settlement proposals in any certified class action. The advisory committee cited some examples of when an independent evaluation might be necessary: when the named parties and their counsel have ceased to be adversaries with respect to the proposed dismissal or settlement, when the parties are required to disclose weaknesses in their own positions in the course of the evaluation of the proposal, when the parties are required to provide information to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with fiduciary obligations owed to members of the class, or when other conflict-of-interest issues must be resolved.[224]

Data on Special Masters. Of 126 proposed settlements in certified cases, a settlement was assigned to a special master (other than a magistrate judge) in only 2 cases.[225] One assignment was for the purpose of facilitating settlement and the other was to review a consent decree that incorporated a settlement. Neither assignment involved reporting to

221. Cooper, *supra* note 14, at 23.

222. Fed. R. Civ. P. 53(b). *See also* Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394, 395–98 (1986) (discussing historical use and purpose of special masters); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 57–58, 58 n.173 (1991) (discussing courts' justifications for appointing special masters).

223. 28 U.S.C. § 636(b)(3) (1976).

224. Cooper, *supra* note 14, at 22.

225. There were no referrals to review dismissal.

the judge on the merits of settlement. Moreover, courts appointed masters in only 3 cases in the study as a whole, counting all appointments for whatever purpose.[226]

Data on Magistrate Judges. The study found that referrals to magistrate judges for settlement purposes[227] were somewhat more frequent. By far, the greatest rate of magistrate referrals occurred in N.D. Cal. (47% of certified cases with proposed settlement; 14 of 30 cases).[228] In the other three courts, the comparable rates were 5%, 23%, and 20%.[229] Typically, the magistrate judge's role was to facilitate settlement, not to report and recommend to the district judge on the merits of a proposed settlement, although this occurred in some cases.

Discussion. The premise underlying the proposed rule change is that some judges are uncertain about their authority to appoint masters, especially for run-of-the-mill class action settlements or dismissals.[230] The rarity of appointment may indicate that district judges are reluctant to spark Rule 53(b) disputes within the litigation. The data may also indicate district judge confidence and pleasure with the effectiveness of referrals to magistrate judges. The differences in magistrate judge referral rates among the four districts may indicate variations in district referral practice generally, rather than propensity or reluctance to refer class action settlements.[231]

Another view is that the data reflect a general reluctance to assign matters to nonjudicial officers, who might be perceived as having the potential to create more problems than they solve. For example, the large numbers of parties in a class action make conflict of interest checks difficult for the master, possibly exacerbating the problems of potential and actual conflicts of interest that, it is argued, inherently exist in the class action setting. Others argue, however, that these "inherent" conflicts are themselves one reason to appoint a master, one who can, to some extent, serve as an additional guardian against collusive settlements or other alleged abuses.

The study's finding of generally low referral rates might suggest a need for the proposed rule change. Since class actions often involve time-consuming and complex issues, clear authorization for the use of masters and magistrate judges could potentially conserve district judge time and help expedite settlement and dismissal decisions.

226. In the third case, a master reviewed requests for attorneys' fees.

227. There were no referrals to review dismissal.

228. Although the proposed rule change would not affect cases until after certification, it is interesting to note that the rate of referral was lower for noncertified cases (37% or 7 of 19 cases). District judges eventually approved settlement in 20 of the 21 cases referred to magistrate judges.

229. The numbers of cases referred were small (2 of 43, 3 of 13, and 8 of 40, respectively). Rates of referral were similar for noncertified cases.

230. *See* La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957) (construing narrowly exceptional circumstances required to enlist services of special master).

231. For example, looking at other phases of class actions, the magistrate referral rate in N.D. Cal. was also significantly higher than the average rates in the other three districts with respect to the following phases of litigation: discovery management, resolution of class issues, claims resolution, fund administration, and counsel-fee application review; however, the district's rate of referral for pretrial case management was comparatively low and its rate of referring class certification issues was about average compared to the other three districts.

(15) Trials

(a) How often were trials held and with what results in what types of cases?

Background. The Judicial Conference Advisory Committee on Civil Rules asked us to determine how often class actions were actually tried on the merits and what results came from those trials. To this end, we identified the frequency and outcomes of trials by nature-of-suit code and by other case characteristics, such as certification status and Rule 23(b) subdivision.

Data overview. A trial began in only eighteen cases in the four districts combined. The trial rate in class actions in each of the four districts was not notably different from the 3% to 6% trial rate for nonprisoner nonclass civil actions (see Table 16). A little less than half of the eighteen trial cases were certified as class actions.[232] Given the small number of trials, we did not attempt to stratify trial outcome data by district.[233] Instead, we aggregated data for the four districts (see Tables 43 and 44); however, inferences about the universe of trials in class actions nation-wide cannot be made from these aggregated results.

Plaintiff classes and individual plaintiffs did not fare well at trial. Except for one default judgment that led to a class settlement,[234] no trial resulted in a final judgment for a plaintiff class. Of the three trials that found for individual plaintiffs, one judgment was vacated and remanded for dismissal, one judgment was vacated with a resulting $1 damage award for the plaintiff on remand, and one defendant's appeal was dismissed. Five of the eighteen trials led to settlement during or after trial, including the default judgment case mentioned above that was settled during an appeal, two certified cases after partial judgments for the class, and two noncertified cases.

Some have theorized that trials are more common in (b)(2) actions, because they often pursue still developing legal theories, and less common in (b)(3) actions where large sums are often at stake.[235] This did not appear to be the case in the small number of trials we studied. Four of the eighteen trials were in cases filed as (b)(2) class actions without any (b)(3) claims. Three were certified; one was not. An additional three noncertified civil rights actions did not specify a 23(b) type, but they also could have been of the pure (b)(2) variety. Thus, as many as seven of the eighteen trials involved (b)(2) issues with no

232. The percentage of certified class actions in which a trial began ranged from 0% to 14% in the four districts (see Figure 56).

233. We did, however, gather data on the percentage of class action cases in which a trial date was entered on the docket (see Figure 62), the percentage of certified cases in which a trial date was entered on the docket (see Figure 56), the timing of the first entry of the trial date (see Figures 63 and 64), and the timing of the scheduled trial date (see Figures 65 and 66). The four study districts entered a trial date within two years of the filing of the complaint in over 40% of the cases for which trial dates were entered (see Figure 64). One district set a trial date in all of its cases within the first two years of the case. *See supra* § 14(a)(ii) for a discussion of the effect of setting a trial date on settlement.

234. In one certified case, the plaintiff class won a default judgment after the defendant failed to appear on the first day of the jury trial.

235. Cooper, *supra* note 6, at 33.

(b)(3) issues. The same number of other trials involved classes seeking large dollar recoveries: five (b)(3) securities classes[236] and two (b)(2)/(b)(3) Title VII classes.[237]

The remaining four trials concerned a certified class's (b)(3) contract claim, an uncertified b(3) ERISA claim, and (b)(2)/(b)(3) tort claims in cases in which the case file did not indicate that large dollars were at stake. No prisoner cases went to trial. More specific information on the eighteen trials is presented below.

Data on Jury Trials. Ten of the eighteen trials were before a jury (see Table 43). All but one resulted in decisions for the defendant or in settlement by the parties. The verdicts generally survived appeals, except for one reversal in part of a directed verdict.

Among the eighteen trials, cases involving (b)(3) claims had a higher rate of trial by jury than cases without (b)(3) claims. Seventy percent of the trial cases with (b)(3) claims went to jury trial, compared to 25% of the cases filed under (b)(2) alone.[238]

(i) Certified cases with jury trials

Six of the ten jury trials involved class issues in certified cases. The class was not successful in four of these cases, including three securities cases and one contracts case. These four verdicts for defendants survived appeal. The fifth of the six jury trials in certified cases was a jury/bench combination in a protracted Title VII case that eventually settled, but only after nonfinal judgments for one large subclass on the issue of defendant's liability and for the defendant on its liability to a second subclass. In the sixth certified case, the plaintiff class won a default judgment; the court of appeals dismissed the appeal of that ruling after the parties settled.

(ii) Noncertified cases with jury trials

Four of the ten jury trials were in cases not certified as class actions. In one securities case, the parties settled during the trial. In two civil rights cases, individual plaintiffs lost at trial; the resulting appeal in one case was dismissed and in the other case the court of appeals reversed in part and affirmed in part the trial court's directed verdict. In the fourth noncertified case, a jury/bench trial combination resulted in injunctive relief and damages for the individual plaintiff on Title VII claims and partial summary judgment for the defendant on an ADEA claim; resulting cross-appeals were dismissed.

Data on Bench Trials. Eight of the eighteen were bench trials (see Table 44). Defendants were found not liable in four of these cases. Three were not certified and involved individual claims concerning civil rights, personal injury, and ERISA issues, with no resulting appeals in two cases and an affirmance in the third. In the one certified case, the court found defendants not liable for civil rights violations, both with respect to the class and with respect to individual plaintiffs. No one appealed.

236. These five were jury trials, generally involving fraud issues, with all but one of the classes certified.

237. Both were combination jury/bench trial cases, one certified and the other not.

238. Seven out of the ten trials in cases with (b)(3) claims (alone or in combination with (b)(1) or (b)(2) claims) were jury trials, compared to one jury trial out of four trials in cases with (b)(2) claims and no (b)(3) claims.

Courts found for individual plaintiffs in two bench trials[239] but the court of appeals vacated those judgments. Finally, two cases settled during, or immediately after, the bench trial: one a certified civil rights action and the other a noncertified contracts case.

(b) How did class action trial rates compare with trial rates for all other civil cases within the district?

As discussed *supra,* in section 2(b), the rate of trial (jury and bench) for class actions and other civil cases was in the 3% to 6% range in the four districts (see Table 16).

(16) Fee/Recovery Rates

Overview. An overarching question concerning attorneys' fees is whether, in addition to conferring benefits on attorneys, class action outcomes confer substantial benefits on class members. The major questions posed in this section are: What were the ratios of attorneys' fees to recoveries? What methods other than lodestar have courts used to regulate fees? To what extent have methods of fee regulation taken into account the benefit to the class?

(a) What were the ratios of attorneys' fees to recoveries?

Background. Professor Cooper has referred to the "cynical belief" that "many class actions serve only to confer benefits on class counsel."[240] To address this issue, we computed a "fee-recovery rate" (attorneys' fee awards[241] divided by gross monetary settlement[242]) for certified class actions where the court approved a settlement.[243] This rate is meaningful only in "distribution cases," cases where some form of monetary benefit was available for distribution to class members after payment of attorneys' fees and expenses, notice costs, and other administrative expenses. Interestingly, in two districts 82% of certified cases that settled were distribution cases, but the comparable figure in the other two courts was 53%.[244]

239. In one case involving personal property damage claims, the trial court awarded $75,000 to the individual plaintiffs with no award to the certified class. In the other, a civil rights case, no class was certified.

240. Cooper, *supra* note 6, at 34. Some argue that class counsel at times receive large fees from settlements that provide nominal benefits or only speculative benefits to the class. *See* MCL 3d, *supra* note 34, § 30.42, at 239–40. *See also* Senate Staff Report, *supra* note 8, at 73–74.

241. Fee awards exclude sanctions and out-of-pocket expenses.

242. Gross monetary settlement includes any cash payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses awarded by the court, and administrative costs of the settlement.

243. No case that went to trial and did not settle resulted in a final judgment or verdict in favor of a class. *See supra* § 15(a).

244. In the balance of certified and settled cases, the class received some form of equitable relief, coupons, price reductions, or other benefits that the court could not quantify, that the parties did not quantify, or that led to unresolved disputes concerning value in the litigation or on appeal. We refer to these as "no distribution cases." In the *General Motors Pick-Up Truck Litigation,* the principal settlement (vacated on appeal) consisted of distribution of $1,000 coupon certificates to an estimated 5–6 million class members. Objecting class members placed economic value on the coupon distribution that differed significantly from defendant's estimates. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 807 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995). The fee award, vacated on appeal, was $9.5 million. *Id.* at 822.

Data and Discussion. There were no fee awards to, and few fee requests by, counsel other than plaintiffs' counsel.[245] In most cases, net monetary distributions to the class exceeded attorneys' fees by substantial margins. The fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. Median rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement (see Figures 67 and 68).[246]

Some distribution cases also included other class relief that the court did not quantify.[247] This occurred about a third of the time in two districts and about 17% and 25% of the time in the other two courts. To the extent that monetary value can be associated with that relief, the data presented in this subsection understate the value of gross settlement and thus possibly overstate fee-recovery rates.

The fee-recovery rate calculations discussed in this subsection do not include cases with no net monetary distribution to class members (no distribution cases), because those settlements contained only equitable or other nonquantifiable relief. Fees and costs comprised all or a large percentage of the settlement funds in those cases.[248]

Sometimes litigants settled on liability issues but left each class member's claim to be determined individually, such that the total amount to be distributed to the class was not known at the time of the fee award. For example, under the claims resolution procedure in one settled case, class members who filed valid claims could receive 100% of the medical insurance benefits due to them for certain medical services. The settlement did not place a dollar limit on claim recoveries. Fee awards totaled $3.7 million.

245. Defendants' counsel unsuccessfully requested fees in one case each in three districts; case files did not contain the amounts sought. Parties other than plaintiffs or defendants requested fees in two cases in only one district. The first was a $300,000 fee application by nonlead counsel relating to legal services performed before the court appointed lead counsel pursuant to a competitive bidding process. Although the court declined to award the requested fees from the settlement fund, the order stated that nonlead counsel might be entitled to fees on the basis of *quantum meruit.* In the other case, counsel for an objecting class member unsuccessfully requested $131,000 in fees.

246. In one district, N.D. Cal., the median fee award to class counsel was $1.5 million, with an average fee award of approximately $2.5 million. In the other three districts, the median and average fee awards were smaller—with medians ranging between $0.6 million and approximately $1 million and averages from just under $0.75 million to approximately $1.4 million (see Figure 69). However, the N.D. Cal. average fee award was within the range of the other three districts if one excludes the district's largest fee award ($13.9 million).

N.D. Cal. also had the highest median ($5.1 million) and average ($10 million) gross monetary settlement. In comparison, the other three districts' median settlement amounts were between just under $2 million and approximately $3 million, with average amounts between $3.2 and $4.7 million (see Figure 70). For N.D. Cal., even if the largest settlement ($73.6 million) is excluded, the district still had a comparatively large mean settlement amount ($7.2 million). However, some perspective is offered by looking at the district's average gross monetary settlement per notice sent, which was only slightly above the comparable average for the other three districts combined.

247. For example, in one case, class counsel valued the settlement's "noncash" benefits at $8.3 million in addition to the $9.9 million monetary distribution. In another case, the defendant supplemented the $487,000 monetary distribution by agreeing to implement practices designed to increase the representation of women and African-Americans in its workforce.

248. *See supra* note 244. Typically, the only payments defendants made in these cases were to attorneys, class representatives, and noticing companies. We will refer to these payments collectively as "settlement costs." Fee awards as a percentage of these settlement costs were 96%, 91%, 88%, and 80% on the average for the four districts (see Table 45). The median percentage of gross settlement amounts attributable to costs of administering the settlement (primarily notice) was 2% across the four districts in the 29 cases for which

(b) How were fees calculated?

Background. In most study cases—as in most class actions generally—the court awarded attorneys' fees under the century-old common fund doctrine.[249] Traditionally, in determining fees in common fund cases, courts included the size of the fund as a principal factor and frequently based awards on what the court considered to be a reasonable percentage of the fund.[250] In the early 1970s, courts began moving away from this approach toward the lodestar method, under which the fee award is calculated by multiplying the hours reasonably expended times the reasonable hourly rates.[251] In the 1980s, however, the pendulum swung again and courts began to reconsider the lodestar method.[252]

In federal courts today, a threshold question in determining fees in common fund cases is "whether the jurisdiction requires use of the lodestar method or whether it requires, permits, or has yet to rule upon the propriety of a percentage fee award."[253] In recent years, the trend has been toward the percentage of recovery method.[254] For example, the Court of Appeals for the Eleventh Circuit has required the percentage method in common fund class actions.[255] The Third,[256] Seventh,[257] and Ninth[258] Circuits authorize either the lodestar or the percentage method.

data were available. In these cases, the median amount of such expenses was $100,000.

249. The principle governing the doctrine is that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." Boeing Co. v. Van Gemert, 444 U.S. 472, 478–79 (1980). *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970). *See generally* Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation 5-48 & 75-88 (Federal Judicial Center 1994).

250. A basic premise of the percentage of recovery method is that a common fund is "itself the measure of success . . . [and] represents the benchmark from which a reasonable fee will be awarded." 3 Newberg & Conte, *supra* note 55, § 14.03, at 14-4. *See also* Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991).

251. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973). The Supreme Court never formally adopted the lodestar method in a common fund case. MCL 3d, *supra* note 34, § 24.121, at 189.

252. The latest swing away from lodestar received momentum from a footnote in a 1984 Supreme Court decision that distinguished between calculation of fees under fee-shifting statutes (where "a reasonable fee reflects the amount of attorney time reasonably expended") and under the common fund doctrine ("where a reasonable fee is based on a percentage of the fund bestowed on the class"). Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984).

Additional momentum came in 1985 when a Third Circuit task force, formed to examine court-awarded attorneys' fees, recommended the percentage of recovery method for common fund cases. Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force, *reprinted in* 108 F.R.D. 237, 255–56 (1985) [hereinafter Task Force Report]. The Task Force Report discussed criticism by courts, commentators, and members of the bar. Criticism included that lodestar has proven to be difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. *Id.* at 246–53.

253. MCL 3d, *supra* note 34, § 24.121, at 188 (footnotes omitted).

254. *Id.* at 189.

255. *See* Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) ("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.").

256. For example, in evaluating which method the district court could use, the Third Circuit stated recently that "the court may select the lodestar method in some non-statutory fee cases where it can calculate

Proponents of the percentage method believe that it encourages early settlements and provides benefits to efficient counsel who under a lodestar approach might be penalized, rather than rewarded, for their efficiency.[259] The percentage method also saves the court from the cumbersome task of closely scrutinizing lodestar fee petitions to determine whether the hours claimed were reasonably spent for the benefit of the class.[260]

At the same time, the percentage method has been criticized because, when strictly applied, it can result in windfalls to class counsel in cases with very large settlements. Conversely, class attorneys can be penalized if they take on challenging cases that yield small monetary recoveries.[261] The method has also been criticized because it encourages early settlement and, thus, might deny the class a potentially more generous recovery that further litigation could bring.[262]

In a relatively small number of study cases, the court awarded fees pursuant to fee-shifting statutes, such as the one governing civil rights claims,[263] rather than under the

the relevant parameters (hours expended and hourly rate) more easily than it can determine a suitable percentage to award." *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995).

257. *See, e.g., In re* Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) (fee award simulating "what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character" would be appropriate); Florin v. NationsBank of Georgia, 34 F.3d 560, 565 (7th Cir. 1994); Harmon v. Lymphomed, 945 F.2d 969, 975 (7th Cir. 1991). Although permitting either method, the Seventh Circuit has expressed a preference for the percentage method. *In re Continental Illinois*, 962 F.2d at 572–73.

258. Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (allowing use of either percentage or lodestar calculation method in common fund case). *See also In re* Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295 (9th Cir. 1994). In Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989), the Ninth Circuit held that the percentage method is particularly suited for cases with multiple claims where it would be difficult to identify what fees directly relate to the claims that created the fund.

259. "Objections to the lodestar method were based on the . . . premise that attorneys pad their hours and otherwise engage in unethical activities to enhance their fees, and that key decisions pertaining to settlement are affected by counsel fees." Downs, *supra* note 50, at 667. *See also* 3 Newberg & Conte, *supra* note 55, § 14.03, at 14-3 to 14-7 and cases in nn. 17–20; Kirchoff v. Flynn, 786 F.2d 320, 324 (7th Cir. 1986) (lodestar creates an incentive to run up hours in relation to the stakes of the case); *In re* Oracle Sec. Litig., 131 F.R.D. 688, 693–97 (N.D. Cal. 1990) (same). For additional problems identified with the lodestar method, see Monique Lapointe, Note, *Attorneys' Fees in Common Fund Actions,* 59 Fordham L. Rev. 843, 847–61 (1991).

260. *See* Skelton v. General Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989).

261. Cooper, *supra* note 6, at 34.

262. Some critics maintain that settlement sometimes occurs when class counsel determines that the case has reached its point of diminishing returns from the fees perspective, with class counsel viewing the additional attorney time necessary to obtain a larger class recovery as not cost beneficial. *See generally* John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, Law & Contemp. Probs., Summer 1985, at 5, 41–44 [hereinafter Coffee, *Unfaithful Champion*]. *See also* John C. Coffee, Jr., *The "New Learning" on Securities Litigation*, N.Y.L.J., Mar. 25, 1993, at 5 [hereinafter Coffee, *New Learning*]. For a discussion of conflicts of interest that these situations create between class counsel and the class, see generally MCL 3d, *supra* note 34, § 30.16.

263. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 1988 (1988) (public accommodation and employment discrimination cases). Such statutes specifically authorize recovery of attorneys' fees by the prevailing

common fund doctrine. Although over the past decade the percentage method has gained favor in common fund cases, lodestar remains the accepted method in fee-shifting cases.[264] Given that the common fund doctrine applies in most class actions, we will concentrate our discussion on that doctrine.

Data and Discussion. For all certified and settled cases in the study, lodestar was used more frequently than the percentage method in only one district, E.D. Pa. (see Figure 71). Even in that district, however, the percentage method was used nearly as much as lodestar. By contrast, N.D. Cal. determined fees by percentage of recovery 6:1 over lodestar and N.D. Ill. nearly 2:1 over lodestar. It appeared that the percentage method was the exclusive method in S.D. Fla. (see Figure 71).

Interestingly, S.D. Fla., which did not use lodestar, had the lowest average rate (24%) while E.D. Pa., which used lodestar the most, had the highest average fee-recovery rate (30%) (see Figure 68). The differences were not as pronounced for median fee-recovery rates, which ranged from 27% (S.D. Fla.) to 30% (N.D. Ill.) (see Figure 68).[265] Factors other than selection of fee-calculation method, of course, may have contributed to these results. Moreover, similar differences in mean and median fee-recovery rates were found when we looked only at cases using the percentage of recovery method (see Figure 72).

The four courts differed in their approaches to fee calculation depending on whether or not the settlement created a fund for distribution to the class. In certified cases with net monetary distributions to class members (distribution cases), the percentage method was far more prevalent than lodestar (see Figure 73). As one would expect, in settlements where the only benefits to the certified class were those that could not be easily quantified (no distribution cases), courts generally used lodestar or relied on consensual fee determinations (see Figure 74).

We will first discuss distribution cases. In the three districts where the appellate courts have authorized either fee-calculation method, lodestar was used in less than 10% of the distribution cases in two districts but in a third of the cases in E.D. Pa.[266] (see Figure 73). In all four districts, judges determined fees using the percentage method in 45% or more of the distribution cases. Percentage of recovery appeared to be the sole method used in

party. Whether the award is mandatory or permissive depends on the terms of the particular statute and applicable case law. MCL 3d, *supra* note 34, § 24.11. The availability of statutory fees is driven by public policy, encouraging private enforcement of substantive rights under the law. Statutory fee cases often produce only nominal damages or declaratory judgments—the kind of results that usually cannot be quantified. *See generally* Lapointe, *supra* note 259, at 865–67 (discussion of the differences between statutory fee and common fund cases).

264. Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) (indicating that lodestar approach is the centerpiece of attorneys' fee awards in a statutory fee case (citing Hensley v. Eckerhart, 461 U.S. 424 (1983))); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986); Blum v. Stenson, 465 U.S. 886, 897 (1984). *See generally* Hirsch & Sheehey, *supra* note 249, at 19-44.

265. Generally, the study could not measure the degree to which higher fee-recovery rates reflected high quality work done, efforts to pursue challenging but deserving claims, or other factors. See discussion of fee adjustments and multipliers *infra* § 16 (c).

266. The mean and median fee-recovery rates in E.D. Pa. distribution cases using lodestar were 30% and 28%, respectively, compared to 28% and 27% using the percentage method.

S.D. Fla.[267] In N.D. Cal., judges used it in 78%[268] of the distribution cases, compared to about 60%[269] in N.D. Ill. and 45%[270] in E.D. Pa.[271] (see Figure 73).

In no distribution cases, lodestar was the dominant method in two districts (see Figure 74). In the other two districts, findings were less informative because, in all but a few cases, the parties consented on fees or the method used was not apparent from case files. In all four districts, nine cases were determined by lodestar and three by percentage of recovery (see Figure 74).[272] It appears that in many cases the court opted for lodestar when it could not quantify the value of class benefits, making a percentage of recovery calculation problematic.

Civil rights claims were generally more prevalent in no distribution cases.[273] In part, this explains the higher lodestar usage in no distribution cases; lodestar is the appropriate method when the court applies a fee-shifting statute.[274]

The Percentage Method. Median fee-recovery rates for distribution cases ranged from 27% to 30% when the percentage method was used, consistent with precedents in the four districts' respective courts of appeals (see Figure 72). For example, recently the Third Circuit cited an E.D. Pa. decision that noted that fee awards have ranged from 19% to 45% of the common fund.[275] In recent decisions, the Seventh[276] and Eleventh[277] Circuits have discussed benchmarks or ranges of 20% to 30%. In addition, the Eleventh Circuit has instructed district courts to apply the twelve *Johnson* factors[278] and other pertinent factors[279] in determining the fee percentage. The Ninth Circuit has indicated that

267. In S.D. Fla., all percentage method cases involved securities claims.

268. In N.D. Cal., over 80% of the percentage method cases involved securities issues. None involved civil rights claims.

269. In N.D. Ill., 60% were securities cases; 10% involved civil rights.

270. In E.D. Pa., nearly 90% were securities cases; no cases involved civil rights.

271. In one case each in two districts, the court applied both the lodestar and percentage of recovery methods (see Figure 73). These cases are included in the percentages cited above. In addition, we could not determine the method the court used in about 20% of the distribution cases where generally the parties stipulated to a fee award and the court approved all or most of the stipulated amount.

272. In 50% or more of the cases, parties stipulated to fees or the fee method was otherwise unknown.

273. Civil rights cases represented 44%, 0%, 19%, and 40% of cases with no net monetary distribution to the class, compared to 6%, 11%, 11%, and 9% of cases where the class received net monetary distributions.

274. *See supra* note 264.

275. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (citing *In re* SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 533 (E.D. Pa. 1990)).

276. *See* Florin v. NationsBank of Georgia, 60 F3d 1245, 1248 (7th Cir. 1995) (quoting *In re* Unisys Corp. Retiree Medical Benefits ERISA Litig., MDL No. 969, 1995 WL 130679, at *12 (E.D. Pa. Mar. 22, 1995) ("'the benchmark in common fund cases is 20%–30%'").

277. Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774–75 (11th Cir. 1991) (noting that percentage method is "better reasoned" for common fund cases and that the "majority of common fund fee awards fall between 20% and 30% of the fund"). In addition, the Eleventh Circuit stated, as a general rule, that 50% may be established as an upper limit. *Id.*

278. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974).

279. The other factors include "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any non-monetary benefits conferred upon the class by settlement, and the economics involved in prosecuting a

25% should be the "benchmark"[280] for such awards, subject to adjustment upward or downward to account for any unusual circumstances involved in a case.[281] When federal district courts across the country use the percentage of recovery method for common fund cases, most select a percentage in a range from 25% to 30% of the fund.[282]

Other Methods. To prevent a windfall to plaintiffs' counsel in cases where the settlement fund is unusually large, some courts have used the lodestar method[283] or a sliding scale percentage method with the percentage to be awarded decreasing as the size of the fund increases (sliding scale percentage method).[284] Only one case in the study had a gross monetary settlement amount greater than $50 million.[285] The fee-recovery rate in that N.D. Cal. case was 19%, below the Ninth Circuit benchmark of 25%.[286]

In another case, as part of a bidding process for lead class counsel, the court selected a fee structure that included the sliding scale percentage method. In addition, the fee percentage under this structure would be discounted by 20% if the case settled within the first year of litigation (an early settlement discount). That is, in addition to the sliding scale based on settlement amount, the class would also receive a discount on fees if the case settled early.[287] Such discounts generally are intended to keep class counsel from

class action." *Camden I,* 946 F.2d at 775. *See* discussion of fee enhancements *infra* § 16(c).

280. "A benchmark is a single percentage figure used over and over again, regardless of the type of litigation or the size of the recovery." Lapointe, *supra* note 259, at 867, n.165.

281. *See* Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (25% of $850,000 in damages: a percentage award "should be adjusted or replaced . . . when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). *See also* Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989) (25% of a $4,736,000 recovery); *In re* Pacific Enterprises Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (an award of 33% was justified because of the complexity of the issues and the risks). See discussion of fee enhancements *infra* § 16 (c).

282. MCL 3d, *supra* note 34, § 24.121, at 189 (25%–30% range). *See also* Hirsch & Sheehey, *supra* note 249, at 68 (20%–30% range).

283. *In re* Washington Public Power Supply Sys. Litig., 19 F.3d 1291, 1297 (9th Cir. 1994) ("the 25% 'benchmark' is of little assistance" in a case where the settlement fund was large ($687 million)).

284. *See* Task Force Report, *supra* note 252, at 256. *See also* Florin v. NationsBank of Georgia, 60 F.3d 1245 (7th Cir. 1995) ("fee awards usually fall in the 13 percent–20 percent range for funds of $51–$75 million, and in the 6 percent–10 percent range for funds of $75–$200 million"). *See also* Coffee, *New Learning, supra* note 262, at 7 n.13 and accompanying text. But, it has been noted:

> A percentage is a relative concept and one court's award of twenty-five percent of a $19.3 million recovery does not mean that the percentage continues to be reasonable when applied to a $4.7 million recovery. Thus, the notion that a percentage falling within a certain range is reasonable is inherently misleading.

Lapointe, *supra* note 259, at 868 & n.170.

285. Stender v. Lucky Stores, Case No. 88-1467 (N.D. Cal. filed April 22, 1988).

286. The parties stipulated to attorneys' fees and the court awarded the full amount of the fee request.

287. *In re* Oracle Sec. Litig., 132 F.R.D. 538, 541 (N.D. Cal. 1990). The selected fee structure was as follows:

Recovery	Time for Resolution	
(in millions)	0–12 months	13 or more months
Up to $1	24%	30%
$1–$5	20%	25%

settling prematurely, under the theory that early settlement is likely to be advantageous to class counsel but detrimental to the class.[288] Some ascribe to this theory in particular with respect to cases with large potential recoveries where, as described above,[289] the sliding scale percentage method would decrease the fee percentage as the size of the fund increases. To offset any incentives for attorneys to settle early and obtain fees at a higher percentage of a smaller settlement, the early settlement discount has been introduced as a disincentive to premature settlement.

(c) How was benefit to the class taken into account?

Overview. In determining fee awards, the courts often included consideration of the extent to which the class benefited from the settlement. We looked for the following as indicators: (1) use of the percentage of recovery method, (2) any adjustments to the lodestar amount based on results achieved, and (3) whether the court considered any fee objections.

Using this somewhat limited data-gathering technique, it was apparent that the court took class benefits into account in at least 80% of the distribution cases in two districts and at least 68% and 51% of the time in the other two districts (see Figure 73).[290] In the balance of the distribution cases, case files did not provide sufficient information on fee-award rationale, often because awards were based on consent of the parties or unadjusted lodestar calculations. Given this, we generally could not determine whether or not the courts considered class benefits in their fee decisions for these cases. To the extent that they did, the percentages cited above are understated.

Background on fee adjustments and multipliers. One method courts have used to take class benefits and other considerations into account has been to apply enhancements or reductions to fee awards.[291] In common fund cases, the trend had been that fee enhancements, where not otherwise prohibited, should be reserved for the rare case in which the standard fee-calculation method will not adequately compensate the professional.

$5–$15	16%	20%
$15 or more	12%	15%

288. *See supra* note 262 and accompanying text.

289. *See supra* note 283.

290. This is in contrast to Professor Downs' findings that "class attorneys received substantial awards . . . with little or no judicial scrutiny." Downs, *supra* note 50, app. at 710–11 (Chart D).

291. When counsel request fee enhancements, arguments generally are that the case was especially difficult, that the ultimate results produced exceptional benefits for the class, or that performance was otherwise superior. Counsel also sometimes asks for adjustments to reflect the novelty of the issues presented, risk of nonpayment, and delay in payment (loss of use of money). *See* Hirsch & Sheehey, *supra* note 249, at 69–70; 3 Newberg & Conte, *supra* note 55, § 14.03. *See also* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974) (twelve factors to be used in determining attorneys' fees); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562–66 (1986) (Delaware Valley I) (in the context of fee-shifting statutes, *Johnson* factors are subsumed within the lodestar amount absent extraordinary circumstances).

One method used to enhance fees has been to apply a multiplier to the lodestar amount.[292] In the past, the Seventh Circuit suggested limiting multipliers to a 200% increase in the lodestar.[293] The majority of courts, however, had not imposed such limits.[294]

Data and discussion on fee adjustments and multipliers. In two cases, the lodestar was enhanced by a multiplier. In each case, the multiplier was approximately 2.5 times the lodestar amount, resulting in a $765,000 (34%) fee award on a $2.2 million gross settlement in one case and a $9.5 million fee award in the *General Motors Pick-Up Truck* settlement recently vacated on appeal.[295]

The dearth of enhancers or other adjustments in study cases might be related to the frequent use of the percentage method where the selected percentage itself can incorporate the factors that previously resulted in fee adjustments. Similarly, there is a trend, and in fee-shifting cases a mandate, to incorporate those factors into the lodestar components. Also, it is possible that, prior to 1994 appellate decisions affecting two of the study courts, *Dague* had a chilling effect on enhancements in common fund cases.[296]

(d) What percentage of the fee amounts requested were awarded and how often were objections and appeals filed concerning fees?

Data and Discussion. We looked at how frequently the court awarded fee amounts less than counsel requested. Again, we found differences depending on the calculation method used. In the three districts that used the lodestar, courts granted lodestar amounts less than requested in 22%, 17%, and 33% of the cases. By contrast, when these same three courts used the percentage method, they reduced fee requests in 43%, 9%, and 16% of certified case settlements, respectively. The fourth district did not use lodestar and ap-

292. In a decision that might have affected the use of multipliers in study cases, on June 24, 1992, the Supreme Court barred risk multipliers (fee enhancers that account for counsel's risk of nonpayment) in statutory fee-shifting cases. City of Burlington v. Dague, 505 U.S. 557 (1992). The decision, however, did not address specifically whether risk multipliers remain available in common fund cases. The effect of *Dague* on study cases (i.e., cases terminated in the four districts between July 1, 1992, and June 30, 1994) is unclear; the relevant appellate courts did not begin to interpret the decision in the class action context until March 1994.

The Seventh and Ninth Circuits concluded that *Dague* does not extend to common fund cases. *See* Florin v. NationsBank of Georgia, 34 F.3d 560, 564–65 (7th Cir. 1994) (op. dated Sept. 8, 1994); *In re* Washington Public Power Supply System Sec. Litig., 19 F.3d 1291, 1300 (9th Cir. 1994) (holding that district court erred by refusing to award risk multiplier to lodestar calculation) (op. dated Mar. 23, 1994). On the other hand, a recent Third Circuit opinion, interrupting *Dague*, could be read to prohibit the use of multipliers for lodestar enhancement in common fund class actions. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995).

293. Skelton v. General Motors Corp., 860 F.2d 250, 258 (7th Cir. 1988), *cert. denied,* 493 U.S. 810 (1989). *But see In re* Superior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 132 (N.D. Ill. 1990) (awarding multipliers ranging from 1.5 to 2.5, depending on each attorney's contribution). *See also In re* Continental Ill. Sec. Litig., 750 F. Supp. 868, 896 (N.D. Ill. 1990) (no multiplier allowed), *rev'd,* 962 F.2d 566, 569 (7th Cir. 1992). These three cases were not in the study.

294. *See* Richard B. Schmitt, *Shareholders Suits Pay Attorneys Less,* Wall St. J., Feb. 1, 1991, at B1, col. 4.

295. *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995).

296. *See supra* note 292.

parently did not reduce percentage method requests. Regardless of the method, the vast majority of awards were 90% to 100% of the request.

Class members, or other interested parties, did not object to fees very often; objections were filed with respect to five out of thirty-four (15%) fee awards in one court, three of eleven (27%) in another, five of thirty-four (15%) in the third, and seven of twenty-eight (25%) in the fourth district. An objection was filed in only one lodestar case (representing 11% of lodestar cases in that district and 6% of lodestar cases in the four districts combined). In contrast, rates of fee objection were higher in cases using the percentage method[297] (see Figure 75). Since objections were filed in percentage method cases 4.5 times as often as under lodestar, these results could be read to indicate that objections are more likely under the percentage method. However, one must also consider that notices of proposed settlement identified fee-related amounts[298] in 33% of the lodestar cases compared to 78% of percentage method cases. That is, for all four districts combined, class members in percentage cases were given information about fee amounts 2.4 times as often as in lodestar cases. Even considering this, however, there appeared to be less propensity to object under lodestar for some reason. Note, however, that one cannot extrapolate these data on a small number of cases to all class actions nationwide; factors other than those discussed here may have caused these results.

Appeals were filed in 15% to 34% of study cases (*see infra* § 20). For three of the four districts, 3% to 7% of these appeals (four or fewer per district) involved attorneys' fees issues,[299] often accompanying appeals on other issues. In the fourth district, three fee-related appeals constituted 25% of the court's class action appeals. All fee-related appeals were challenges to the award, denial, or reduction of plaintiffs' counsel fees. In total, for the four districts, there were ten such appeals. One of these cases, the *General Motors Pick-Up Truck Litigation*, resulted in vacating a "settlement class" settlement that included $9.6 million in fee awards. The other appeals ended in fee-award affirmance (two cases), appeal dismissal (two cases), reversal of denial of fees (one case), vacating the trial court's reduction of fees (one case), and remanding for reconsideration (one case). The other two appeals were pending (see Tables 51 to 54).

(17) Trivial Remedies; Other Remedies

(a) How frequently did certified (b)(3) classes lead to relief that is relatively trivial in comparison to attorneys' fees?

Study results did not show recurring situations where (b)(3) actions produced nominal class benefits in relation to attorneys' fees. (*See also supra* § 1(a) for a discussion of the average recovery per individual class member and of cases in which the average individual recovery was less than $100.) We gauged this by determining, for each certified case with (b)(3) recovery, what percentage of the gross monetary settlement was paid to class

297. The rate reflects the number of percentage method cases with at least one fee objection divided by the number of percentage method cases.

298. These notices described the proposed settlements and either stated the amount or range of fees or the percentage of the settlement fund to be allocated to fees, subject to court approval.

299. Not including appeals on sanctions.

counsel. This fee-recovery rate exceeded 40% in 11% of settled cases in two districts and in less than 5% of settled cases in the other two courts (see Figure 67).[300] In half of these cases, case files provided information that helped explain the "high" rates. For example, in some cases, monetary relief was accompanied by nonquantifiable (b)(2) benefits, such as a permanent injunction for the benefit of the class. In other cases, the settlement produced relatively small payments to the class as well as to attorneys for the class.[301] (For a more detailed discussion of fee-recovery rates, *see supra* § 16(a).)

In the four districts, in twelve cases that were certified *solely* under Rule 23(b)(3), attorneys' fees were awarded but no objectively quantifiable monetary relief was awarded to the class. Table 46 summarizes the relief and the attorneys' fee awards in those cases. Assessing whether the relief is trivial in relation to the fees calls for subjective judgments that we leave to the readers. The fee awards in these cases were generally the product of a stipulation (eight of nine cases for which information was available). In one case, the *General Motors Pick-up Truck Litigation,* the court of appeals cast doubt on the justification for the stipulated fees when it vacated the settlement. Judges reduced substantially two of the four fee requests that were not stipulated by the parties.

(b) How frequently did certified (b)(2) classes lead to injunctive relief that is relatively trivial in comparison to attorneys' fees?

We looked at the percentage of certified (b)(2) cases that resulted in injunctive relief without any substantive monetary distribution. We found variation among the districts, with the percentage ranging from 0% (zero of three cases) in one district to 71% (five of seven cases) in another.[302] In just over half of these cases, attorneys' fee awards were around $50,000 or less, with injunctive relief ranging in scope from a nationwide nondiscrimination policy in a federal agency ($53,000 in fees) to a local housing authority's rewiring of dwelling units ($6,600 in fees). It appears that many would agree that the

300. The "fee-recovery rate" exceeded 40% in the following numbers of cases: two of eighteen certified settled cases with net monetary distribution in each of two districts, one of twenty-three cases in the third district, and zero of nine cases in the fourth.

301. In the case with the highest fee-recovery rate (71%), a $34,000 monetary class recovery and $83,000 fee award were accompanied by a prothonotary's agreement to place future interpleaded funds in separate interest-bearing accounts. The second highest rate (63%) involved a $3.6 million fee award, $300,000 in notice costs and a $1.8 million net cash distribution to a certified class of approximately 2,000 stockholders that incurred stock losses. The third highest rate (around 47%) was related to a $82,000 net monetary distribution to a class of terminated members of a health plan, with attorneys' fees of $76,000. The fourth largest rate (45%) was based on a $21,000 net monetary distribution and $17,500 in fees related to bank customers that received improper forms. Two other cases had high rates (just over 40% in each). One was a securities case, where the court used the percentage of recovery method but did not place a value on other nonclass benefits valued by class and settlement counsel at $8.3 million. The other was a lodestar case with a net monetary settlement of $200,000 where no noneconomic benefits were apparent in the case file. There also may have been other factors, not apparent in case files, that affected the rates at which fees were awarded.

302. The percentages of certified (b)(2) settlements that resulted in injunctive relief without any substantive monetary distribution were as follows: 71% (five of seven settled certified (b)(2) cases) in one court, 44% (seven of sixteen cases) in another district, 20% (one of five cases) in the third court, and 0% (zero of three cases) in the fourth.

breadth of the results obtained was not trivial in comparison to the size of the fee award in these cases.

Cases with fee awards greater than $150,000 resulted in the following relief:

- improving treatment and placement opportunities for developmentally disabled Medicaid recipients ($682,681);
- entering into a consent decree concerning abortion and family planning services ($224,810 in fees); and
- readjudicating claims for survivor and disability benefits ($167,500).

The comparatively high level of fees makes it more difficult to assess their appropriateness after the fact. Given the breadth and complexity of these cases, however, many would consider the relief to be nontrivial (see Table 47).

(c) How often were recoveries distributed to charities or the like?

Nine percent or less of approved settlements included distribution of settlement funds to a charitable or other nonprofit organization.[303] This occurred in a total of five cases in two districts (see Table 48). One example is a settlement fund that donated $150,000 to the Chicago Bar Foundation for specific programs on domestic abuse, juvenile justice, and mentoring.

(18) Duplicative or Overlapping Classes

Background. The core questions are: How common are duplicate or overlapping classes? What difficulties were posed by such classes? Case law and commentary provide us with more information than the empirical data in the study. It is clear that multiple actions that are similar or identical and brought in different forums can be problematic. Such problems include the de facto surrender of jurisdiction by a court's yielding priority to another action and intercourt and intersystem consolidation.[304] These multiple actions can result in conflicting or overlapping classes that may produce inconsistent adjudications, duplication of effort, and confusion for class members, litigants, and judges.[305] "When such an overlap occurs, the individual's claims become subject to an 'irrational resolution by a race to judgment,'"[306] and "[e]ven if absent class members are permitted to opt out of any

303. The number of approved settlements with charitable distributions were as follows: three of thirty-four court-approved settlements in one district, two of twenty-seven settlements in another, zero of thirty-four in the third, and zero of eleven in the fourth.

304. *See, e.g.*, Garcia-Mir v. Civiletti, 32 Fed. R. Serv. 2d (Callaghan) 509 (D. Kan. 1981) (court denied certification because of the danger of overlapping classes and of wasted judicial effort; the court found that there were cases pending in another district involving the same class members and issues; the case was eventually transferred to the other district).

305. George T. Conway III, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1101 & n.11 (1987) (quoting Kennedy, *Class Actions: The Right to Opt Out*, 25 Ariz. L. Rev. 3, 81 (1983): "Among the hypothetical parade of horribles which can be projected is the scenario in which fifty competing, national, multistate opt out class actions are brought on the same claims and all members remain silent in response to the fifty notices.").

306. *Id.* at 1121 & n.12 (citing Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 70 (1986): "Professors Miller and Crump observe that a race to judgment among competing class actions would encourage litigants to engage in unseemly tac-

or all of the parallel lawsuits, no guarantee exists that the actions of many individual class members choosing to opt out will resolve the conflict or eliminate the overlap.'[307] Problems arising from competing classes may benefit by consolidation of the actions in one court.[308]

Data. We found that overlapping classes generally arose in related cases that were not consolidated with similar litigation pending in federal and state courts (*see supra* § 1(b)). Our data uncovered five cases with what appeared to be duplicative or overlapping classes. The data showed that those cases generated few difficulties, if any, for the court. In several instances, the federal court avoided parallel proceedings by issuing a stay pending the completion of trial in related state litigation. Aside from our search for file references to related and consolidated cases, we did not inquire into the existence of competing class actions.

(19) Res Judicata

Call for Research. There are no data from the field study on this topic. It would be interesting to pursue the extent to which opt-out plaintiffs or objecting class members filed an action on the same issues that were addressed in the class action. Our data would permit identification of counsel in those cases and a follow-up questionnaire or interview might well uncover interesting and useful data.

(20) Appeals

Background: Proposed Revision to Rule 23. Under the final judgment rule,[309] orders granting or denying class certification are interlocutory and generally not appealable until the entry of a final judgment;[310] however, in certain cases courts have allowed interlocutory appeal under the limited exceptions of 28 U.S.C. §§ 1292(a) and (b).[311] Generally,

tical behavior. 'For example, defendants could forum shop by delaying or accelerating particular actions. Plaintiffs could collude with similarly aligned parties in stalking horse litigation, diverting their opponents' attention or seeking collateral advantages such as the cumulative benefits of inconsistent discovery rulings.'" *Id.* at 1101 n.12 (quoting Miller & Crump, *supra*, at 24 (footnotes omitted))).

307. *Id.* at 1101.

308. Subclasses will often be necessary when independent actions are brought on behalf of classes that overlap or conflict with classes represented in other actions. For example, in the settling *Antibiotics* cases, well over 100 actions were filed, including several brought on behalf of nationwide classes. To avoid obvious conflicts, and to ease administrative chores, the consumer classes were redefined on a geographical basis, with states named as representatives of statewide consumer classes. 2 Newberg & Conte, *supra* note 55, § 7.31, at 7-93 to 7-94 (citing West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971)). "Similarly, nonsettling *Antibiotics* actions were upheld as statewide classes after being transferred for coordinated pretrial proceedings." *Id.* at 7-94 (citing *In re* Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), *nonsettling actions transferred*, 320 F. Supp 586 (J.P.M.L. 1970).

309. Federal "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291 (1988).

310. Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978) (order decertifying a class is not appealable under 28 U.S.C. § 1291); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978) (not appealable under 28 U.S.C. § 1292(a)(1)). *But see* Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce,

> [c]lass action certification rulings involve some factual analysis and thus do not qualify as "a controlling question of law as to which there is substantial ground for difference of opinion . . . . " [28 U.S.C. § 1292(b).] In short, there is little likelihood of immediate review of class action rulings even though such rulings may be crucial and controlling in the future conduct of the case.[312]

Pendent appellate jurisdiction over an otherwise unappealable order is available only to the extent necessary to ensure meaningful review of an appealable order.[313] Granting a petition for writ of mandamus for certification review is rare.[314]

The proposed revision to Rule 23 would add a provision that authorizes immediate appellate review of class certification rulings by leave of the court of appeals. As described in the draft committee note, this provision is intended to afford an opportunity for prompt correction of error before the parties incur significant litigation or settlement costs.[315] The underlying theory is that class certification rulings very often have make-or-break significance for the litigation, with denial of certification sometimes leading to quick dismissal of the case and with granting of certification at times seen as forcing defendants to settle. (*See supra* § 14(a).) The draft committee note anticipates that orders permitting immediate appellate review will be "rare." Others speculate about whether losing parties will seek interlocutory appellate review of nearly every decision on certification.

In 1986, the Special Committee on Class Action Improvements of the ABA Section of Litigation recommended a code change that would be similar in effect to the proposed

Fenner & Smith, Inc., 903 F.2d 176 (2d Cir. 1990) (class representative's failure to prosecute its individual claims created a final judgment; denial of class certification merged into that judgment), *cert. denied,* 498 U.S. 1025 (1991).

311. Forbush v. J.C. Penney Co., 994 F.2d 1101 (5th Cir. 1993) (interlocutory appeal reversed denial of class certification); Gay v. Waiters & Dairy Lunchmen's Union, 549 F.2d 1330 (9th Cir. 1977) (ruling on class certification that is integral to a preliminary injunction ruling, also appealed, may be reviewed pursuant to 1292(a)). *See also* Castano v. American Tobacco Co., No. 95-30725, 1996 WL 273523, at *1 (5th Cir. May 23, 1996) (certifying class certification ruling for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b)). *But see* Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 208–09 (3d Cir. 1990) (class certification not reviewable under pendent appellate jurisdiction because preliminary injunction was vacated).

312. Downs, *supra* note 50, at 701.

313. Georgine v. Amchem Products, Inc., No. 94-1925, 1996 WL 242442, at *9 (3d Cir. May 10, 1996) (holding that "[t]o give full effect to the appellants' right to review of the injunction, we must reach class certification"). *Hoxworth*, 903 F.2d at 209.

314. *In re* Catawba Indian Tribe of S.C., 973 F.2d 1133 (4th Cir. 1992) (writ of mandamus will not issue unless denying certification amounted to a usurpation of judicial power); Interpace Corp. v. Philadelphia, 438 F.2d 401 (3d Cir. 1971) (writ of mandamus power is rarely exercised in class action context). *But see In re* American Medical Systems, Inc., 75 F.3d 1069, 1090 (6th Cir. 1996) (ruling that writ of mandamus to decertify nationwide plaintiff class was justified because of trial court's "total disregard of the requirements of Rule 23" in medical device products liability case); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir.) (mandamus justified; district court certification of class was in error and delaying review would cause irreparable harm), *cert. denied*, 116 S. Ct. 184 (1995).

315. Appellate review would be "available only by leave of the court of appeals promptly sought, and proceedings in the district court . . . are not stayed . . . unless the district judge or court of appeals so orders." Cooper, *supra* note 14, Committee Note.

rule amendment.[316] The ABA special committee proposed amending the jurisdictional provisions of 28 U.S.C. § 1292 to permit appellate review of a certification ruling by permission of the court of appeals "with accompanying safeguards designed to deter vexatious or delaying resort to interlocutory review."[317] The ABA special committee also anticipated that orders permitting such interlocutory review would be rare.[318]

Providing for discretionary interlocutory appeal of certification rulings might dovetail with another proposed change: making some level of probable success on the merits an additional element or factor for the court to consider in deciding whether to certify a class. (*See supra* § 5(c).) Some argue that both proposed changes would affect the impact of the certification ruling on parties' bargaining power during settlement negotiations. Some maintain that allowing interlocutory appeal on certification would be even more important if Rule 23 provided for consideration of probable success on the merits, because the certification ruling would make an even stronger statement on the potential outcome of a case than under the current rule.

(a) How often were appeals filed?

Data. In the four districts, the rate of filing at least one appeal in class action cases ranged from 15% to 34% (see Figure 76).[319] For this purpose, rate of appeal is defined as the number of cases in which at least one appeal was filed divided by the number of cases in the study.[320] It is important to recognize, however, that the pool of cases from which parties generally might appeal is far less than all class actions in the study, because study cases exhibited a high rate of settlement and settlement judgments are infrequently appealed (see Table 39 and discussion at *supra* § 14(a)). The overall rate of appeal (see Figure 76) might have been even higher had it not been for the high rate of class settlement. Significant differences in appeal rates for settled cases (appeal rates ranging from 9% to 21%) and nonsettled cases (ranging from 33% to 43%) were observed in three districts. In the fourth court, the rate of appeal was the same (15%) for both settled and nonsettled cases.

In three districts, noncertified cases were more likely to have one or more appeals than certified cases (see Figure 76). These findings may reflect the higher rate of settlement

316. The ABA special committee made this recommendation prior to the enactment of 28 U.S.C. § 1292(e) (Supp. 1993) which provides the statutory authority for using the rule-making process to permit an appeal of interlocutory orders.

317. ABA Special Committee Report, *supra* note 10, at 200. The report cited 28 U.S.C. § 1927 (1988), Fed. R. Civ. P. 7, Fed. R. App. P. 38, and inherent judicial power as "ample deterrents against abusive resort to interlocutory review." *Id.* at 211.

318. *Id.* at 211.

319. In the time study, 14% of the class actions included one or more appeals. Willging et al., *supra* note 26, at 28. For discussion and statistics on appeal rates in federal civil cases, see generally Carol Krafka et al., Stalking the Increase in the Rate of Federal Civil Appeals 6–7, n.13 (Federal Judicial Center 1995); Judith A. McKenna, Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States 29–30 (Federal Judicial Center 1993); Richard A. Posner, The Federal Courts: Crisis and Reform 89–91 (1985).

320. There are other ways to estimate appeal rates for these and other purposes. *See, e.g.*, Krafka et al., *supra* note 319, at 4–6, 21–22; McKenna, *supra* note 319, at 29 & n.57.

found in certified cases (see Table 39 and discussion at *supra* § 14(a)(i)). In the fourth district, there was no difference in appeal rates for certified and noncertified cases.

Because of the elevated stakes in trial cases, one might expect that the percentage of cases that resulted in appeal would be higher for cases that go to trial compared to those that do not. This expectation was borne out for the four districts in the aggregate. Cases in the study resulted in eighteen trials and twelve of those trials led to appeals on trial-related issues (see Tables 43 and 44);[321] a 67% rate of appeal.[322] Looking only at fully completed trials, that is, excluding four cases that settled during trial (three of which resulted in no appeal), the rate of appeal was higher (79%). Given that these rates are for a small number of trials in cases terminated in a two-year period in four districts combined, they cannot be used to predict the rates for class actions nationally. It is interesting to note, however, that these appeal rates are much higher than past findings of the nationwide appeal rate for all civil cases that terminated by trial. For example, a 1981 study found a 24% rate of appeal after full trials in 18,500 cases terminating between 1977 and the first half of 1978.[323]

There were twelve, thirty-four, thirty-six, and fifty-six appeals in the four districts. All but two of the appeals were from a final judgment or order. Most cases with appellate review included only one appeal. Two districts experienced multiple appeals in about a third of the cases with appeals; the comparable rate for the other two districts was around 10% (see Figure 77).

(b) How often did appeals alter the prior decision of the trial judge?

Data: Overview of Results on Appeal. Few of the appeals resulted in altering the prior decision of the trial judge (see Figure 78).[324] The appellate courts reversed, vacated, or remanded in full in about 15% of the appeals from three districts and 6% from the fourth.[325] Appellate decisions affirmed in full with much greater frequency—in about 50% of decided appeals in three districts and in 33% in the fourth court. The other frequent disposition was dismissal of the appeal, either by the court of appeals or by stipula-

321. Eight of 12 appeals of trial results led to an appellate ruling and the other four appeals were dismissed (see Tables 43 and 44).

322. In computing rate of appeal, for this purpose, the numerator was the number of post-trial appeals in cases where trial commenced; the denominator was the number of study cases where a trial commenced.

323. Gordon Bermant et al., Protracted Civil Trials: Views from the Bench and the Bar, Table 6, at 41 (Federal Judicial Center 1981). *See also* J. Woodford Howard, Jr., Court of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits, Table 2.5, at 35 (1981).

324. The disposition data shown in Figure 78 is broken down further by appeals filed by plaintiffs (see Figure 79) and defendants (see Figure 80). Figures 78–80 show the number of decided appeals, rather than the number of cases with appeals; some cases had more than one appeal.

325. These percentages were obtained by dividing the number of appellate reversals, vacations, or remands for each district by the total number of appeals filed in study cases in that district, with the denominator excluding appeals where the court of appeals had not yet issued a decision. These five excluded appeals, shown in the legend for Figure 78, amount to about 3.6% of appeals filed in study cases in the four districts combined.

tion of the parties. This occurred at rates in the four districts ranging from 28% to 36% of decided appeals (see Figure 78).[326]

Plaintiffs were appellants more often than defendants were. Plaintiffs filed about 75% of the appeals in three districts and 85% in the fourth.[327] The preliminary time study found that plaintiffs filed 71% of the appeals in that sample of fifty-one class actions nation-wide.[328]

In the instant study, between 13% and 26% of plaintiffs' appeals were successful, in whole or in part, in reversing or vacating trial court decisions in three courts.[329] The fourth court did not have a sufficient number of appeals for this stratification (see Figure 79). Few defendants' appeals resulted in reversal or vacation (see Figure 80).

Data: Reversals. Generally in study cases, after appellate reversal and remand of a dispositive order, case resolution in favor of the class appeared more likely if a class had been certified prior to the appeal than if no class had been certified. While other explanations may be possible for these observations, our study data establish a plausible hypothesis that may warrant further testing.

Reversals in Cases with Certified Classes. Viewing the four districts as an aggregate, appellate reversals in whole or in part occurred in seven cases where the district court had certified a class prior to the appeal (see Table 49). In four of the seven cases, after the appellate court reversed a final judgment, the district court on remand approved a class settlement. The judgments appealed from in three of these four cases had been dispositive in favor of the defendants.[330] The fourth case settled despite the court of appeals reversal of summary judgment for the plaintiff class on liability. In the other three of these seven cases, the court of appeals vacated a settlement (the *General Motors Pick-Up Truck Litigation* now pending in the district court), affirmed nearly all of a summary judgment for defendants in another case (also pending), and in the third case vacated a decision in favor of defendants with instructions to dismiss the case for lack of jurisdiction.

Reversals in Cases with No Class Previously Certified. Thirteen reversals occurred in cases where a class was not certified before appeal, again looking at the four districts as

326. These calculations exclude appeals where no appellate disposition information was available. *See supra* note 325.

327. This is not surprising given (1) the frequency and outcome of defendant motions to dismiss some or all of plaintiff claims, (2) the frequency and outcome of plaintiff motions for class certification, and (3) the outcome of trials in study cases. For example, motions to dismiss were granted in full or in part in about 75% of the rulings on motions to dismiss in two districts and in about 48% of such rulings in the other two districts (see Table 25). The district court denied certification of a plaintiff class in about one-third of the rulings on class certification in three districts and in half of the rulings in the fourth district (*see supra* § 5). For all four districts combined, plaintiffs were unsuccessful in about 70% of the trials that commenced, not counting trials that settled before completion (see Tables 43 and 44).

328. Willging et al., *supra* note 26, at 28.

329. *See supra* note 326.

330. In the first of these three cases, an appellate panel vacated summary judgment for the defendants. In the second case, the court of appeals reversed the district court's dismissal of the case for failure to state a claim; the district court had certified a plaintiff class on the same date that it dismissed the case. In the third settled case, the court of appeals twice reversed and remanded summary judgments for the defendants, once before and once after class certification.

an aggregate. The aftermath of reversals in these cases did not appear as favorable to the class as where a class had been certified before the filing of the appeal (see Table 50 compared to Table 49).

All but one of the thirteen were plaintiff appeals of claim dismissal or summary judgment for the defendants.[331] Despite appellate reversal of these judgments,[332] remand led to dismissal or no substantive success on plaintiffs' original claims in all but five of the twelve cases with plaintiff appeals; three of those five remanded cases are pending in district court. Another one of the five resulted in class certification and class settlement after remand. In the one additional case, a class was certified after reversal of the first summary judgment ruling for defendants; the case eventually settled after appellate reversal of a second summary judgment ruling for defendants.[333]

Data: Issues on Appeal. We categorized the principal issues and related outcomes on appeal in Tables 51 through 54.

Implications for Proposed Amendments to Rule 23. Study data on appeals can be interpreted in several ways but they should not be viewed as predictors of the universe of class action cases nation-wide. Because study data reflect a small number of appeals in a limited time period in only four districts, we cannot make broad-based conclusions.

Current supporters of the rule change have maintained that an appellate reversal of the class certification decision could change the life of a case in ways far beyond the class certification itself. Some might read the study's reversal and remand findings to suggest that certifying a class before a plaintiffs' appeal of dismissal or summary judgment had a significant impact on the eventual outcome of the case. Not surprisingly, cases certified before such appeal had a higher likelihood of class settlement after remand than those cases with no class certification before the appeal, suggesting the potential importance to a plaintiff class of a favorable and timely ruling on certification.[334] Some also might read the data to suggest that the absence of class certification before appeal of a dispositive

331. In the defendants' appeal in one case, the appellate panel vacated the district court's injunction and award of nominal damages to individual plaintiffs, resulting in nominal damages on remand.

332. For example, in one case, the court of appeals vacated partial summary judgment for the defendants with instructions to dismiss plaintiffs' claims. In another case, plaintiffs and intervenors successfully challenged the district court's dismissal of the case but were unsuccessful in getting a reversal of the denial of class certification. In a third case, the court of appeals reversed in part the grant of defendant's motion for summary judgment.

333. Interestingly, there was no district court ruling on certification prior to the initial appeal in these two settled cases, whereas in over half of the other reversal cases the trial court ruled on, but denied, class certification before the filing of the appeal.

334. Some may argue that our results illustrate that rulings on dispositive motions, before giving plaintiffs the opportunity to have their class certified, could be viewed as a detriment to plaintiffs (see Table 50). If this phenomenon is widespread beyond the four districts, plaintiffs' lawyers might conclude after considering other factors that they prefer the issuance of a certification ruling before any ruling on dispositive motions, rather than run the risk of waiting and possibly precluding any future ruling on certification. *See supra* § 14(a)(i). Some plaintiffs' counsel might see this as a reason to oppose the proposed amendment to Rule 23 that would authorize, and thus possibly promote, district court rulings on dispositive motions prior to rulings on class certification, putting aside the cost of notice problem for purposes of this discussion. *See supra* § 5(c).

order may decrease the likelihood of settlement upon remand, even if the appellate ruling on the dispositive motion is fully favorable to the plaintiff.

These readings of the data parallel the general observation that certified cases settled at a higher rate than noncertified cases (*see supra* § 14(a)). These outcomes may indicate a higher level of merit in certified cases than in noncertified cases. Although one cannot conclude from our data that class certification causes settlement, class certification before appeal could be viewed as one of the factors that led to eventual settlement. But, defendants and their counsel may view these cases as illustrations to support their arguments that certification exerts pro-plaintiff pressure on defendants.

(c) To what extent did appellate review serve to correct errors in procedural decisions relating to the class action mechanism, such as class certification?

Data: Appeals Involving Certification. Study results suggest that litigants infrequently seek appellate review of district court decisions involving class action mechanics, such as certification or class settlement. For example, in the four districts combined, seven cases included appeals on class certification issues (see Table 55).

Putative class representatives appealed the denial of class certification in a total of five cases; two of the denials were reversed and remanded, two were affirmed, and one appeal was dismissed. After these appellate rulings, three of the cases were dismissed without class certification and two are pending in the district court. A class was certified in one of the pending cases; nonclass claims are pending in the other case.

Parties other than class representatives filed certification appeals in two cases. In the *General Motors Pick-Up Truck Litigation,* objecting class members successfully challenged a class settlement judgment and the standards used to certify the class. And, in another case, defendants twice appealed certification of a plaintiffs' class. The appellate court deemed the first district court certification decision as interlocutory and not reviewable.[335] When the certification decision later came up for appellate review with a final order, the court of appeals affirmed class certification.

Discussion. There could be several explanations for the small number of appeals involving class certification. For example, most class action appeals, given that they were nearly always filed after a final judgment, may have excluded certification issues because other issues, such as the merits of the claims, may have superseded the need or feasibility of revisiting the certification issue. Also, there was no apparent opposition to certification with respect to 50% to 60% of certification orders in the study. (*See supra* § 6(a); *see also supra* § 2(a).) In about 18% of the study's certified class actions, the parties submitted a proposed settlement before or simultaneously with the first motion to certify. (*See supra* § 5(d).)

When certification is granted, some defendants might settle rather than incur the costs of litigating to final judgment and appeal.[336] Likewise, when certification is denied, individual plaintiffs might be unwilling to incur expenses disproportionate to their individual

335. Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 209 (3d Cir. 1990).

336. *See* Cooper, *supra* note 14, Committee Note.

recoveries to litigate further to secure appellate review on certification.[337] These projections of the impact on plaintiffs and defendants can be viewed as consistent with the reasoning offered in the ABA special committee's commentary to its 1986 recommendation on interlocutory appeal.[338]

Regardless of the reasons, the dearth of certification appeals in the study does not necessarily mean that the revised rule would not have generated more appeals in these cases had it been in effect during the study period. Some believe that, since certification is a settlement-significant event, if parties can seek appeal they will, especially defendants challenging the grant of certification. (*See supra* § 14(a)(i).) The discretionary nature of the proposed rule, however, is designed to be a guard against abuse of the appellate process.

Estimating Appeals of Certification Rulings Under the Proposed Amendment. Our data may be useful as a description of the number of certification appeals currently taken. One might reasonably expect at least that many interlocutory appeals under the proposed amendment. Our data cannot predict, however, how many parties will seek such appellate review and how these interlocutory appeals will affect settlement prospects.

Even though few appeals in study cases involved the certification ruling itself, an analysis of all appeals in cases with certification rulings may provide some insight into how many additional appeals the amended rule might bring. In two districts nearly two-thirds of class actions included at least one ruling on certification, nearly half did in the third district, but only 36% did in the fourth (see Figure 81). Most (84% to 100%) of the appeals in these cases occurred after the ruling on certification (see Figure 82). Appeals, of any kind, in cases with rulings on certification occurred at about the same rate (19% to 34%) as in cases without any ruling on certification (see Figure 83 compared to Figure 76).

Many believe that the appellate courts will not grant appeals of routine certification decisions. The finding that only 19% to 34% of cases with rulings on certification resulted in any appeal on any issue (see Figure 83) could support the draft committee note's statement that the number of orders granting appeal under the proposed amendment

337. As described *supra* in § 20(c), the court of appeals reversed the denial of certification in two of the seven cases with appeals on certification issues. Such reversals have been cited as one of the reasons for authorizing interlocutory appeals concerning certification. Under the current rule, if the denial of class certification is reversed on appeal after the entry of a final judgment in the case, putative class members can delay their decision to opt in until remand with full knowledge of the nature of the final judgment. Some have argued that this scenario gives putative class members the advantage of "one way intervention." *See* Cooper, *supra* note 14, Committee Note. The infrequency of these types of cases in the study does not necessarily mean that they occur as infrequently in other cases or in other districts.

338. The ABA committee commentary stated:

> If [class certification] is denied, the individual plaintiff must abandon his efforts to represent the alleged class or incur expenses wholly disproportionate to his individual recovery in order to secure appellate review of the certification ruling. If, as often happens, the individual plaintiff is unwilling to incur such an expense, the case is dismissed and the certification ruling is never reviewed. . . . Conversely, if class certification is erroneously granted, a defendant faces potentially ruinous liability and may be forced to settle a case rather than run the economic risk of trial in order to secure review of the certification ruling.

ABA Special Committee Report, *supra* note 10, at 210–11.

would be rare. However, as discussed above, there are strongly held views that parties will seek review of certification rulings as freely as possible and that the proposed revision adding consideration of probable success would increase the significance of the certification ruling.

Data: Appeals on Other Class Action Issues. In addition to the certification appeals described above, only a small number of other appeals could be identified as characteristic of class actions. Most of these were fee-award appeals (four or fewer in each district). Arguably, these are not uniquely characteristic of class actions, particularly where a fee-shifting statute applied. (*See supra* § 16(d) for a discussion of the results on these appeals.)

In addition, prospective intervenors appealed the denial of intervention in one case in one district and in two cases in another. None of the intervenors was successful on appeal.

Objecting class members sought appellate review of the fairness and reasonableness of a class settlement in only one case, the *General Motors Pick-Up Truck Litigation.* That settlement was vacated. In two other appeals, a third-party defendant challenged the district court's approval of a settlement; however, those appeals were dismissed. Finally, in one case, the trial court's disqualification of plaintiffs' counsel was affirmed as part of an appeal of the district court's decision on class certification.

In section 10(c) *supra,* we saw that the certified class actions included twenty-one objections to some aspect of the notice process. But, no appeal involved any issue related to notice to the class.

(21) Class Action Attorneys

(a) How extensive was the class action bar across the four districts?

Data and Discussion. Some have expressed concerns about the prevalence of "class action firms" that appear with great frequency in class actions across the country.[339] Related to these concerns are questions concerning conflicts of interest that arise in class actions and even allegations of collusion between class counsel, defense counsel, and representative parties in certain cases.[340]

Using court files,[341] we identified lead, co-lead, and liaison counsel[342] in 150 of the 152 certified cases in the study[343] and in 4 noncertified cases.[344] These attorneys were

339. *See generally* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 Stan. L. Rev. 497, 521–22, 545–48 (1991).

340. *See generally* Coffee, *Unfaithful Champion, supra* note 262, at 37–38; Senate Staff Report, *supra* note 8, at 61–62, 73–76.

341. Court files, of course, would not identify behind-the-scenes participation by lawyers who did not enter an appearance or identify themselves in a settlement or other document.

342. For definition and discussion of lead counsel and liaison counsel, see MCL 3d, *supra* note 34, § 20.22.

343. The court docket indicated that plaintiffs in the other two certified cases appeared *pro se.*

344. In 107 certified cases and 4 noncertified cases in the study, we identified counsel from court orders appointing class counsel or from notices to the class that included the name of class counsel. These 111 cases were as follows: 31 in E.D. Pa., 12 in S.D. Fla., 36 in N.D. Ill., and 32 in N.D. Cal. In 8 of the 111 cases,

from 160 different law firms from across the country. In most cases, more than one firm served as class counsel and at least one of the lead attorneys was from within the district where the case was being heard.

Two-thirds of the 160 firms had offices within the district where their respective cases were pending. As one might expect given the districts studied, most of these firms had offices in the Philadelphia, Miami, Chicago, or San Francisco metropolitan areas and they appeared more often within their respective districts than in the other study districts. However, certain Philadelphia firms had offices in California or Florida and appeared frequently outside E.D. Pa.

A third of the 160 firms were from outside the study districts and generally appeared as co-lead counsel. Most of these firms were from New York City (18 firms), Los Angeles (5 firms), or Washington, D.C. (5 firms). Other firms hailed from various states, including Ohio (4 firms), Minnesota (3 firms), Massachusetts (2 firms), and Michigan (2 firms).

(b) How often did the same attorneys appear as counsel for the class in different cases and in different courts?

Data. As an indication of how often the same attorneys appeared as class counsel in different cases in different courts, we looked at the firms that were lead or co-lead counsel in four or more cases.[345] For the four districts combined, there were twelve such firms in ninety-five cases. All but two were certified cases. This means that these twelve firms were lead or co-lead counsel in 63% of the certified cases in the study.

One firm was lead or co-lead in seventeen cases and liaison counsel in two cases. These nineteen cases were spread more or less evenly among three districts, with no cases in N.D. Ill. Two other firms were each lead or co-lead counsel in about fifteen cases in three districts, again with no cases in N.D. Ill. One Washington, D.C., firm was in four cases in three districts. The other eight firms appeared almost exclusively in cases in their own districts. Interestingly, among these eight firms, the three Chicago firms did not appear outside N.D. Ill. (see Table 56).

liaison counsel were appointed in addition to lead or co-lead counsel; in 1 case lead counsel was appointed for a certified defendants' class.

For 43 additional certified cases where court orders or class notices did not identify lead or co-lead counsel, we assumed that plaintiffs' attorneys listed on the docket sheets were lead or co-lead counsel. There were 24 such cases in E.D. Pa., none in S.D. Fla., 15 in N.D. Ill., and 4 in N.D. Cal.

345. Each consolidation of cases is counted as one case.

Conclusion

In this section, we summarize some of the more intriguing findings, discuss implications for policy makers, and suggest areas for future research.

Summary of significant findings. Based on assumptions in the ABA committee report, we expected to find considerable litigation over the appropriate Rule 23 category,[346] judicial reluctance to examine the merits of cases before ruling on class certification,[347] and limited opportunities for appeal of certification rulings before final judgment.

We found little litigation about which Rule 23 category was appropriate. This finding across four districts suggests that the need for collapsing Rule 23's three categories is not as critical as some have suggested, but the question of whether the amount of litigation we found would justify a rule change is a policy question. Further, collapsing categories could create unintended consequences, such as clouding existing case precedent on noticing, opting out, and similar matters. Our finding raises questions about the need for a rule change but could not address whether there would be any harmful effect of changing the rule.

We also found, contrary to a premise underlying the ABA special committee's recommendation, that judges frequently ruled on motions to dismiss and motions for summary judgment prior to ruling on class certification. Among judges who did not so rule, however, we cannot rule out the possibility that some may have considered the absence of express permission for precertification merits rulings to be a factor that restrained them from so ruling. Again, our data do not suggest that the proposed change would have harmful effects. An unintended, but not necessarily harmful, consequence of the proposed change might be, for example, a dramatic shift in allocating the costs of notice. Our data suggest that the parties often appear to avoid imposing the full cost of notice on the proponent of the class despite the clear ruling in *Eisen v. Carlisle & Jacqueline*.[348] Explicitly permitting precertification rulings on the merits would remove one of *Eisen*'s major premises and make the rule consistent with the general practice that we found.

Concerning interlocutory appeals,[349] study data confirmed the assumption in the ABA committee report that there are limited opportunities for appellate review, interlocutory or

346. ABA Special Committee Report, *supra* note 10, at 3–4 ("this problem arises frequently").

347. *Id.* at 10 ("Clarification [is needed] to eliminate confusion concerning proper treatment of precertification motions . . . and to authorize consideration of such motions prior to certification of the class. . . .").

348. 417 U.S. 156 (1974).

349. ABA Special Committee Report, *supra* note 10, at 10 (recommending discretionary interlocutory

not, of decisions on certification. We also found limited success by appellants in altering district court decisions generally and few appeals of certification decisions. Whether the paucity of successful appeals of certification decisions is attributable to the lack of opportunity for earlier appeals of certification decisions or to the lack of appealable issues that survive final judgment cannot be answered with our data for various reasons. For example, because parties often settled certified class actions, only dissenting class members or intervenors would have retained a right to appeal. Thus, the number of appeals we found is not necessarily a measure of the number of issues that might have been candidates for interlocutory appeal immediately after the certification decision.

Based on anecdotal evidence, we expected to find a high level of abuse in the form of attorneys' fees that were disproportionate to the class recoveries.[350] Instead we found that attorneys' fees were generally in the traditional range of approximately one-third of the total settlement. While attorneys clearly derived substantial benefits from settlements, the recoveries to the class in most cases were not trivial in comparison to the fees. But, recoveries by individual class members were in amounts that could not be expected to support individual actions. This finding confirms that many cases satisfy an underlying purpose of Rule 23, which is to provide a mechanism for the collective litigation of relatively small claims that would not otherwise support cost-effective litigation. Our findings, however, do not address the monetary value or sufficiency of plaintiffs' recoveries in relation to any monetary losses they may have incurred.

Anecdotal evidence also led us to expect to find substantial evidence of "strike suits" where filing a class action or certifying a class coerced settlement without regard to the merits of claims.[351] Instead we found that although certified cases in the study settled at a higher rate than cases not certified as class actions, there were no objective indications that settlement was coerced by class certification. Rather, we found that settlements often appeared to be the combined product of a case surviving a motion to dismiss and/or a motion for summary judgment as well as being certified as a class action. Whether the size of the potential liability affected settlement was beyond the scope of the current study.

On the other hand, we found a sizable number of cases that might be characterized as unsuccessful strike suits, that is, cases that were filed as class actions and never certified as such. Such cases were often found to be without merit and were terminated by rulings on motions to dismiss or motions for summary judgment, not by settlements, coerced or otherwise. These data suggest that judges generally rule promptly on the merits of claims and that these rulings frequently dispose of unmeritorious claims.

One of the more surprising findings was that settlement and trial rates for cases filed as class actions were not much different from settlement and trial rates for civil cases gener-

appellate review of rulings on certification).

350. *See, e.g.*, Senate Staff Report, *supra* note 8, at 7 ("settlements yield large fees for plaintiffs' lawyers but compensate investors for only a fraction of their actual losses"); *see also* Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 77z-1(a)(6) (West Supp. 1996) (attorneys' fees in securities class actions shall be limited to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

351. *See* text accompanying *supra* notes 100 to 109 (§ 5(c)) and notes 211 to 215 (§ 14(a)).

ally.[352] The findings on settlement and trial rates are consistent with a general trend toward fewer trials and more settlements in civil litigation in federal district courts.[353]

Addressing one of the advisory committee's fundamental questions, we found that there are significant numbers of "routine" class actions that represent relatively standard or "easy" applications of Rule 23, especially in the securities and civil rights contexts. This finding suggests that there are well-established applications of Rule 23 that might be affected by a major restructuring of class action procedures.

Calls for research. In many respects, this study report represents a threshold empirical look at contemporary class actions. Because of time and budget constraints, we were unable to address certain issues that the advisory committee identified and, in the course of our research, we came across additional issues that warrant further study. We noted those issues in the various sections of the report and summarize them here primarily with the hope that we might stimulate other researchers to pursue them.

There is a basic need for research to determine the incidence or volume of class actions throughout the ninety-four districts of the federal system. Nation-wide statistics on class actions are reported to and by the Administrative Office of the U.S. Courts, but that reporting is not complete. For the four courts in this study we identified the majority of cases selected for the study by using electronic searches of dockets and databases of published opinions; the majority of the study cases could not be found in the statistics reported to the Administrative Office.[354] Similar searches for a scientifically selected sample of the other ninety districts would be required to get a clear picture of the national incidence of class action activity.

The advisory committee sought information about class representatives that we were unable to provide given the limits of our time and resources. Interviews of lawyers and class representatives would be necessary, for example, to develop a clearer picture of how representatives and attorneys come to be involved in class actions. Along similar lines, interviews of nonrepresentative class members, especially those who participate in the process by filing objections, claims, or opt-out notices would provide an opportunity to examine in-depth any "grass roots" dissatisfaction with particular class action settlements.

Some researchers have attempted to assess the percentage of individual loss that class action settlements redress.[355] Surveying class members might provide a better source of information about individual damages and the percentage of those damages recovered through the class actions process. Further, an expanded analysis of the content of notices sent to class members could provide more complete information about the clarity and effectiveness of notices in communicating relevant information about settlements.[356]

352. *See* text accompanying *supra* notes 46 to 49 (§ 2(b)).

353. *See* Donna Stienstra & Thomas E. Willging, Alternatives to Litigation: Do They Have a Place in the Federal District Courts 33–36, 68 (Federal Judicial Center 1995) (federal civil trial rate diminished from more than 7% to less than 4% between 1970 and 1993).

354. See the section "Identification and Definition of Class Actions" in Appendix D, *infra*, and Table 57.

355. *See* Senate Staff Report, *supra* note 8, at 151–61 (summarizing studies of whether the merits matter in securities class actions).

356. *See* text accompanying *supra* notes 177 to 185 (§ 10(d)).

Also, study of the relationship among multiple filings of class actions seems in order. We encountered related cases in state and federal courts and noted their presence.[357] A more in-depth look at such overlapping cases might provide insights into ways to improve federal–state coordination and federal management of multidistrict and intradistrict consolidations.

Studying the res judicata effects of class settlements or adjudication would also be another worthy candidate for further research. In a similar vein, studying the frequency and nature of satellite or subsequent litigation by class members who opt out could generate data comparing class and individual recoveries and could thereby facilitate examining the sufficiency of class action settlements.

These calls for research suggest that there is much to be done before systematic data are available to put into perspective the anecdotes and generalizations that long have been driving the debate about class actions.

357. *See* text accompanying *supra* notes 32 to 41 (§2(b)).

Appendix A

PROPOSED RULE 23—1993

Rule 23. Class Actions.

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

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

(2) legal or factual questions are common to the class;

(3) the representative parties' positions typify those of the class;

(4) the representative parties and their attorneys are willing and able to fairly and adequately protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty; and

(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) Whether a Class Action Is Superior. The matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods include:

(1) the extent to which separate actions by or against individual members might result in

(A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications that, as a practical matter, would dispose of the nonparty members' interests or reduce their ability to protect their interests;

(2) the extent to which the relief may take the form of an injunction or declaratory judgment respecting the class as a whole;

(3) the extent to which common questions of law or fact predominate over any questions affecting only individual members;

(4) the class members' interests in individually controlling the prosecution or defense of separate actions;

(5) the extent and nature of any related litigation already begun by or against members of the class;

(6) the desirability or undesirability of concentrating the litigation in the particular forum; and

(7) the likely difficulties in managing a class action which will be eliminated or significantly reduced if the controversy is adjudicated by other available means.

(c) Determinations by Order Whether Class Action To Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) As soon as practicable after persons sue or are sued as representatives of a class, the court must determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.

(A) An order certifying a class action must describe the class and determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class. The matters pertinent to this determination will ordinarily include:

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

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

(iii) potential conflicts of interest among members;

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

(v) the inefficiency or impracticality of separate actions to resolve the controversy.

When appropriate, a putative member's election to be excluded may be conditioned upon a prohibition against maintaining a separate action on some or all of the matters in controversy in the class action or a prohibition against its relying in a separate action upon any judgment rendered or factual finding in favor of the class, and a putative member's election to be included in a class may be conditioned upon its bearing a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be conditional, and may be altered or amended before final judgment.

(2) When ordering that an action be certified as a class action under this rule, the court must direct that appropriate notice be given to the class under subdivision (d)(1)(C). The notice must concisely and clearly describe the nature of the action; the claims, defenses, or issues with respect to which the class has been certified; the persons who are members of the class; any conditions affecting exclusion or inclusion in the class; and the potential consequences of class membership. In determining how, and to whom, notice will be given, the court may consider the matters listed in (b) and (c)(1)(A), the expense and difficulties of providing actual notice to all class members, and the nature and extent of any adverse consequences that class members may suffer from a failure to receive actual notice.

(3) The judgment in an action certified as a class action, whether or not favorable to the class, must specify or describe those who are members of the class or have elected to be excluded on conditions affecting any separate actions.

(4) When appropriate, an action may be certified as a class action with respect to particular claims, defenses, or issues, by or against multiple classes or subclasses. Subclasses need not separately satisfy the requirements of subdivision (a)(1).

(d) Orders in Conduct of Class Actions.

(1) In the conduct of actions to which this rule applies, the court may make appropriate orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in the presentation of evidence or argument;

(B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay;

(C) require notice to some or all of the class members or putative members of:

(i) any step in the action, including certification, modification, or decertification of a class, or refusal to certify a class;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(D) impose conditions on the representative parties, class members, or intervenors;

(E) require the pleadings be amended to eliminate allegations about representation of absent persons, and that the action proceed accordingly; or

(F) deal with similar procedural matters.

(2) An order under Rule 23 (d)(1) may be combined with an order under Rule 16, and may be altered or amended.

(e) Dismissal or Compromise. An action in which persons sue or are sued as representatives of a class must not, before the court's ruling under subdivision (c)(1), be dismissed, be amended to delete the request for certification as a class action, or be compromised without approval of the court. An action certified as a class action must not be dismissed or compromised without approval of the court, and notice of a proposed voluntary dismissal or compromise must be given to some or all members of the class in such manner as the court directs. A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or other special master under Rule 53 without regard to the provisions of Rule 53(b).

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

COMMITTEE NOTE

Purpose of revision. As initially adopted, Rule 23 defined class actions as "true," "hybrid," or "spurious" according to the abstract nature of the rights involved. The 1966 revision created a new tripartite classification in subdivision (b), and then established different provisions relating to notice and exclusionary rights based on that classification. For (b)(3) class actions, the rule mandated "individual notice to all members who can be identified through reasonable effort" and a right by class members to "opt-out" of the class. For (b)(1) and (b)(2) class actions, however, the rule did not by its terms mandate any notice to class members, and was generally viewed as not permitting any exclusion of class members. This structure has frequently resulted in time-consuming procedural battles either because the operative facts did not fit neatly into any one of the three categories, or because more than one category could apply and the selection of the proper classification would have a major impact on whether and how the case should proceed as a class action.

In the revision, the separate provisions of former subdivisions (b)(1), (b)(2), and (b)(3) are combined to treat as pertinent factors in deciding "whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which is added as subdivision (a) as a prerequisite for any class action. The issue of superiority of class action resolution is made a critical question, without regard to whether, under the former language, the case would have been viewed as being brought under (b)(1), (b)(2), or (b)(3). Use of a unitary standard, once the prerequisites of subdivision (a) are satisfied, is the approach taken by the National Conference of Commissioners on Uniform State Laws and adopted in several states.

Questions regarding notice and exclusionary rights remain important in class actions—and, indeed, may be critical to due process. Under the revision, however, these questions are ones that should be addressed on their own merits, given the needs and circumstances of the case and without being tied artificially to the particular classification of the class action.

The revision emphasizes the need for the court, parties, and counsel to focus on the particular claims, defenses, or issues that are appropriate for adjudication in a class action. Too often, classes have been certified without recognition that separate controversies may exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion. Also, the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.

As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries—at least for some issues, if not for the resolution of the individual damage claims themselves. The revision is not, however, an unqualified license for certification of a class whenever there are numerous injuries arising from a common or similar nucleus of facts. The rule does not attempt to authorize or establish a system for "fluid recovery" of damages, nor does it attempt to expand or limit the claims that are subject to federal jurisdiction by or against class members.

The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be certified under this rule, and most that were not certified will not be certified under the rule. There will be a limited number of cases, however, where the certification decision may differ from that under the prior rule, either because of the use of a unitary standard or the greater flexibility [given] notice and membership in the class.

Various non-substantive stylistic changes are made to conform to style and conventions adopted by the Committee to simplify the present rules.

Subdivision (a). Subdivision (a)(4) is revised to explicitly require that the proposed class representatives and their attorneys be both willing and able to undertake the fiduciary responsibilities inherent in representation of a class. The willingness to accept such responsibilities is a particular concern when the request for class treatment is not made by those who seek to be class representatives, as when a plaintiff requests certification of a defendant class. Once a class is certified, the class representatives and their attorneys will, until the class is decertified or they are otherwise relieved by the court, have an obligation to fairly and adequately represent the interests of the class, taking no action for their own benefit that would be inconsistent with the fiduciary responsibilities of the class.

Paragraph (5)—the superiority requirement—is taken from subdivision (b)(3) and becomes a critical element for all class actions.

The introductory language in subdivision (a) stresses that, in ascertaining whether the five prerequisites are met, the court and litigants should focus on the matters that are being considered for class action certification. The words "claims, defenses, or issues" are

used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.

Subdivision (c). Former paragraph (2) of this subdivision contained the provisions for notice and exclusion in (b)(3) class actions.

Under the revision, the provisions relating to exclusion are made applicable to all class actions, but with flexibility for the court to determine whether, when, and how putative class members should be allowed to exclude themselves from the class. The court may also impose appropriate conditions on such "opt-outs"—or, in some cases, even require that a putative member "opt-in" in order to be treated as a member of the class.

The potential for class members to exclude themselves from many class actions remains a primary consideration for the court in determining whether to allow a case to proceed as a class action, both to assure due process and in recognition of individual preferences. Even in the most compelling situation for not allowing exclusion—the fact pattern described in subdivision (b)(1)(A)—a person might nevertheless be allowed to be excluded from the class upon the condition that the person will not maintain any separate action and hence, as a practical matter, be bound by the outcome of the class action. The opportunity to elect exclusion from a class may also be useful, for example, in some employment discrimination action in which certain employees otherwise part of the class may, because of their own positions, wish to align themselves with the employer's side of the litigation either to assist in the defense of the case or to oppose the relief sought for the class.

Ordinarily, putative class members electing to be excluded from a plaintiff class will be free to bring their own individual actions, unhampered by factual findings adverse to the class, while potentially able, under the doctrine of issue preclusion, to benefit from factual findings favorable to the class. The revised rule permits the court, as a means to avoid this inequity, to impose a condition on "opting out" that will preclude an excluded member from relying in a separate action upon findings favorable to the class.

Rarely should a court impose an "opt-in" requirement for membership in a class. There are, however, situations in which such a requirement may be desirable to avoid the potential due process problems, such as with some defendant classes or in cases where an opt-out right would be appropriate but it is impossible or impractical to give meaningful notice of the class action to all putative members of the class. With defendant classes it may be appropriate to impose a condition that requires the "opting-in" defendant class members to share in the litigation expenses of the representative party. Such a condition would be rarely needed with plaintiff classes since typically the claims on behalf of the class, if successful, would result in common fund or benefit from which litigation expenses of the representative can be charged.

Under the revision, some notice of class certification is required for all types of class actions, but flexibility is provided respecting the type and extent of notice to be given to the class, consistent with constitutional requirements for due process. Actual notice to all putative class members should not, for example, be needed when the conditions of subdi-

vision (b)(1) are met or when, under subdivision (c)(1)(A), membership in the class is limited to those who file an election to be members of the class. Problems have sometimes been encountered when the class members' individual interests, though meriting protection, were quite small when compared with the cost of providing notice to each member; the revision authorizes such factors to be taken into account by the court in determining, subject to due process requirements, what notice should be directed.

The revision to subdivision (c)(4) is intended to eliminate the problem when a class action with several subclasses should be certified, but one or more of the subclasses may not independently satisfy the "numerosity" requirement.

Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure. For example, in some mass tort situations, it might be appropriate to certify some issues relating to the defendants' culpability and—if the relevant scientific knowledge is sufficiently well developed—general causation for class action treatment, while leaving issues relating to specific causation, damages, and contributory negligence for potential resolution through individual lawsuits brought by members of the class.

Subdivision (d). The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision if this will promote the fair and efficient adjudication of the controversy. See *Manual for Complex Litigation, Second,* § 30.11.

Inclusion in the former subdivision (c)(2) of detailed requirements for notice in (b)(3) actions sometimes placed unnecessary barriers to formation of a class, as well as masked the desirability, if not need, for notice in (b)(1) and (b)(2) actions. Even if not required for due process, some form of notice to class members should be regarded as desirable in virtually all class actions. Subdivision (c)(2) requires that notice be given if a class is certified, though under subdivision (d)(1)(C) the particular form of notice is committed to the sound discretion of the court, keeping in mind the requirements of due process. Subdivision (d)(1)(C) contemplates that some form of notice may be desirable with respect to many other important rulings; subdivision (d)(1)(C)(i), for example, calls the attention of the court and litigants to the possible need for some notice if the court declines to certify a class in an action filed as a class action or reduces the scope of a previously certified class. In such circumstances, particularly if putative class members have become aware of the case, some notice may be needed informing the class members that they can no longer rely on the action as a means for pursuing their rights.

Subdivision (e). There are sound reasons for requiring judicial approval of proposals to voluntarily dismiss, eliminate class allegations, or compromise an action filed or ordered maintained as a class action. The reasons for requiring notice of such a proposal to members of a putative class are significantly less compelling. Despite the language of the former rule, courts have recognized the propriety of a judicially-supervised precertification dismissal or compromise without requiring notice to putative class members, e.g., *Shelton v. Pargo,* 582 F.2d 1298 (4th Cir. 1978). The revision adopts that approach. If circum-

stances warrant, the court has ample authority to direct notice to some or all putative class members pursuant to the provisions of subdivision (d). While the provisions of subdivision (e) do not apply if the court denies the request for class certification, there may be cases in which the court will direct under subdivision (d) that notice of the denial of class certification be given to those who were aware of the case.

Evaluations of proposals to dismiss or settle a class action sometimes involve highly sensitive issues, particularly should the proposal be ultimately disapproved. For example, the parties may be required to disclose weaknesses in their own positions, or to provide information needed to assure that the proposal does not directly or indirectly confer benefits upon class representatives or their counsel inconsistent with the fiduciary obligations owed to members of the class or otherwise involve conflicts of interest. Accordingly, in some circumstances, investigation of the fairness of these proposals conducted by an independent master can be of great benefit to the court, particularly since the named parties and their counsel have ceased to be adversaries with respect to the proposed dismissal or settlement. The revision clarifies that the strictures of Rule 53(b) do not preclude the court from appointing under that Rule a special master to assist the court in evaluating a proposed dismissal or settlement. The master, if not a Magistrate Judge, would be compensated as provided in Rule 53(a).

Subdivision (f). The certification ruling is often the crucial ruling in a case filed as a class action. The plaintiff, in order to obtain appellate review of a ruling denying certification, will have to proceed with the case to final judgment and may have to incur litigation expenses wholly disproportionate to any individual recovery; and, if the plaintiff ultimately prevails on an appeal of the certification decision, postponement of the appellate decision raises the specter of "one way intervention." Conversely, if class certification is erroneously granted, a defendant may be forced to settle rather than run the risk of potentially ruinous liability of a class-wide judgment in order to secure review of the certification decision. The consequences, as well as the unique public interest in properly certified class actions, justify a special procedure allowing early review of this critical ruling.

Recognizing the disruption that can be caused by piecemeal reviews, the revision contains the provisions to minimize the risk of delay and abuse. Review will be available only by leave of the court of appeals promptly sought, and proceedings in the district court with respect to other aspects of the case are not stayed by the prosecution of such an appeal unless the district court or court of appeals so orders. The appellate procedure would be the same as for appeals under 28 U.S.C. § 1292(c). The statutory authority for using the rule-making process to permit an appeal of interlocutory orders is contained in 28 U.S.C. § 1292(e), as amended in 1992.

It is anticipated that orders permitting immediate appellate review should be rare. Nevertheless, the potential for this review should encourage compliance with the certification procedures and afford an opportunity for prompt correction of errors.

Appendix B

PROPOSED RULE 23—1995

Rule 23. Class Actions (November 1995 draft).

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

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

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

(3) the representative parties' positions typify those of the class; and

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

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

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

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

(B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) final injunctive or declaratory relief may be appropriate with respect to the class as a whole; or

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

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

(B) the extent and nature of any related litigation involving class members;

(C) the desirability of concentrating the litigation in the particular forum;

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

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

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

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

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

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

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

(C) potential conflicts of interest among members;

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

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

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

(c) Determination by Order Whether Class Action to Be Certified; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action should be certified as a class action.

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

(B) An order under this subdivision is conditional, and may be altered or amended before final judgment.

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

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

(ii) In any class action certified under subdivision (b)(3), the court shall direct to members of the class the best notice practicable under the circumstances, including indi-

vidual notice to all members who can be identified through reasonable effort [, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims]. The notice shall advise each member that any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

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

(3) Whether or not favorable to the class,

(A) The judgment in an action certified as a class action under subdivision (b)(1) or (2) shall include and describe those whom the court finds to be members of the class;

(B) The judgment in an action certified as a class action under subdivision (b)(3) shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class; and

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

(4) An action may be certified as a class action—

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

(B) by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions.

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

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

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require, to protect the members of the class or otherwise for the fair conduct of the action, notice to some or all members of:

(i) refusal to certify a class;

(ii) any step in the action;

(iii) the proposed extent of the judgment; or

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

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

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

(E) deal with similar procedural matters.

(3) An order under subdivision (d)(2) may be combined with an order under Rule 16, and may be altered or amended

(e) Dismissal and Compromise.

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

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

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

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

PARTIAL DRAFT ADVISORY COMMITTEE NOTE

December 12, 1995

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

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

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing on the merits. Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in

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

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

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

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

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

{***Version 2***} These risks can be justified only by a preliminary finding that the prospect of class success is sufficient to justify them. The prospect of success need not be a probability greater than 0.50. What is required is that the probability be sufficient in relation to the predictable costs and burdens, including settlement pressures, entailed by certification. The finding is not an actual determination of the merits, and pains must be taken to control the procedures used to support the

finding. Some measure of controlled discovery may be permitted, but the procedure should be as expeditious and inexpensive as possible. At times it may be wise to integrate the certification procedure with proceedings on precertification motions to dismiss or for summary judgment. A realistic view must be taken of the burdens of certification—bloated abstract assertions about the crippling costs of class litigation or the coercive settlement effects of certification deserve little weight. At the end of the process, a balance must be struck between the apparent strength of the class position on the merits and the adverse consequences of class certification. This balance will always be case-specific, and must depend in large measure on the discretion of the district judge.

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

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

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

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

Superiority and necessity take on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing

out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

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

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

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

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

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class mem-

bers and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

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

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

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

Factor (G) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation

in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important and even vitally important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

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

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

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

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

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

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b)

should apply to a request for permission to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be "one-way" intervention. That does not seem much of a concern to me—if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

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

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

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

Appendix C

Figures and Tables

The following figures and tables are generally derived from data collected in the field study described in Appendix D. One exception is Table 19, which is based on data derived from the Federal Judicial Center's district court time study and a review of relevant pleadings in class actions in the time study. *See* discussion *infra* Appendix D.

Another exception relates to the data supporting Figures 7–10 and Tables 16–17. The data for the class action cases in those figures and tables come from the class action field study that is the subject of this report. The comparison data for nonclass cases come from the Federal Judicial Center's Integrated Data Base (IDB), which is a compilation of records and case status reports routinely sent by clerks of court to the Administrative Office of the United States Courts. The Center makes the IDB available to the public through the Inter-University Consortium for Political and Social Research, which is located at the University of Michigan, Ann Arbor, Michigan 48109-1248. The IDB number is ICPSR # 8429.

As discussed in the Introduction and in Appendix D, we present these figures and data to describe the class action activity in four district courts in cases terminated within the study period. We present the data and figures as a systematic examination of class action activity in those four courts in cases terminated between July 1, 1992, and June 30, 1994. We caution the reader not to read too much into the data and especially not to draw inferences and conclusions about the universe of class activity. Data on subsets of the data elements, such as nature-of-suit categories or types of class actions, are particularly susceptible to misinterpretation because of their small numbers. For example, differences among districts in such cases may simply represent chance fluctuations or little more than that.

Figure 1: Median Net Settlement Per Class Member in Settled, Certified Class Actions

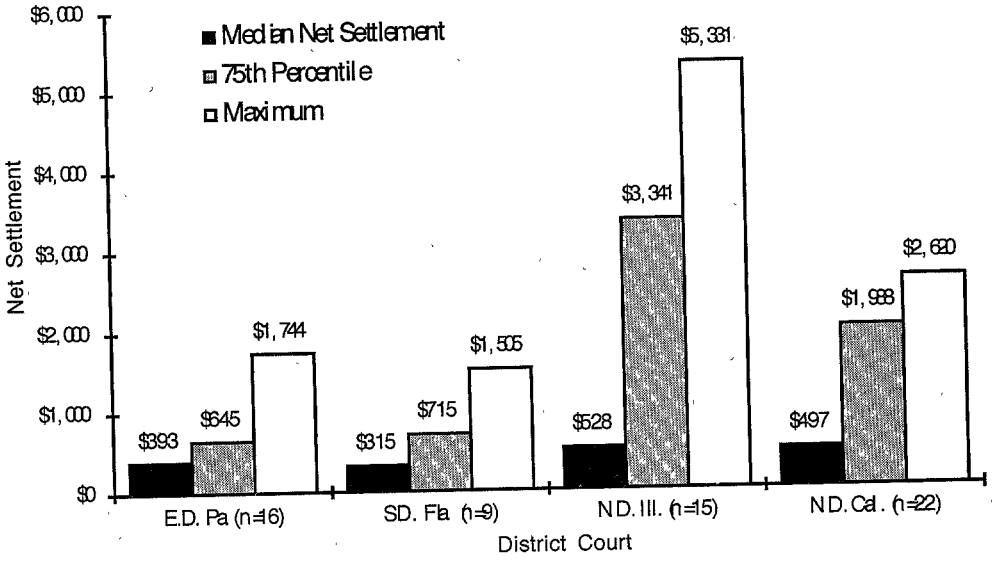


Figure 2: Median Net Settlement Per Class Member in Settled, Certified Securities Class Actions

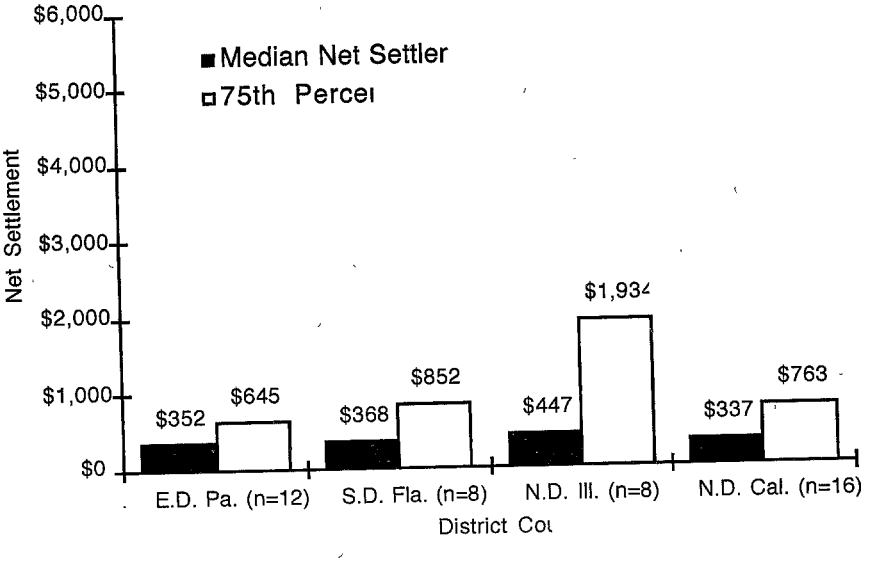


Figure 3: Median Net Settlement Per Class Member in Settled, Certified Nonsecurities Class Actions

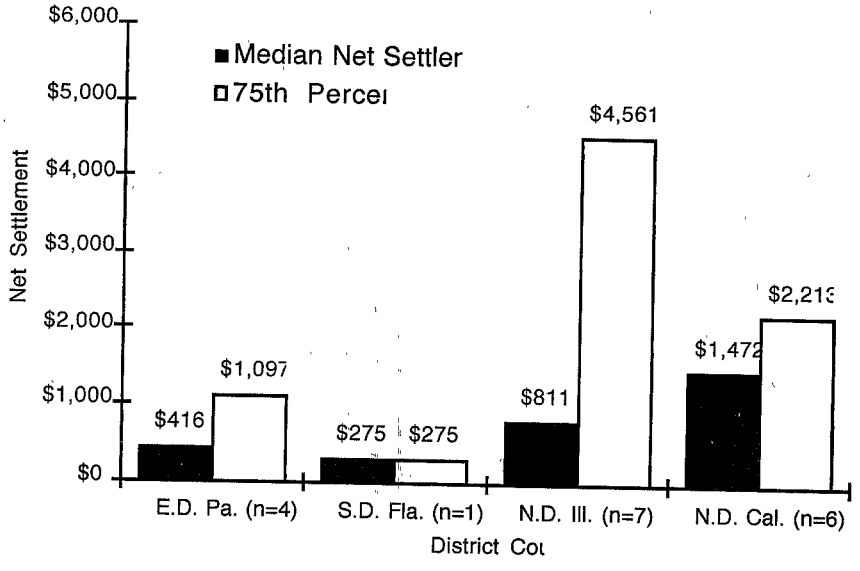


Figure 4: Mean and Median Times from Filing of Complaint to Multidistrict Litigation Consolidation

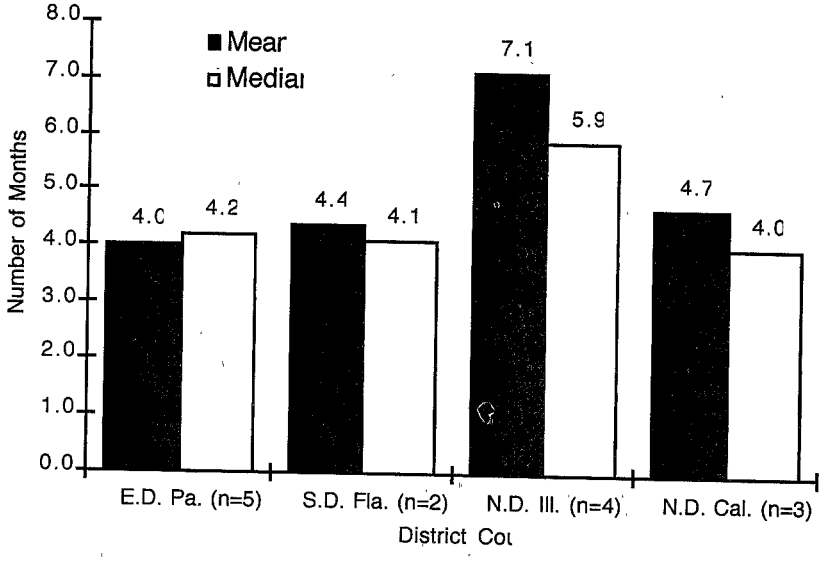
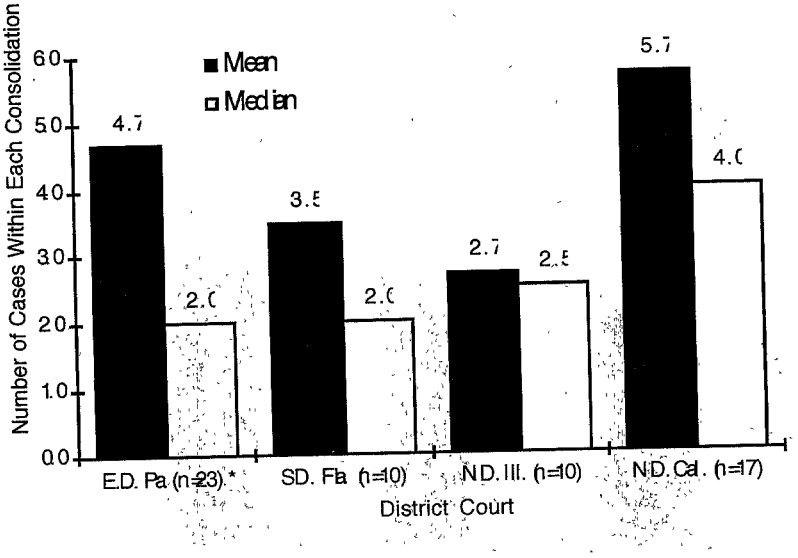


Figure 5: Mean and Median Number of Cases Within Each Consolidation by the District Courts



*Missing value = 1.

Figure 6: Percentage of Related Cases Not Consolidated with Similar Litigation Pending in Federal and State Courts

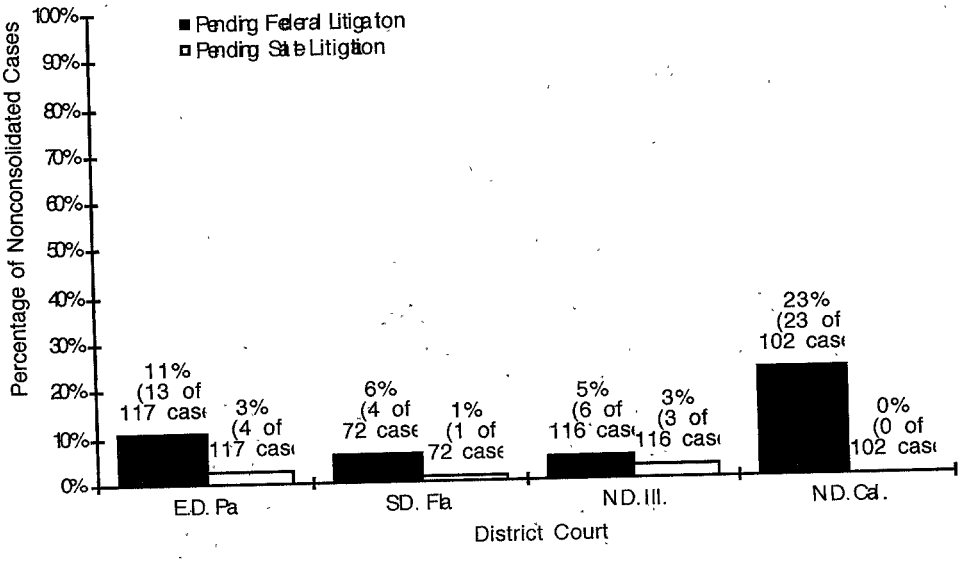
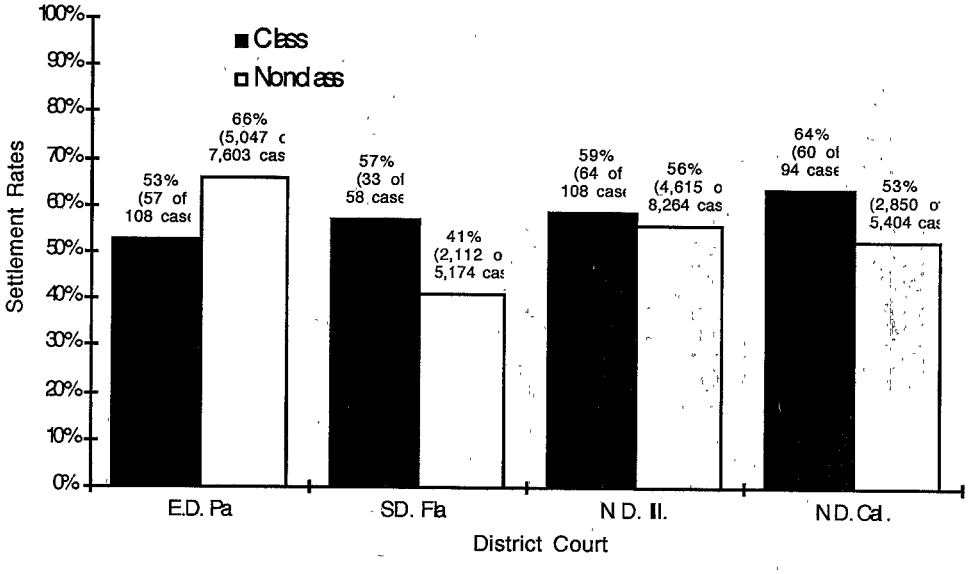
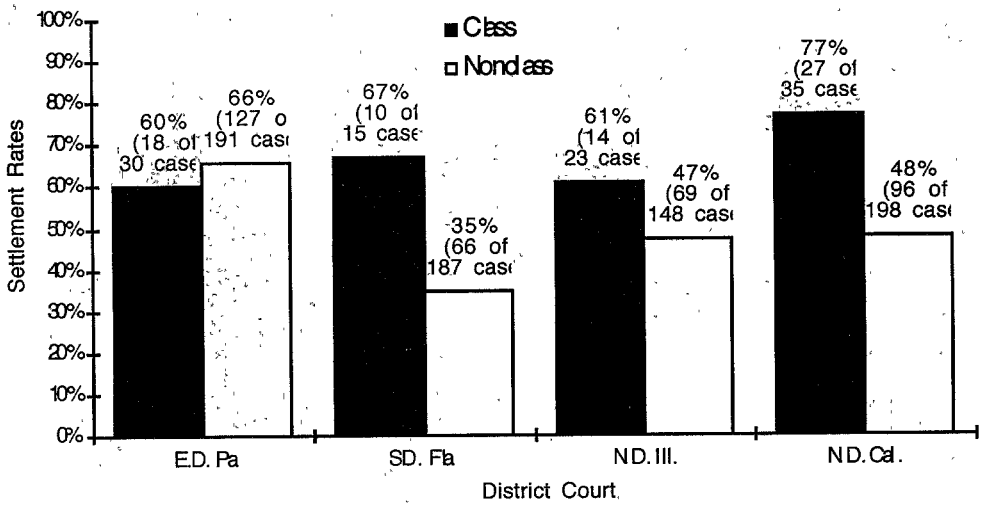


Figure 7: Settlement Rates for Nonprisoner Class Actions Compared to Nonprisoner Civil Actions in Cases Terminated Between July 1, 1992, and June 30, 1994



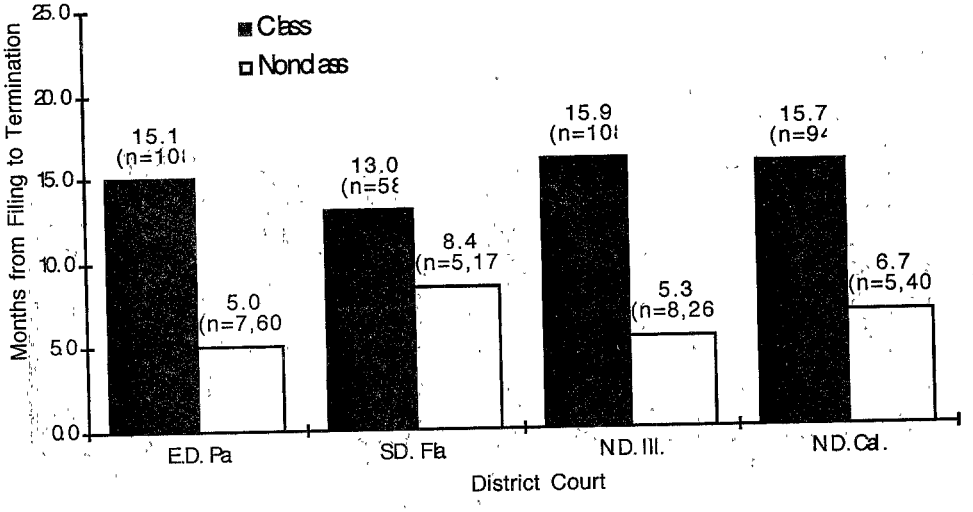
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data; Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994. The Administrative Office data on settlement for the study cases differed from our data for the same set of cases. The differences were not consistently in the same direction. Overall, the Administrative Office data showed 190 settlements in the four districts compared to 214 in the Federal Judicial Center database. The settlement rates and numbers shown by the Administrative Office data for class cases were 64% (69), 41% (24), 47% (51), and 49% (46), respectively.

Figure 8: Settlement Rates for Securities Class Actions Compared to Securities Civil Actions



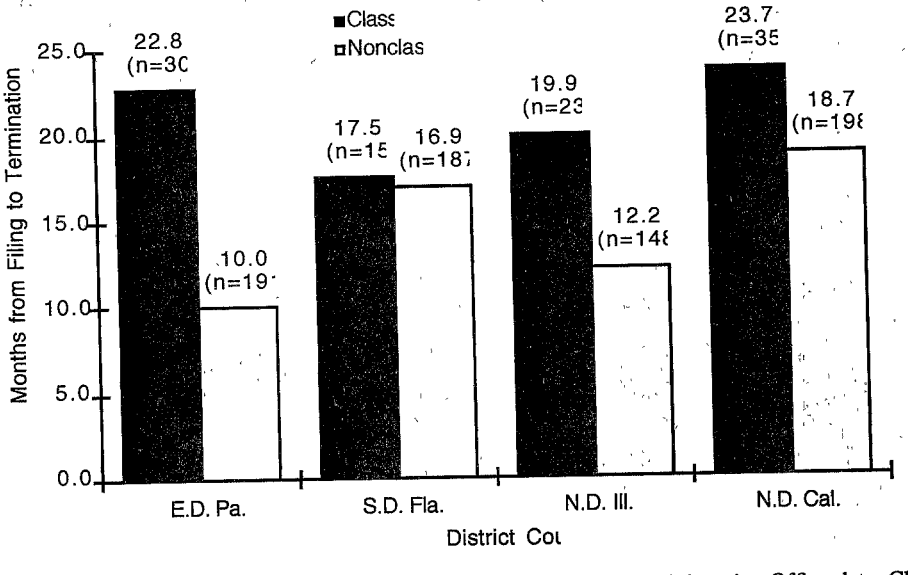
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data; Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994. The Administrative Office data on settlement differed from our data for the same set of cases. The differences were not consistently in the same direction. Overall, the Administrative Office data showed fifty-seven settlements in the four districts compared to sixty-nine in the Federal Judicial Center database. The settlement rates shown by the Administrative Office data for securities class actions were 80% (twenty-four), 27% (four), 52% (twelve), and 49% (seventeen), respectively.

Figure 9: Median Time from Filing to Disposition of Nonprisoner Class Actions Compared to Nonprisoner Civil Actions



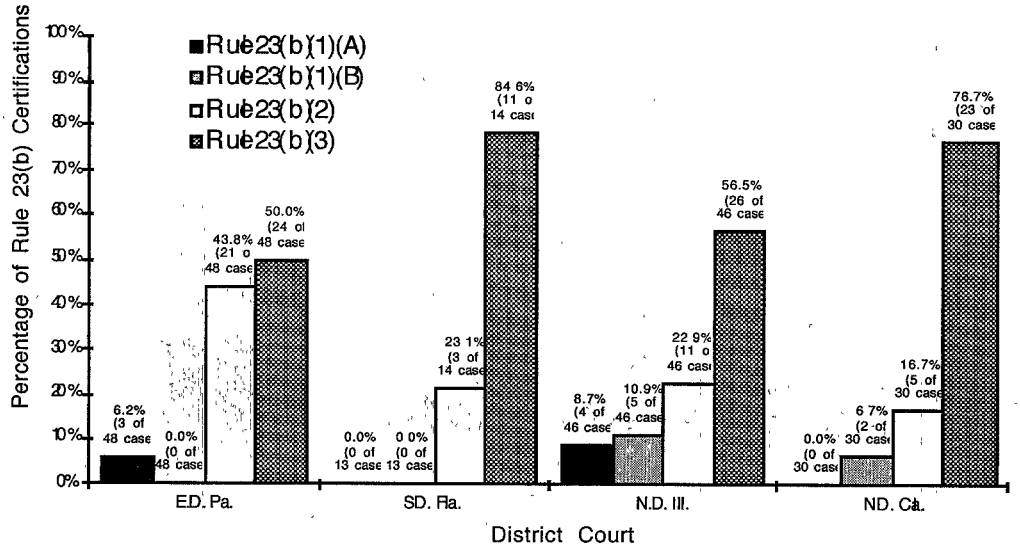
Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data, Class: Federal Judicial Center class action project database (see first paragraph, Appendix D).

Figure 10: Median Time from Filing to Disposition of Securities Class Actions Compared to Securities Civil Actions



Source: Nonclass: Federal Judicial Center integrated database of Administrative Office data, Class: Federal Judicial Center class action project database (see first paragraph, Appendix D).

Figure 11: Rule 23(b) Certifications



Note: Data exclude combinations of types.

Figure 12: Cases with Intradistrict Consolidation

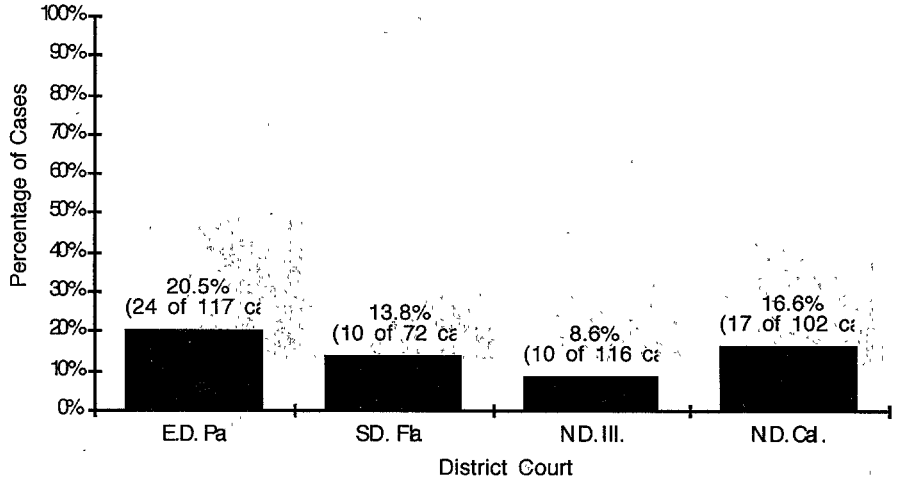


Figure 13: Cases Referring to a Related Federal or State Case

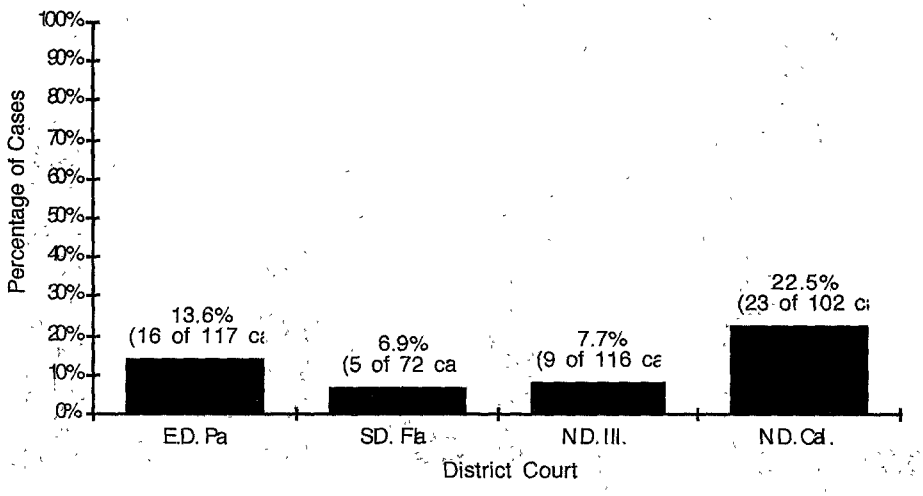


Figure 14: Cases with Multidistrict Litigation Consolidation or Intradistrict Consolidation or Related Case

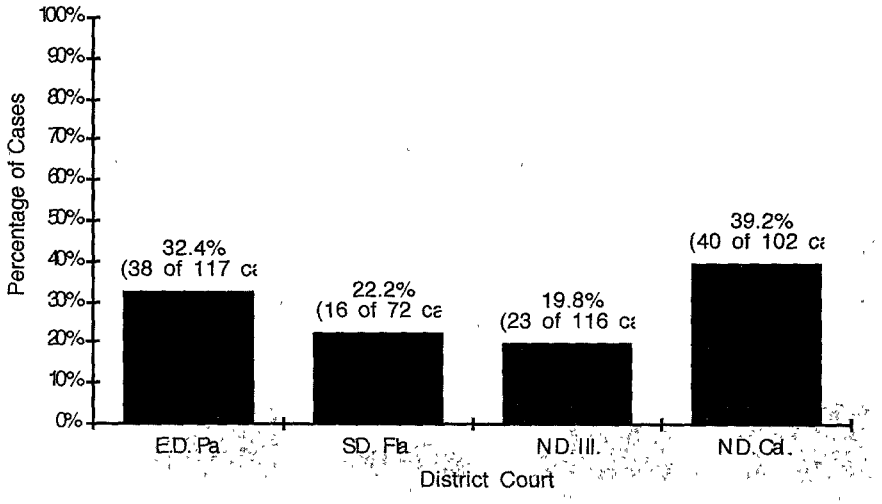


Figure 15: Certified Class Actions in Which Class Representatives Were Changed

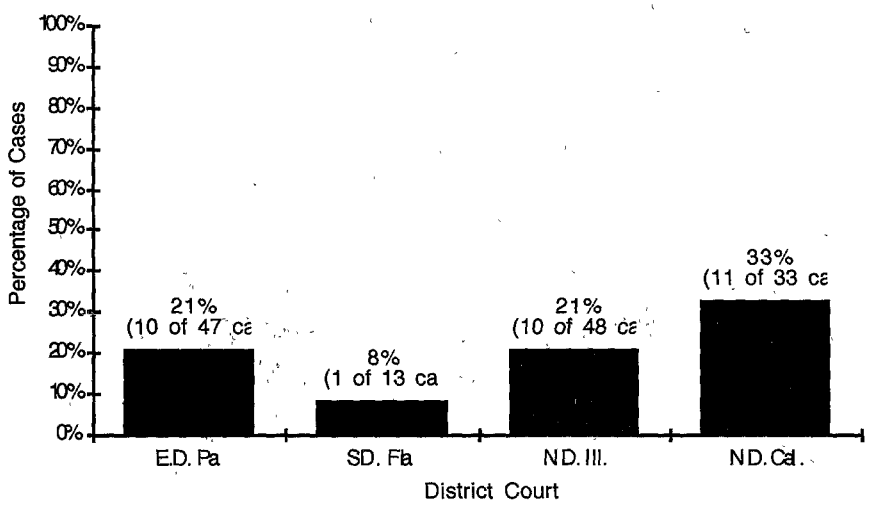


Figure 16: Certified, Settled, Approved Class Actions with Separate Award to Class Representatives

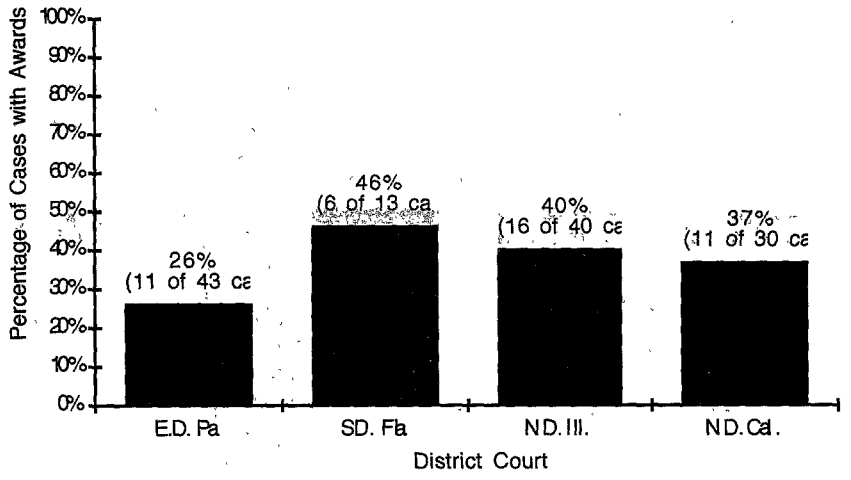


Figure 17: Median Amount of Separate Awards to Class Representatives in Certified, Settled, Approved Class Actions

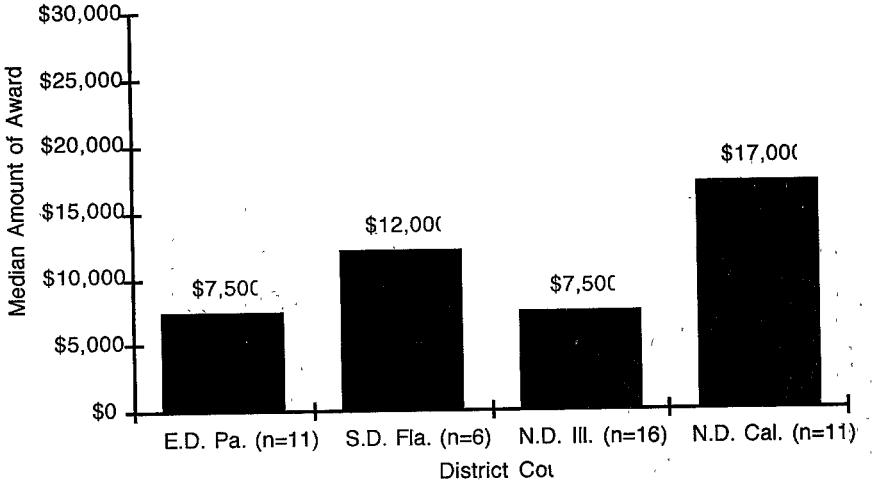


Figure 18: Median and 75th Percentile of Award per Individual Class Representatives in Certified, Settled, Approved Class Actions

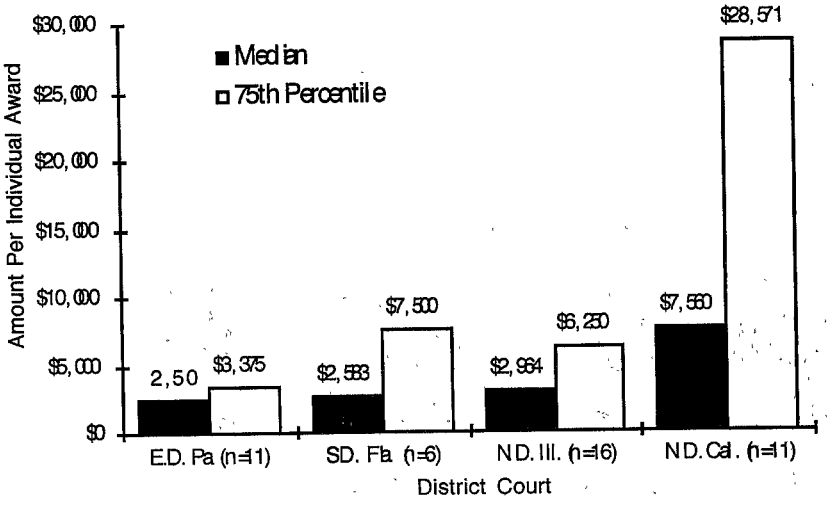


Figure 19: Time from Filing of Complaint to Filing of Motion for Class Certification

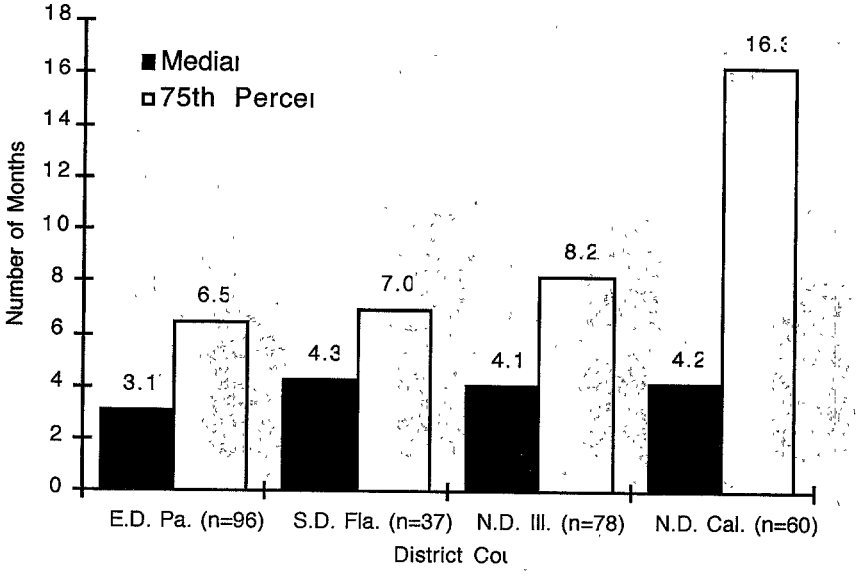


Figure 20: Time from Filing Motion for Class Certification to Judicial Ruling on Certification Issue

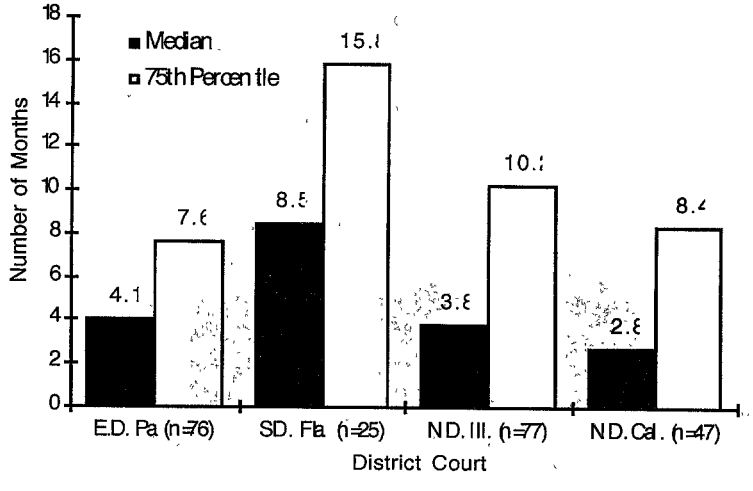


Figure 21: Length of Time from Filing of Complaint to Settlement in Settled Cases

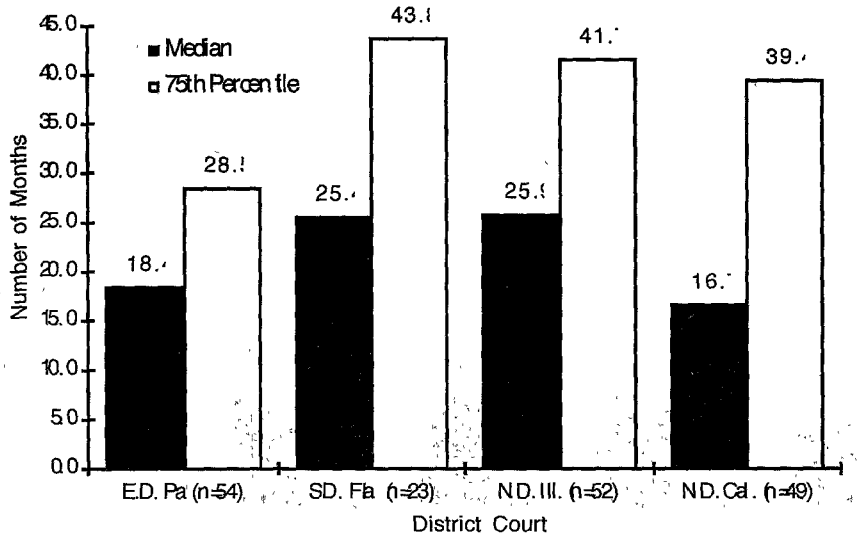


Figure 22: Length of Time from Ruling on Certification Motion to Settlement in Settled Cases

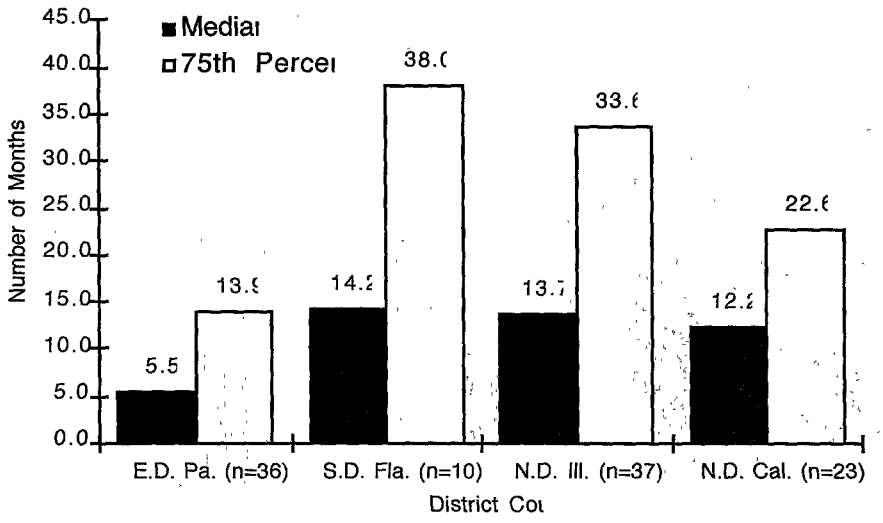
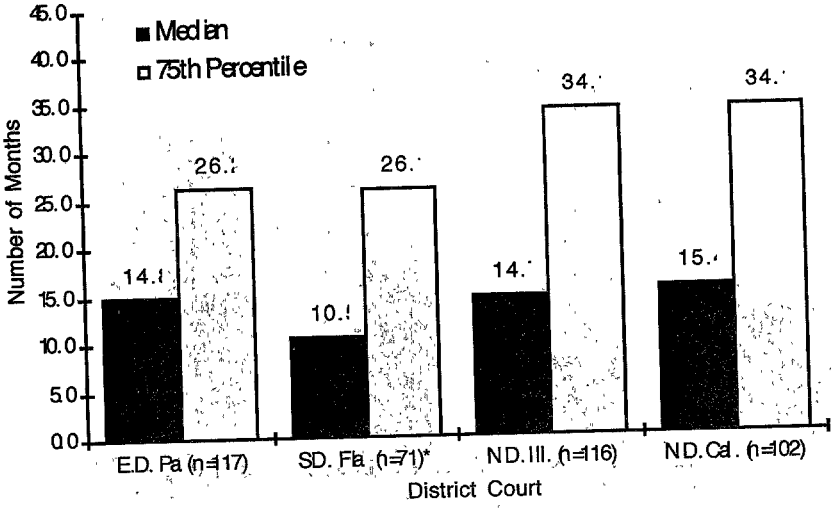


Figure 23: Length of Time from Filing of Complaint to Termination



*Missing value = 1.

Figure 24: Timing of Rulings on Motions to Dismiss in Relation to Rulings on Class Certification

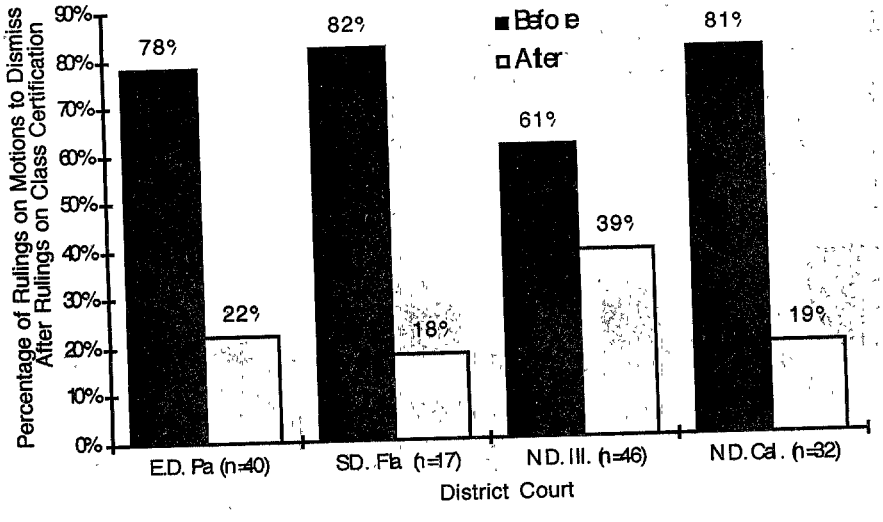


Figure 25: Timing of Rulings on Motions for Summary Judgment in Relation to Rulings on Class Certification

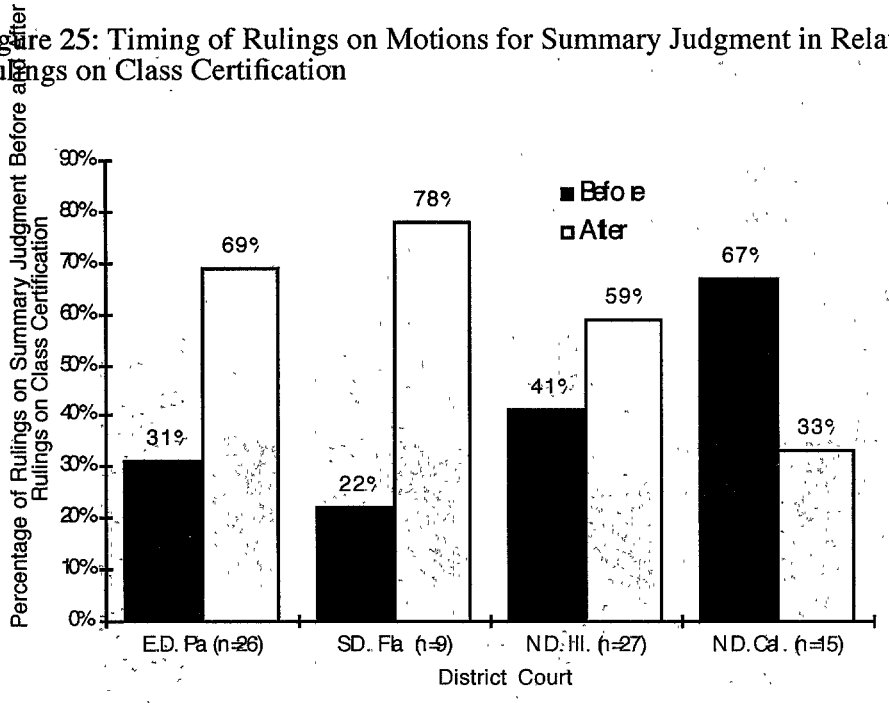


Figure 26: Type of Party Filing Motion for Summary Judgment

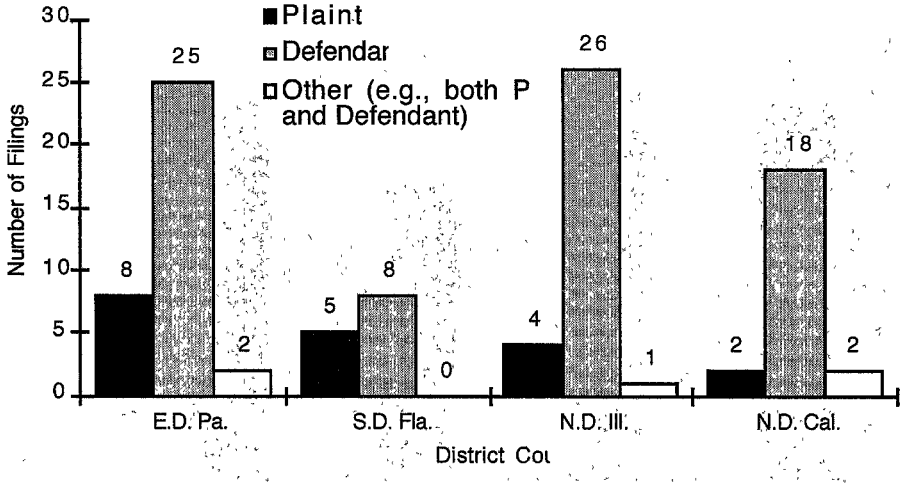


Figure 27: Rulings on Motions for Summary Judgment

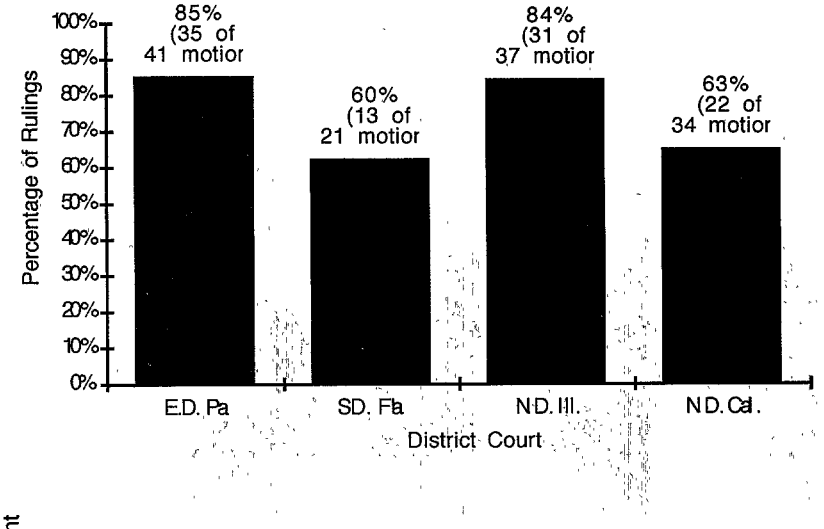


Figure 28: Percentage of Rulings Granting Dismissal or Summary Judgment

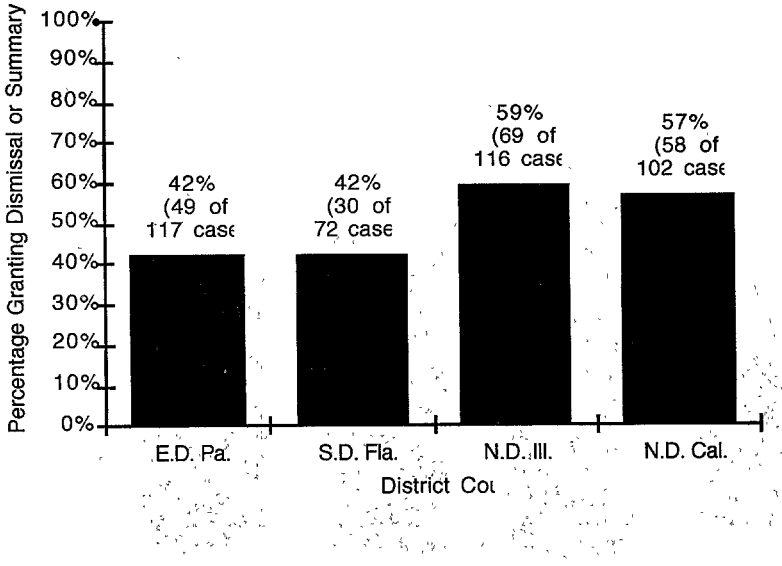
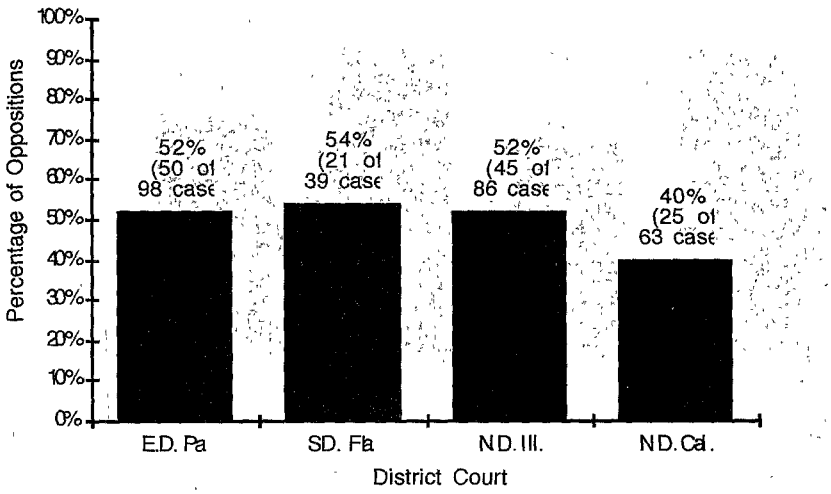


Figure 29: Percentage of Oppositions to Motions to Certify and Sua Sponte Orders Regarding Certification



Note: Data include only those cases where either a motion to certify was filed or a sua sponte order issued.

Figure 30: Percentage of Submissions of Opposition Memoranda to Certification Motions and Sua Sponte Orders Regarding Certification

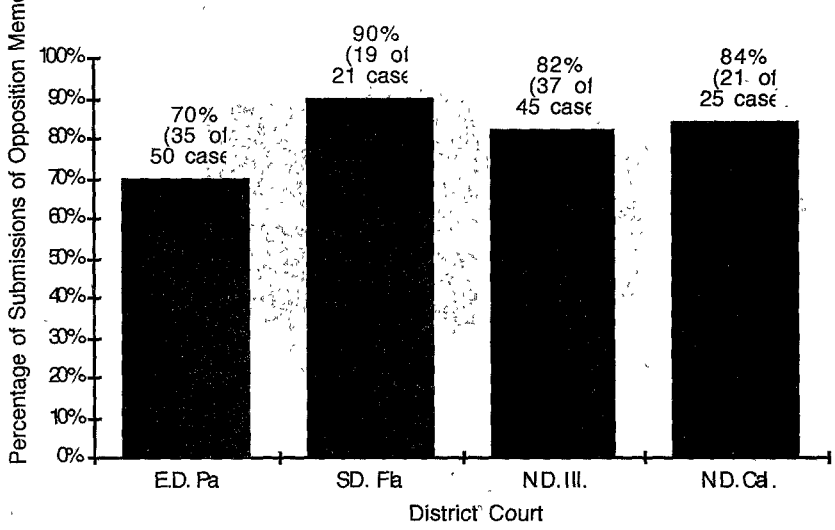


Figure 31: Supporting and Opposition Brief Lengths in Cases with Opposition to Motion for Certification or Sua Sponte Orders Regarding Certification

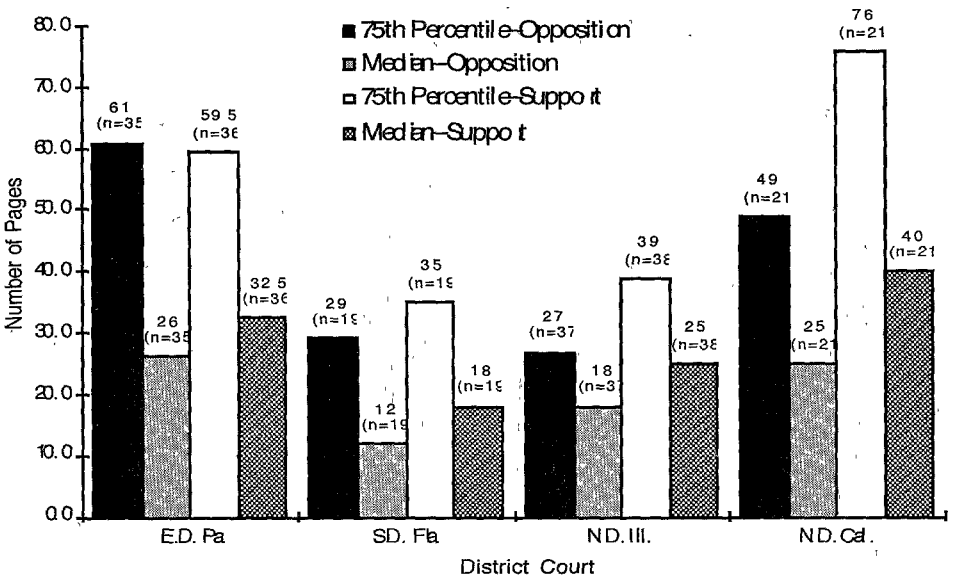


Figure 32: Length of Judicial Opinions in Certified and Noncertified Cases with Certification Disputes

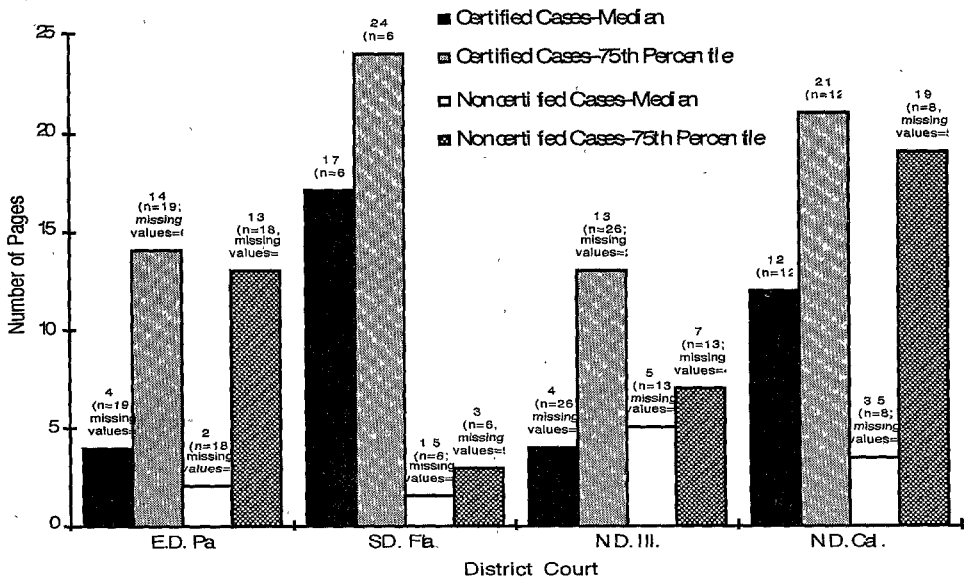


Figure 33: Arguments Raised in Cases Opposing Motion for Class Certification or Sua Sponte Order Regarding Certification

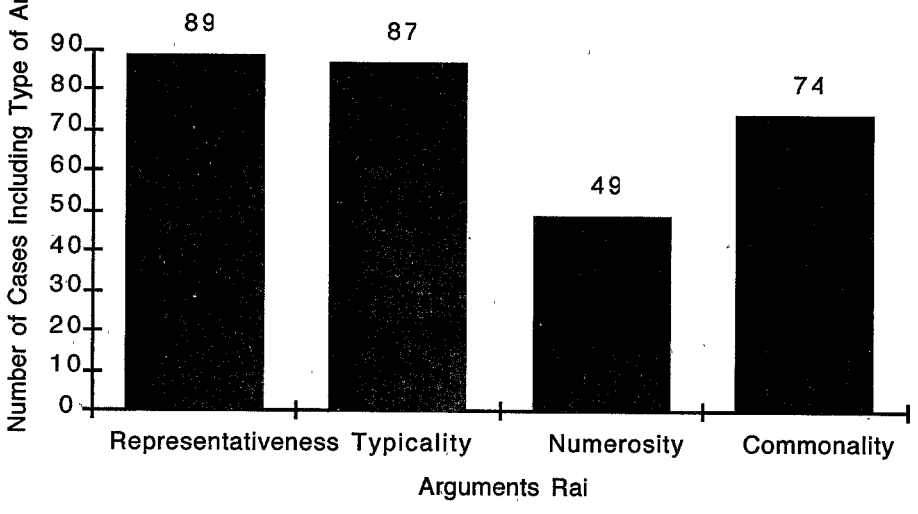


Figure 34: Number of Party-Filed Motions For or Against Class Certification

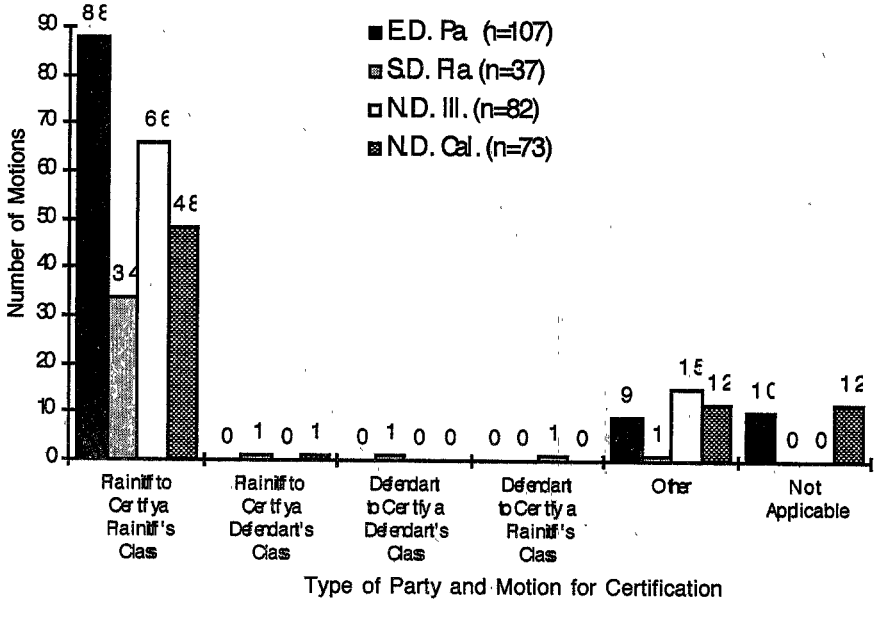


Figure 35: Certified Subclasses and Nature of Suit

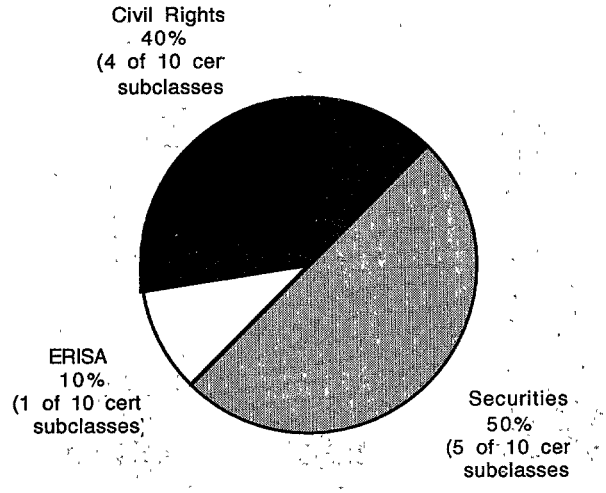
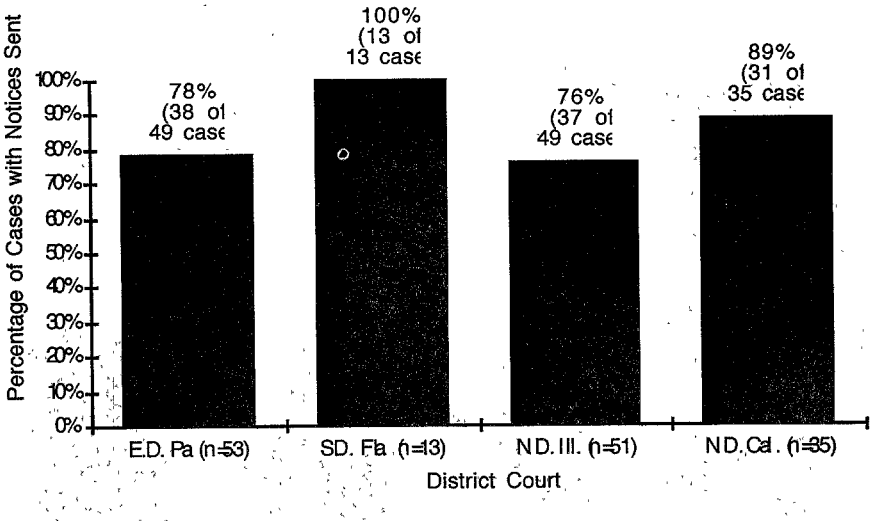


Figure 36: Class Notice Issued as a Percentage of Certified Class Actions



Note: Data are missing for some cases in two districts.

Figure 37: Time from Ruling on Certification to Notice of Certification for Cases in Which Notice Was Issued

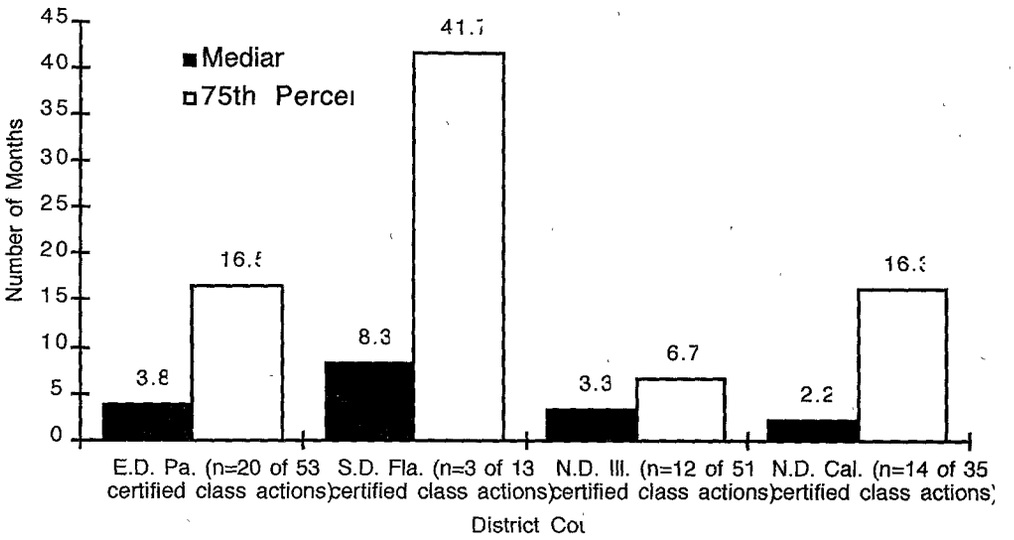


Figure 38: Median Number of Recipients of Individual Notice in Certified (b)(3) Class Actions

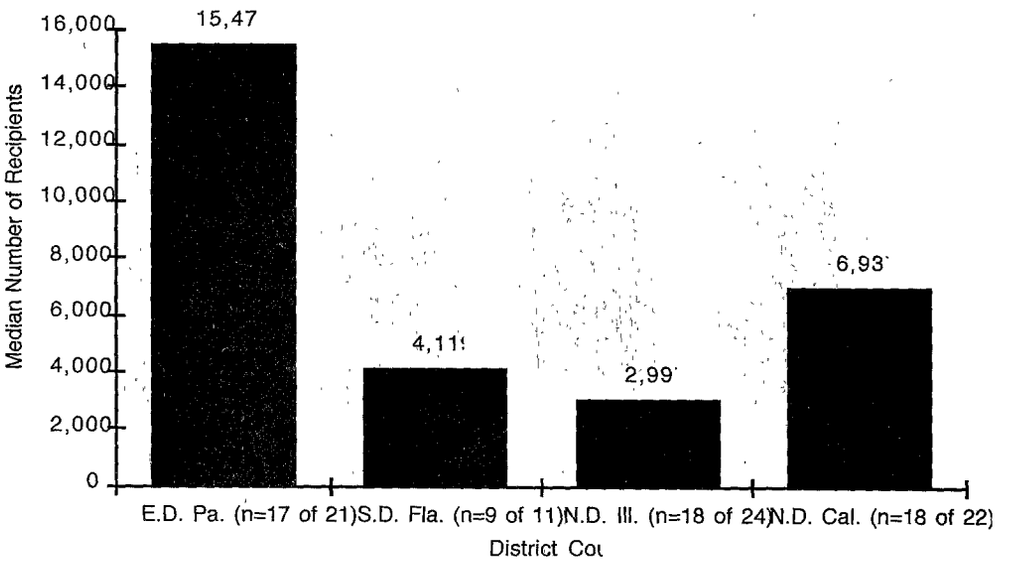


Figure 39: Percentage of Contests of the Notice Process in Cases with Notice

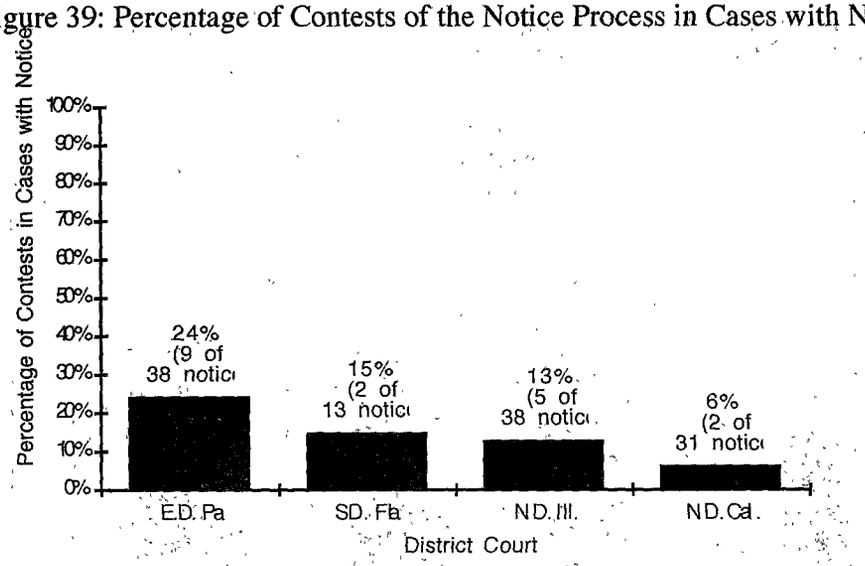
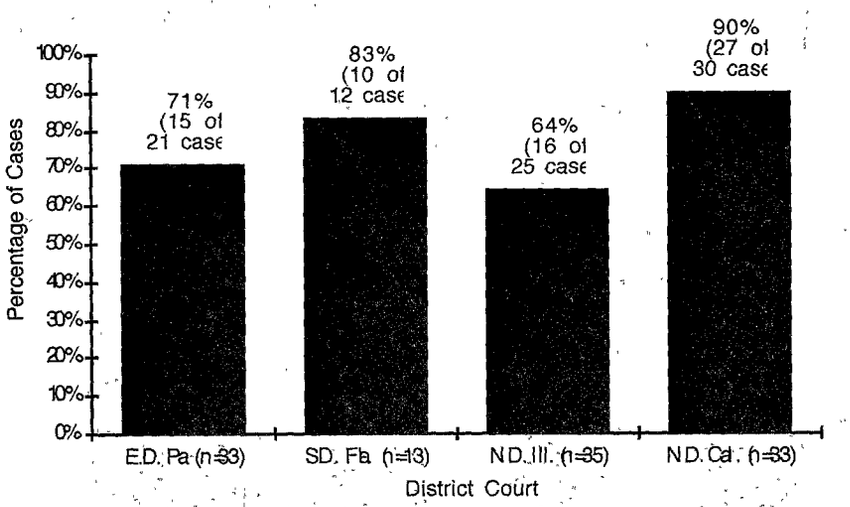
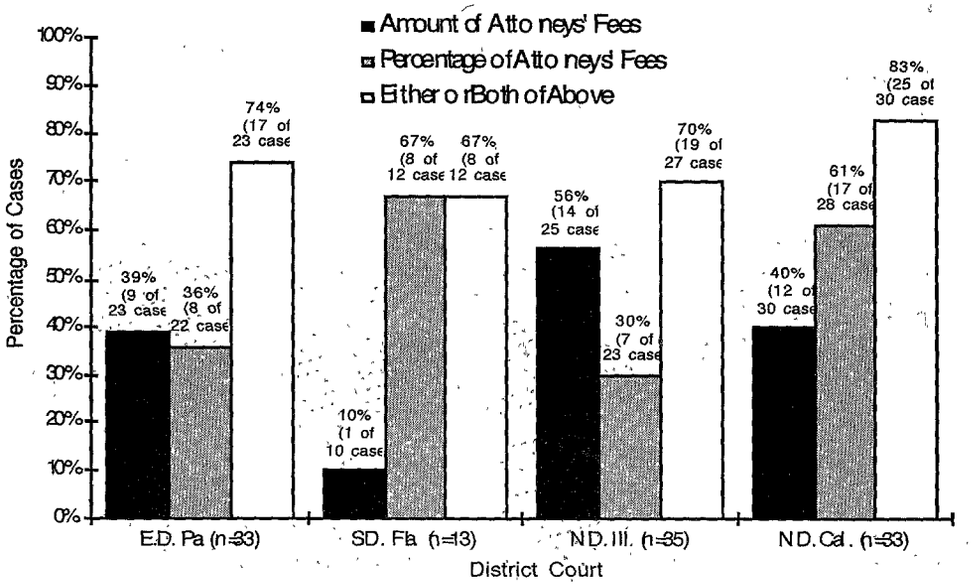


Figure 40: Percentage of Settled Class Actions with Notice Where Notice Includes the Gross Amount of the Settlement



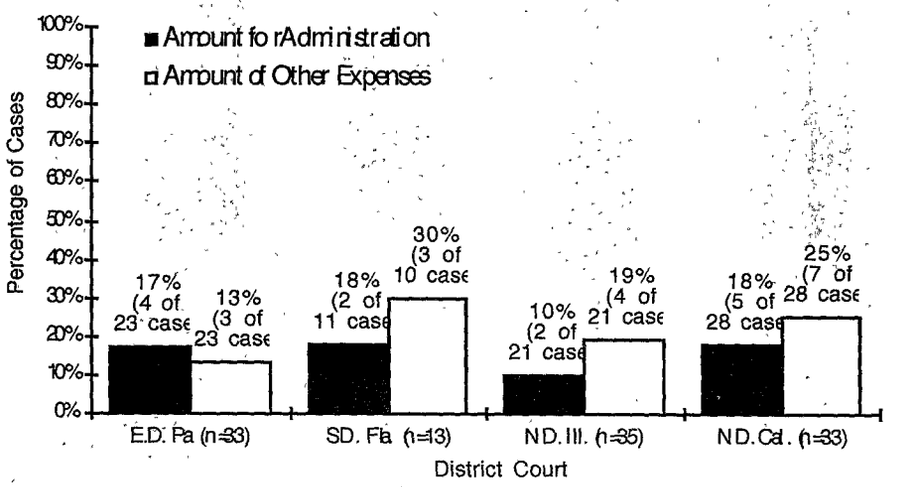
Note: The balance of the cases for each court had missing or inapplicable data.

Figure 41: Percentage of Settled Class Actions with Notice Where Notice Included Amount or Percentage of Attorneys' Fees



Note: The balance of the cases for each court had missing or inapplicable data. In some cases, notices included both the percentage and amount of attorneys' fees.

Figure 42: Percentage of Settled Class Actions with Notice Where Notice Included Amounts for Administration or Other Expenses



Note: The balance of the cases had missing or inapplicable data.

Figure 43: Percentage of Certified 23(b)(3) Class Actions with One or More Opt Outs

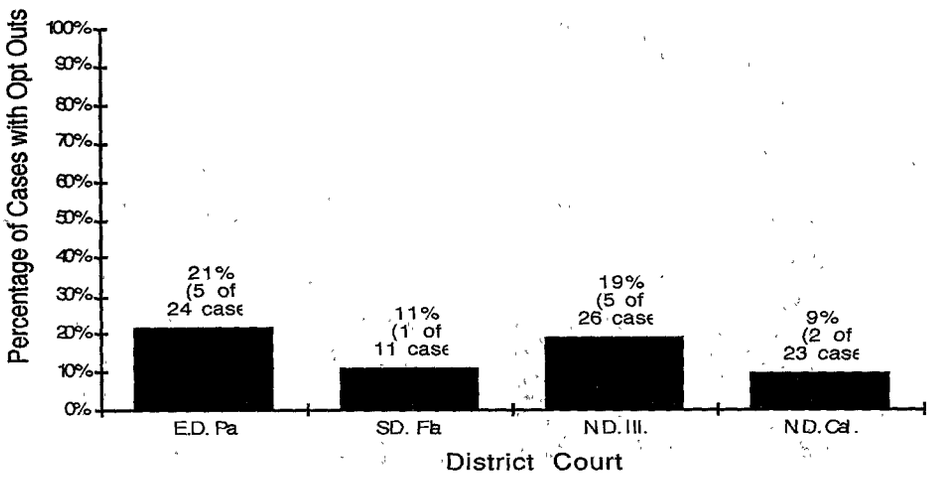


Figure 44: Percentage of Certified 23(b)(3) Civil Rights, ERISA, Securities, and Other Class Actions with One or More Opt Outs

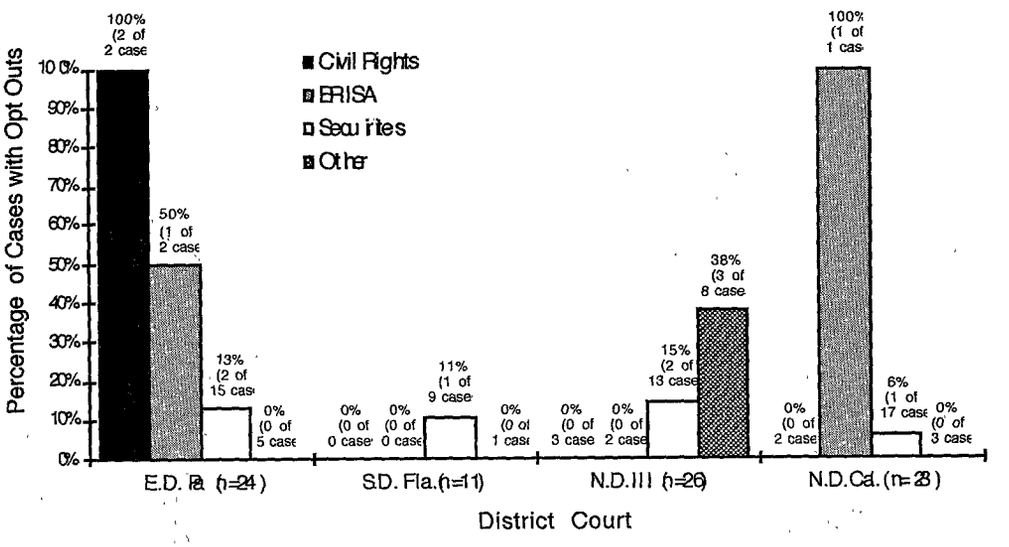


Figure 45: Percentage of Certified, Settled 23(b)(3) Class Actions with One or More Opt Outs of a Proposed Settlement

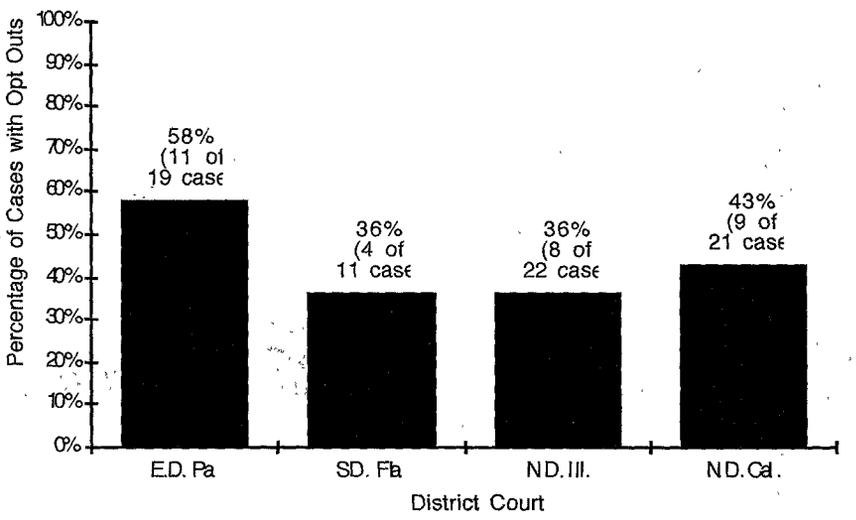


Figure 46: Percentage of Certified, Settled 23(b)(3) Class Actions with One or More Opt Outs from a Proposed Settlement by Nature of Suit

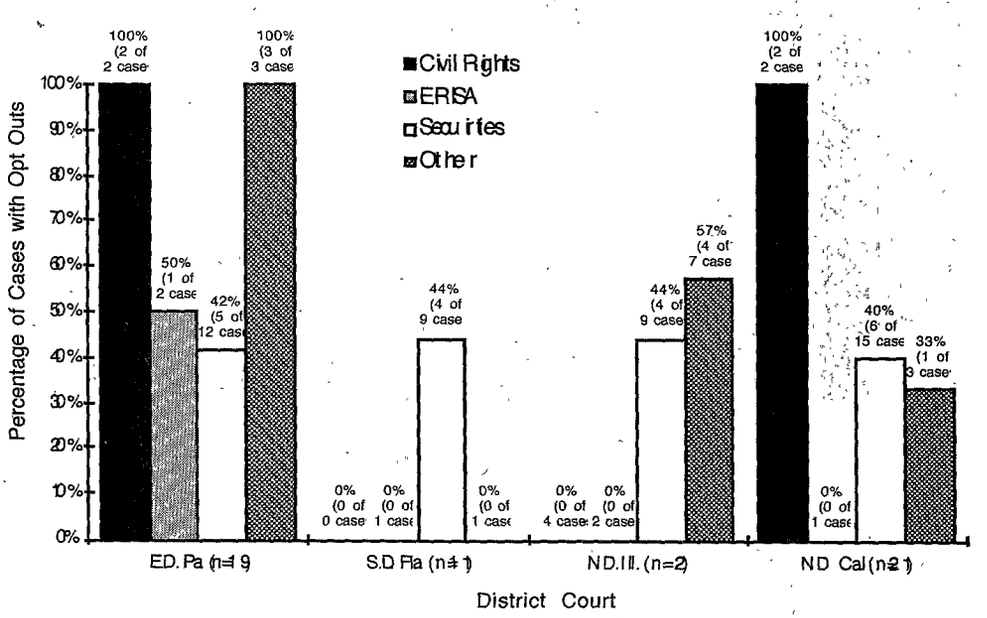


Figure 47: Percentage of Certified (b)(3) Class Actions with One or More Opt Outs from Certification or Settlement

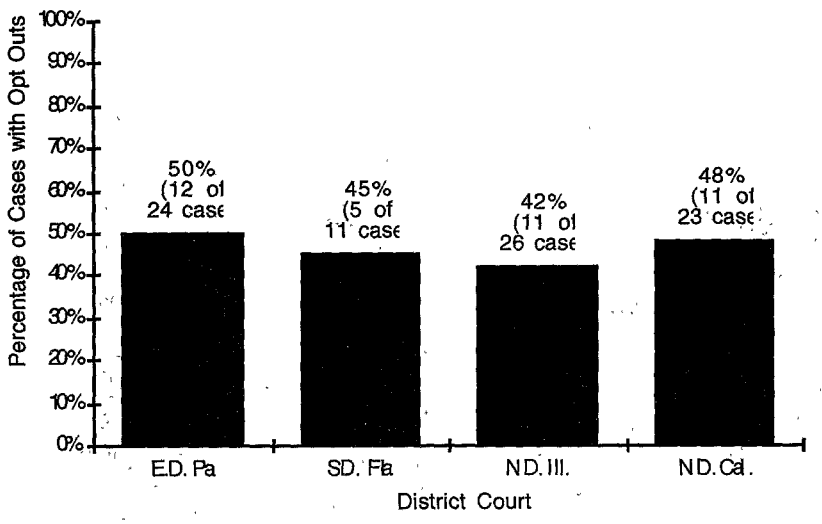
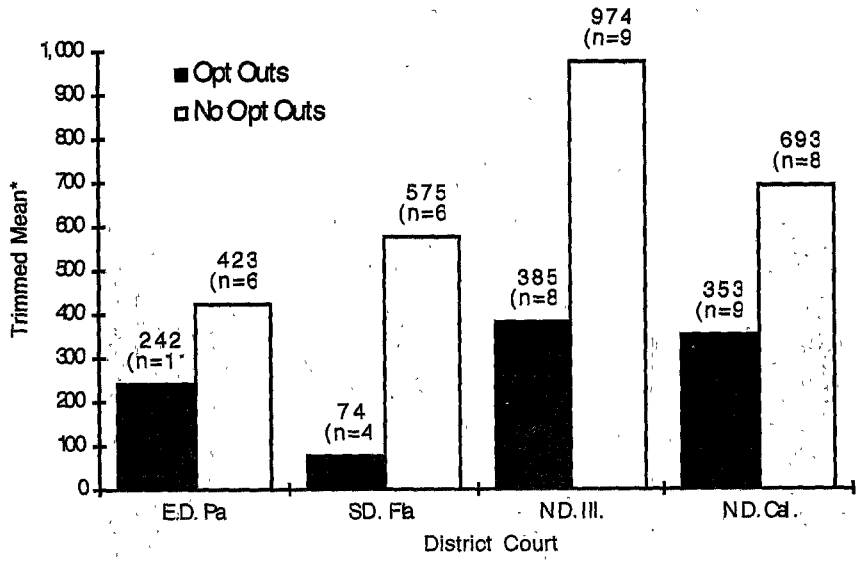


Figure 48: Net Settlement Value Per Class Member of Certified, Settled Rule 23(b)(3) Classes With or Without One or More Opt Outs



*The trimmed mean statistic is, like the mean (average) and the median (midpoint), a measure of the central tendency of a set of data. In this case, to reduce the distortion of extreme values, a 10% trimmed mean was used, that is, a mean of the data after eliminating 10% of the data from the top and the bottom.

Figure 49: Percentage of Certified, Settled Class Actions Using Claims Procedures to Distribute Settlements

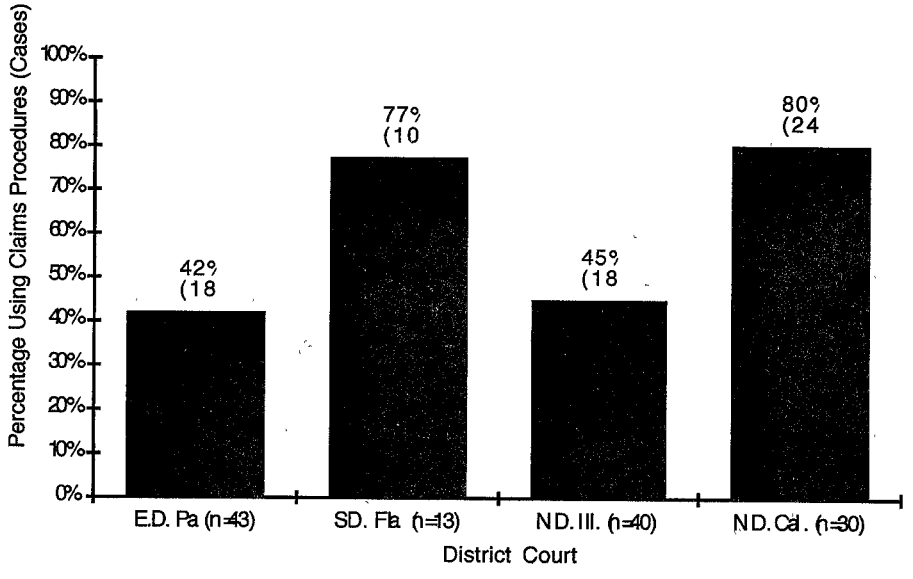


Figure 50: Percentage of Certified, Settled Securities Class Actions Using Claims Procedures to Distribute Settlements

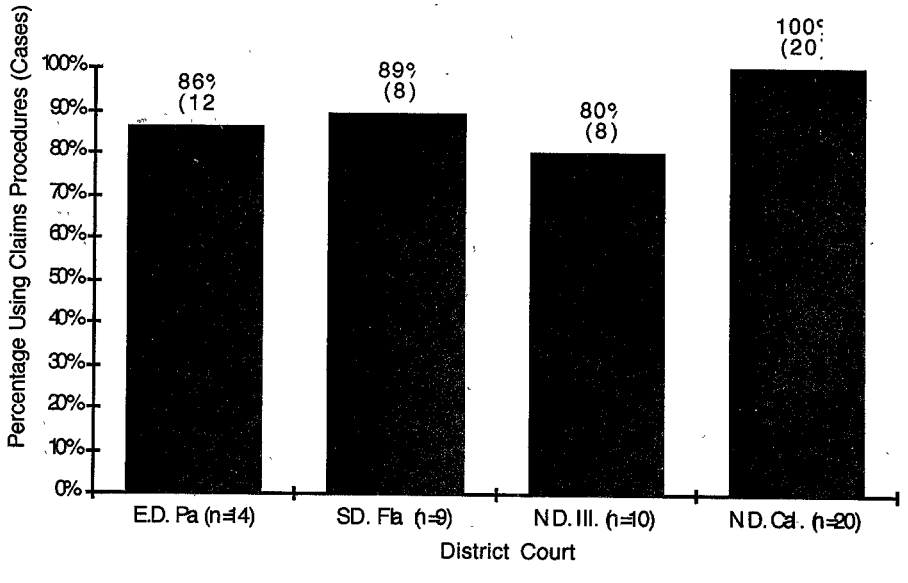


Figure 51: Percentage of Cases with Attempts of Putative Class Members to Intervene and Percentage of Cases with Interventions Allowed

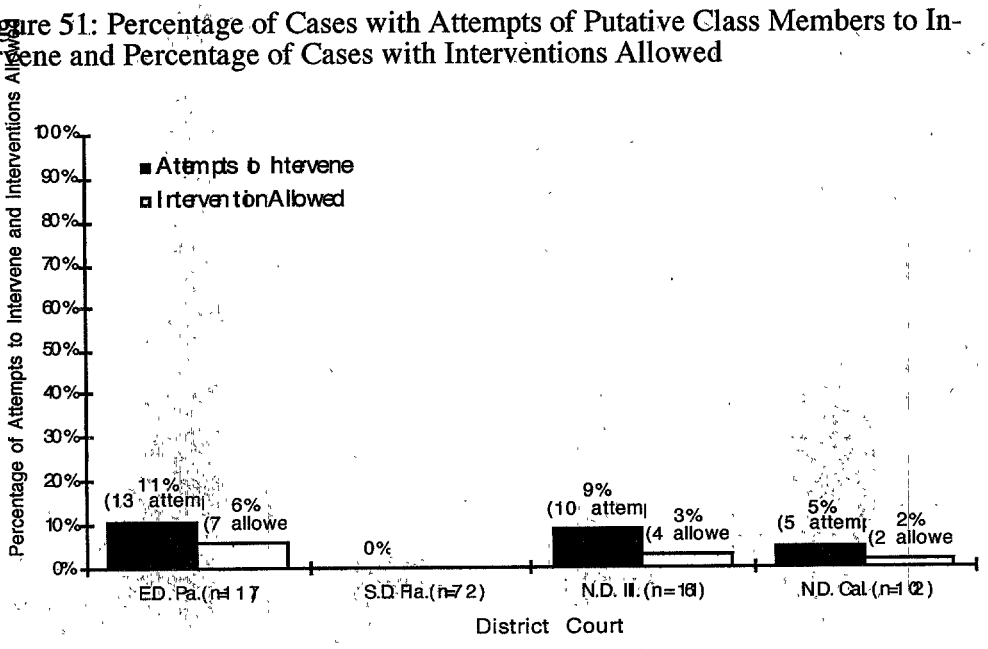
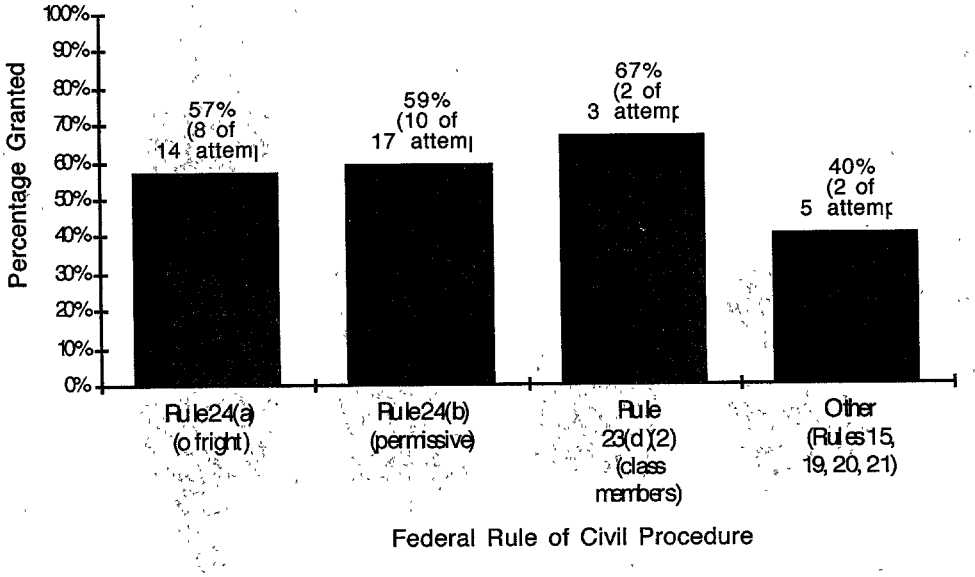


Figure 52: Success Rates for Various Bases for Attempted Intervention by Putative Class Members



Note: Some motions cited more than one source.

Figure 53: Percentage of Settlement Approval Hearings with Participation by Class Representatives or Nonrepresentative Class Members or Objectors

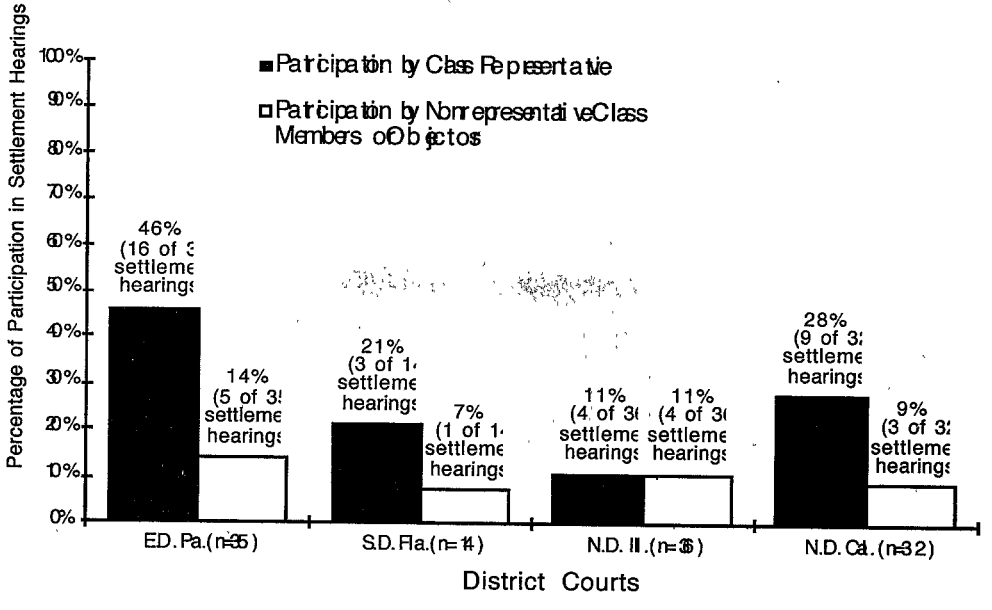
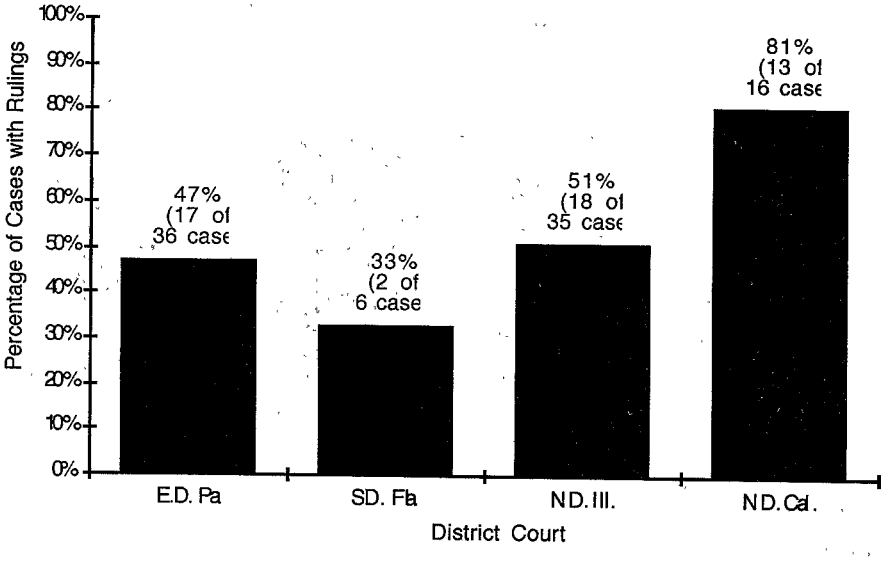
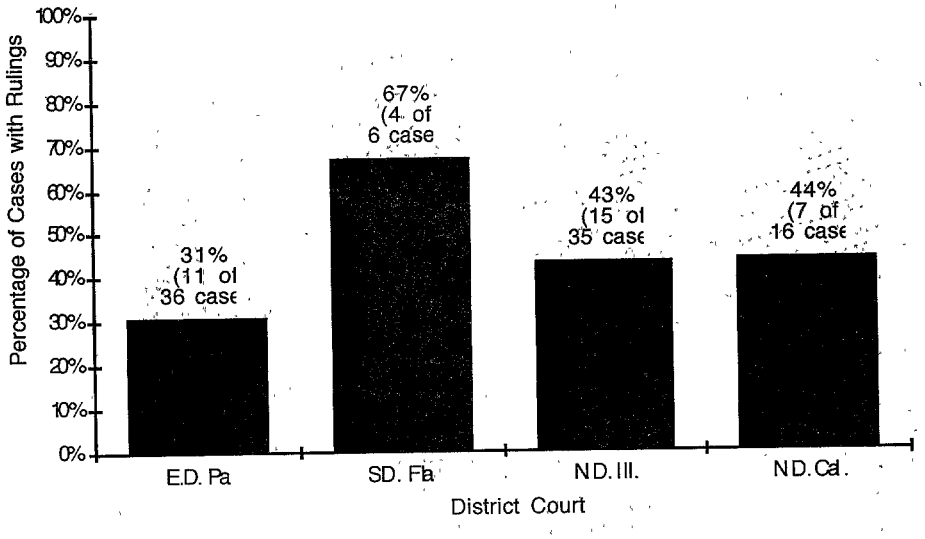


Figure 54: Percentage of Certified Class Actions with a Ruling on a Motion to Dismiss



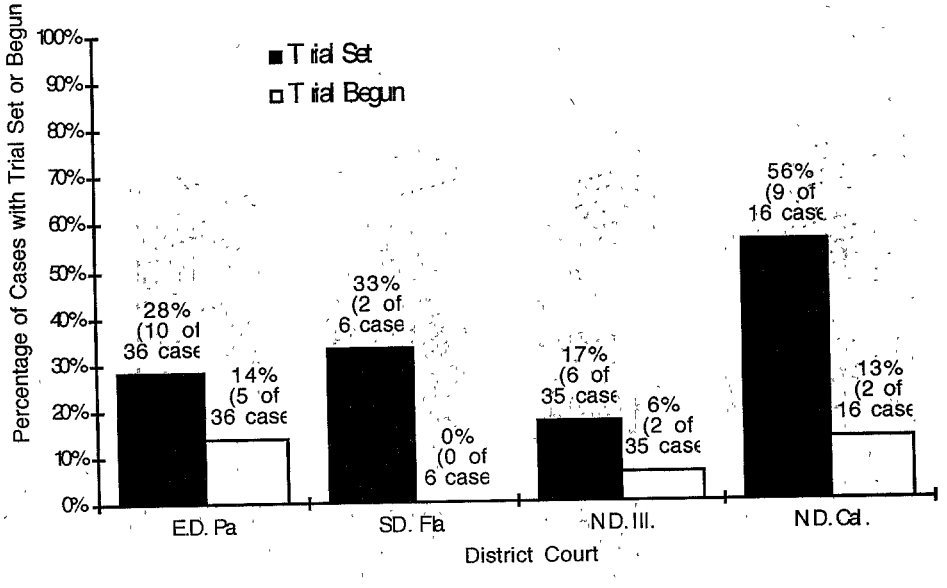
Note: Cases certified for settlement purposes are not included.

Figure 55: Rulings on Motions for Summary Judgment in Certified Class Actions



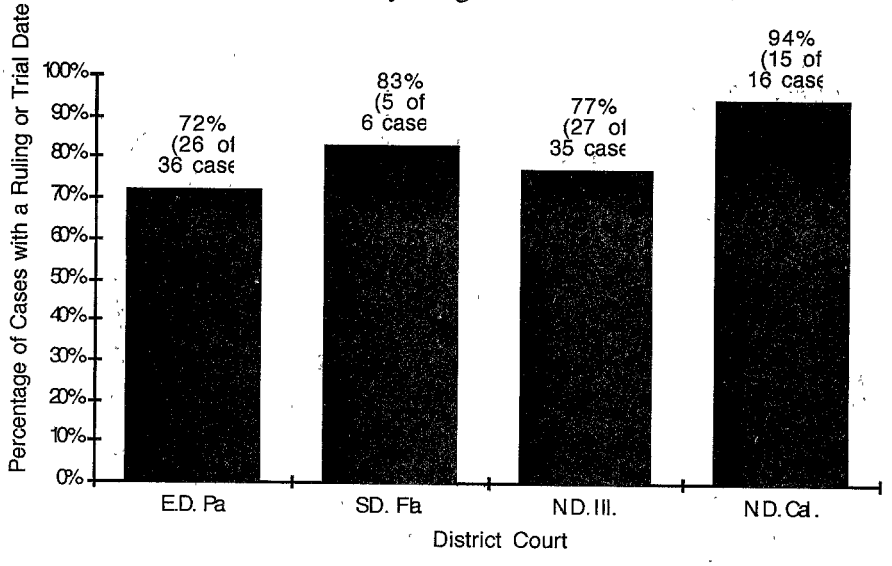
Note: Cases certified for settlement purposes only are not included.

Figure 56: Percentage of Certified Class Actions with Trial Date Set



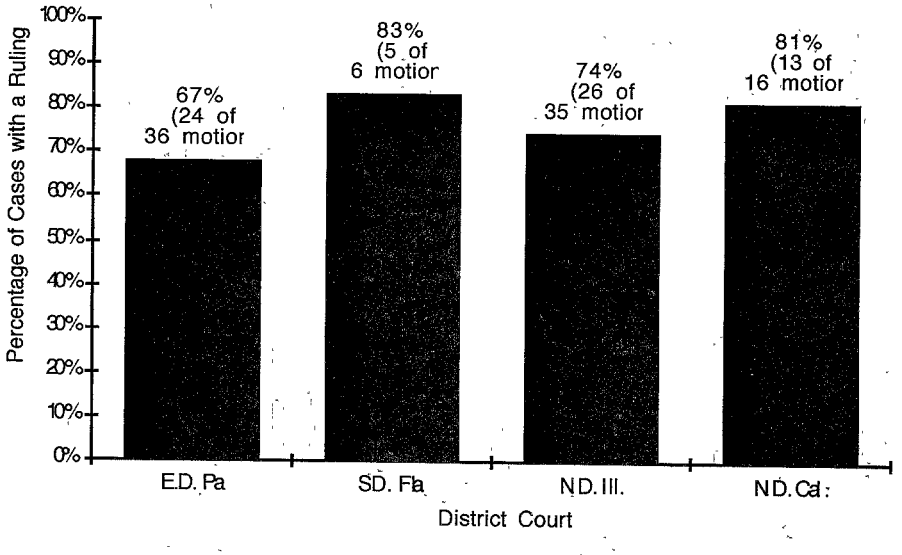
Note: Cases certified for settlement purposes only are not included.

Figure 57: Percentage of Certified Class Actions with a Ruling on a Motion to Dismiss or a Motion for Summary Judgment or a Trial Date Set



Note: Cases certified for settlement purposes only are not included.

Figure 58: Percentage of Certified Class Actions with a Ruling on a Motion to Dismiss or a Motion for Summary Judgment or Both



Note: Cases certified for settlement purposes only are not included.

Figure 59: Percentage of Settlement Class Actions in Which Notice of Settlement Was Communicated to the Class

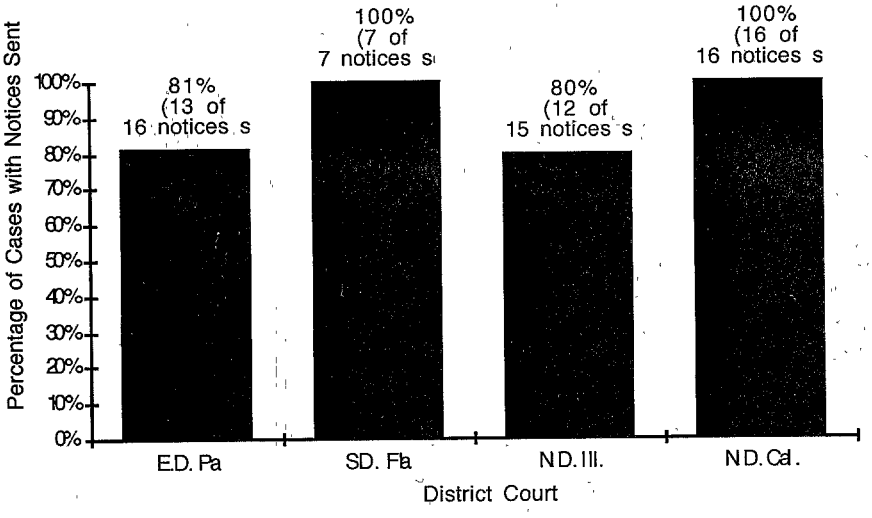


Figure 60: Percentage of Settlement Class Actions in Which Preliminary Findings Were Entered

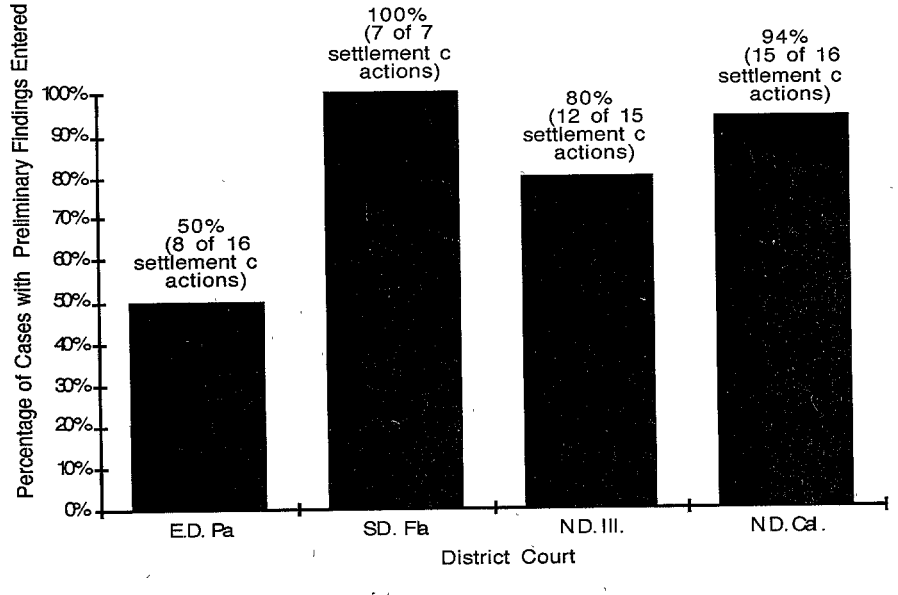


Figure 61: Percentage of Settlement Class Actions in Which Hearings Were Held Prior to Approval of Settlement

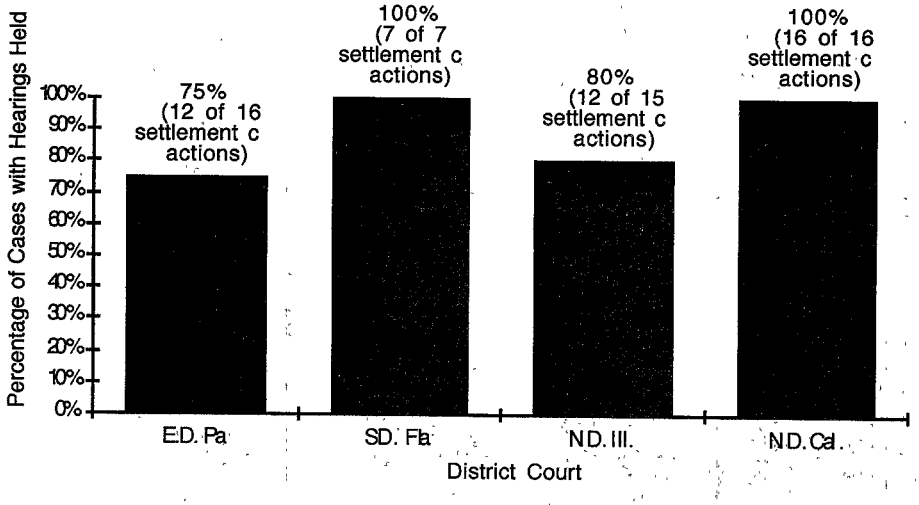


Figure 62: Percentage of Cases with a Trial Date Set

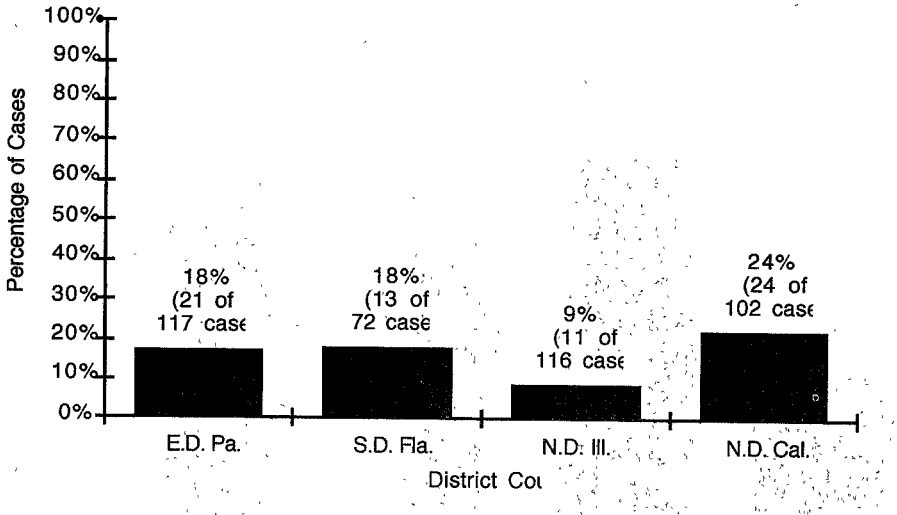


Figure 63: Mean and Median Time from First Complaint to First Entry of Trial Date for Cases with a Trial Date Entered

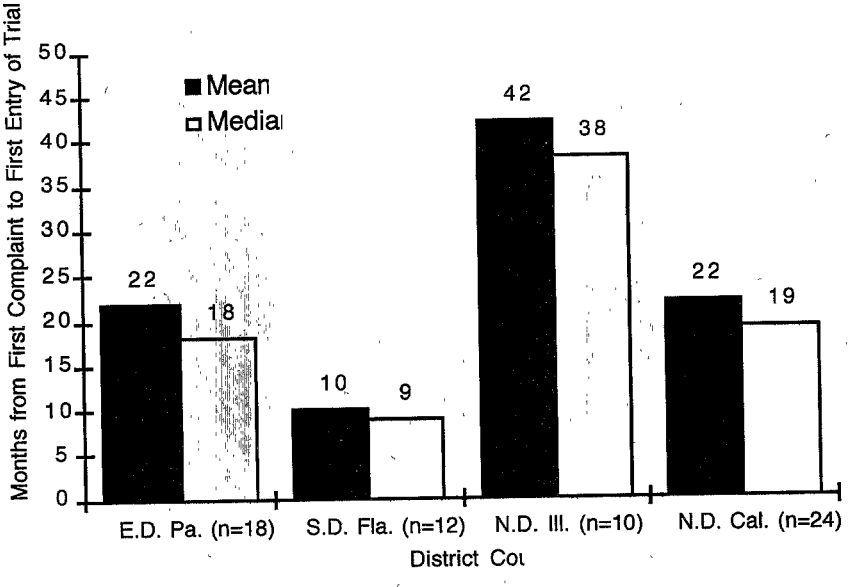


Figure 64: Time from First Complaint to First Entry of Trial Date for Cases with Trial Date Entered

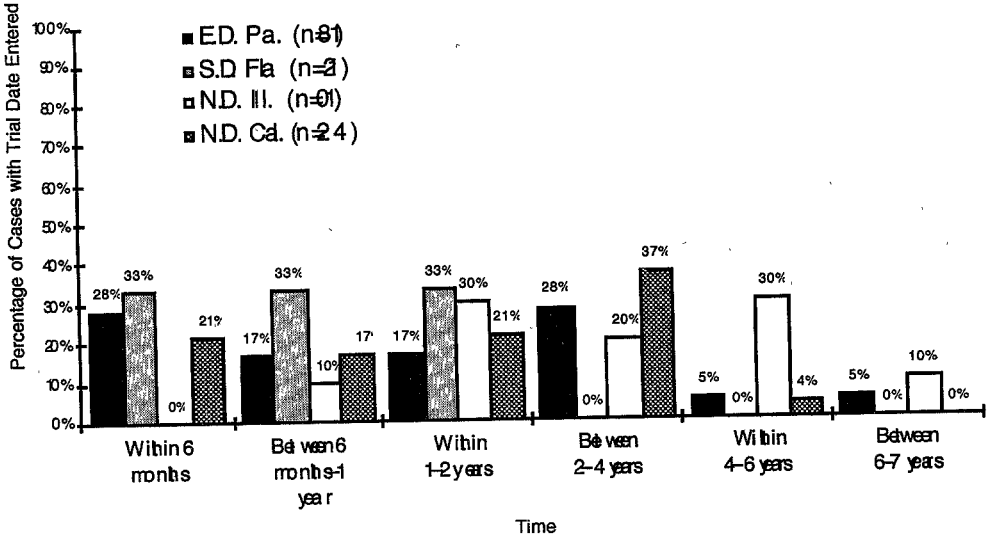


Figure 65: Time from First Complaint to Scheduled Trial Date—Mean and Median for Cases with Trial Date Scheduled

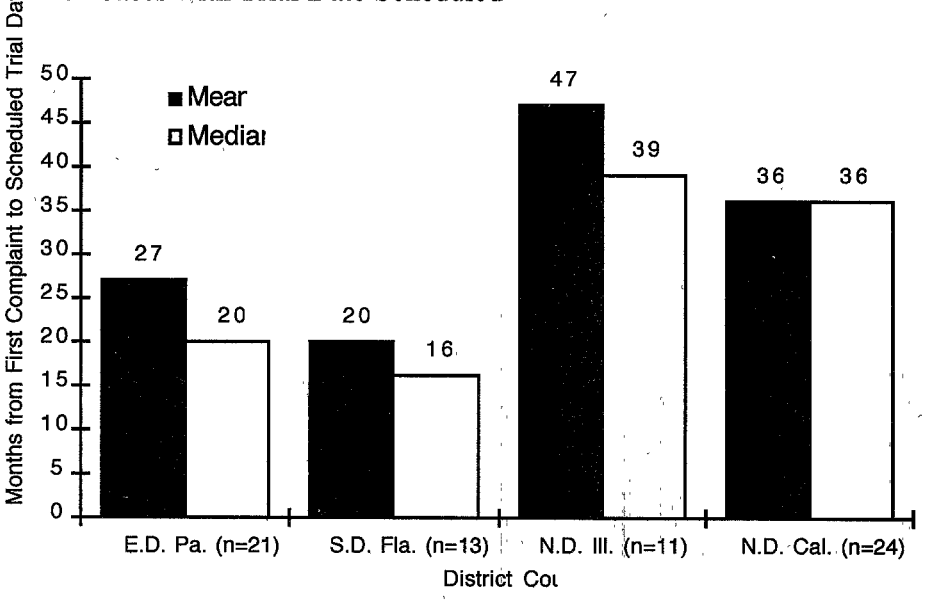


Figure 66: Time from First Complaint to Scheduled Trial Date for Cases with Trial Date Scheduled

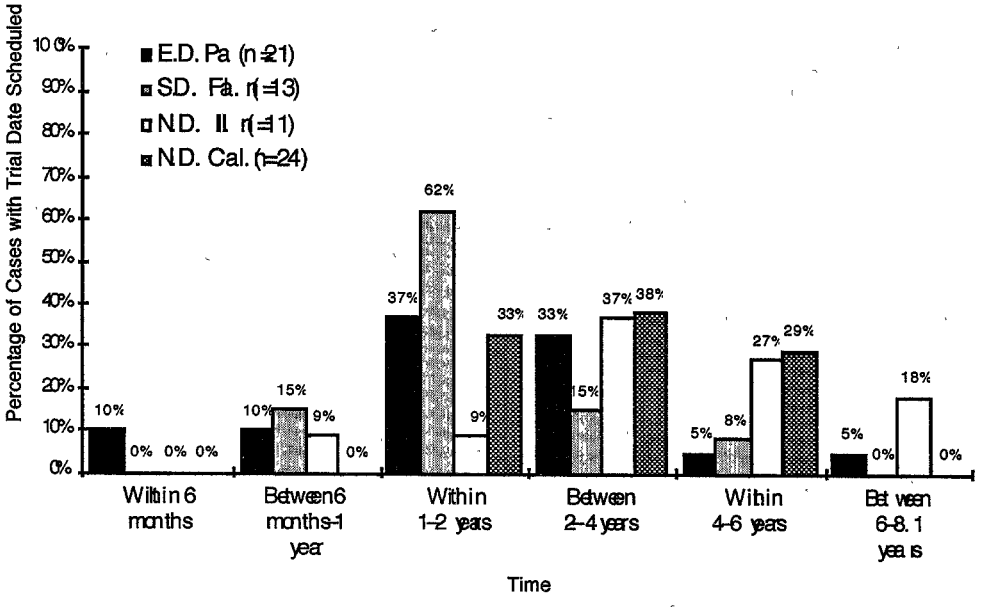
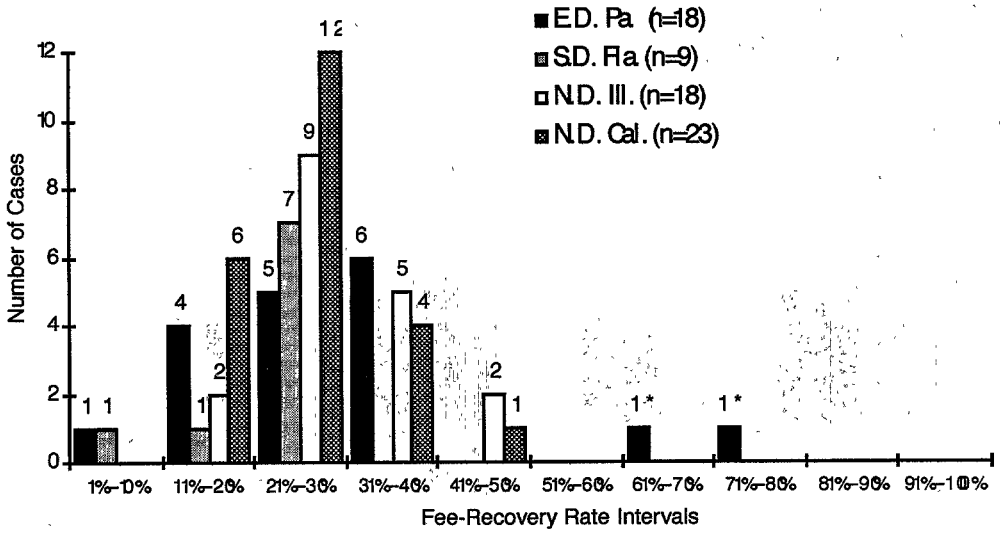


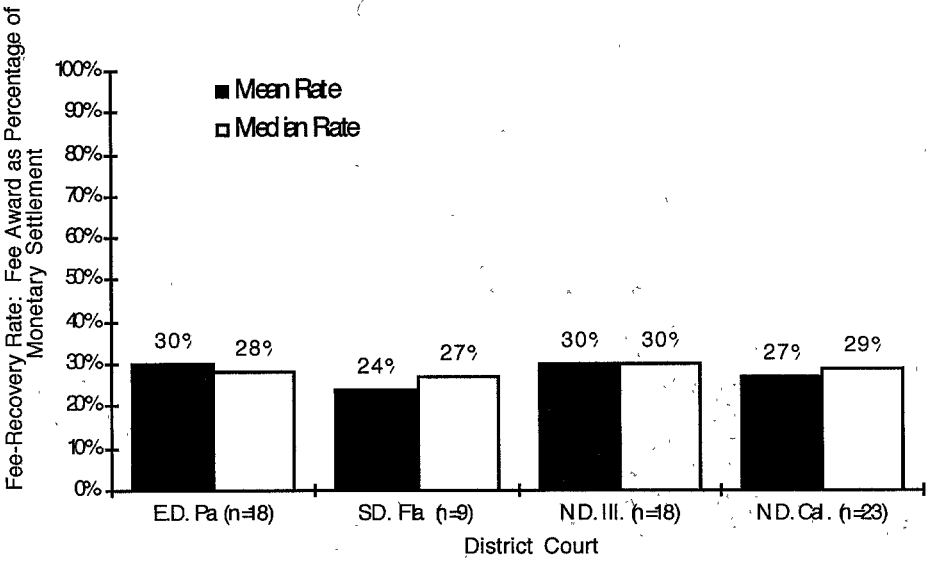
Figure 67: Fee-Recovery Rate Intervals in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys' fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee-recovery rate" is fee awards as a percentage of gross monetary settlement. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross monetary settlement" includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses, and administrative costs of the settlement.

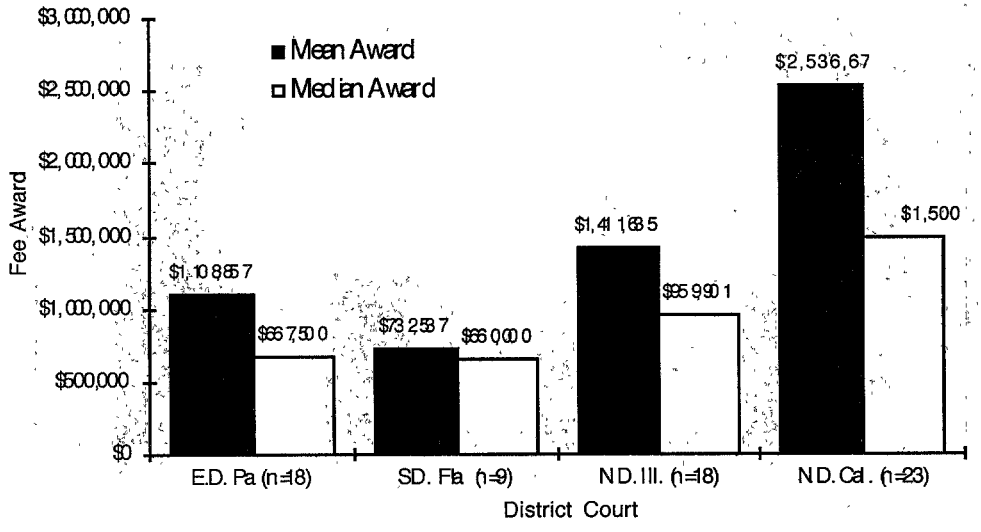
*In the case with the 63% rate, a certified class of approximately 2,000 stockholders received net cash distributions of $1.8 million for damages related to stock sales. For the 71% rate, the settlement included a relatively small amount of interest a county prothonotary agreed to pay class members related to interpleaded funds in its trust account in the past six years. In addition, the prothonotary agreed to place interpleaded funds in separate interest-bearing accounts in the future.

Figure 68: Mean and Median Fee-Recovery Rates in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys' fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee-recovery rate" is fee awards as a percentage of gross monetary settlement. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross monetary settlement" includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses, and administrative costs of the settlement.

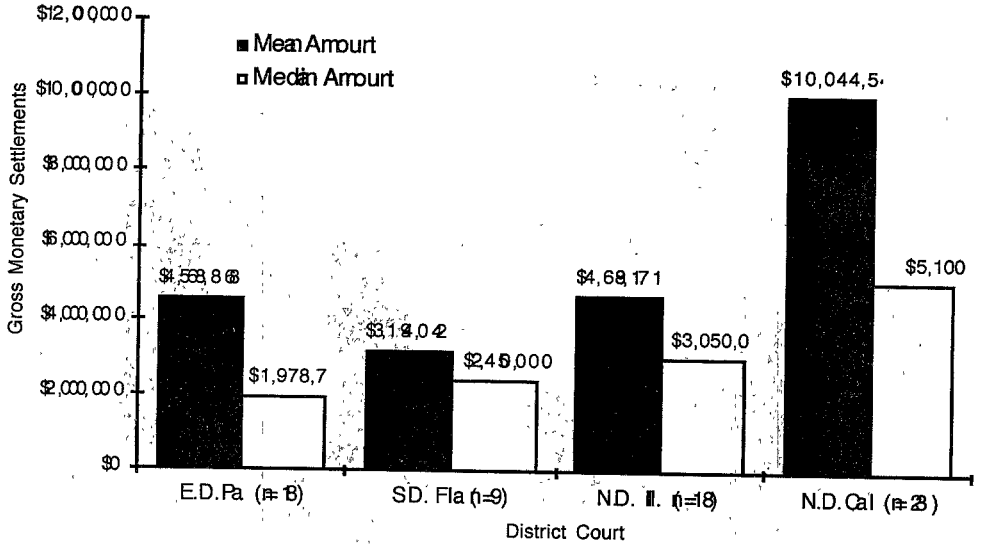
Figure 69: Mean and Median Fee Awards in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys' fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee-recovery rate" is fee awards as a percentage of gross monetary settlement. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross monetary settlement" includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses, and administrative costs of the settlement.

*Includes one case with fee award of $13,875,000.

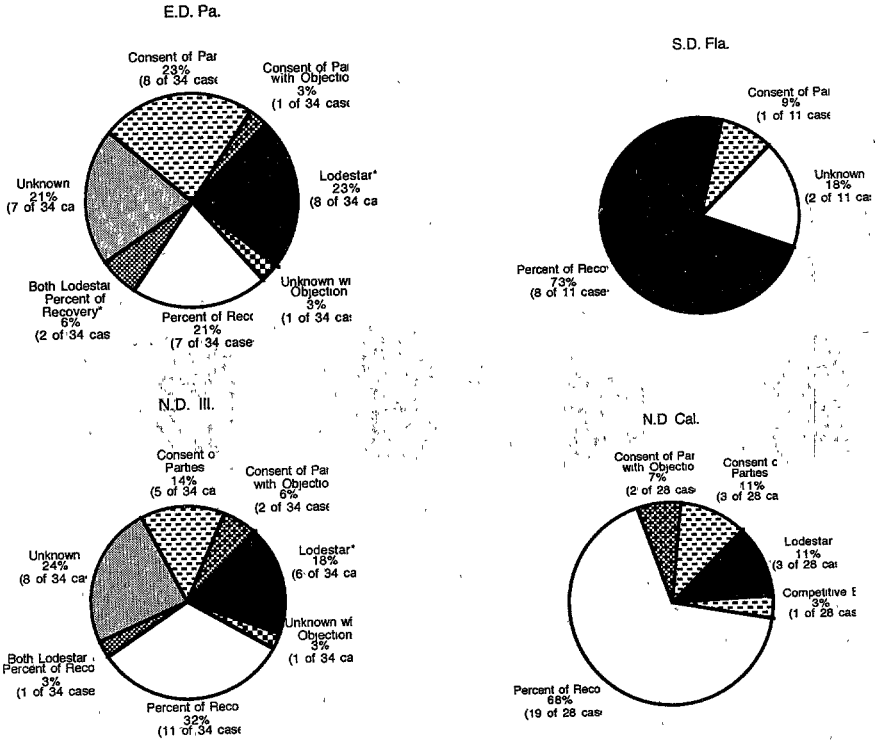
Figure 70: Mean and Median Gross Monetary Settlements in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: Figures 67–70 exclude fourteen cases where the only monetary distribution was to class representatives and twenty-four cases where the only monetary distribution was for attorneys' fees or administrative expenses. These thirty-eight cases (sixteen cases in two districts and two and four cases in the other two districts) are shown in Table 45. Figures 67–70 also exclude three cases (one in each of three districts) where there was no record of a fee request or a fee award but where the court approved a class settlement providing net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee-recovery rate" is fee awards as a percentage of gross monetary settlement. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross monetary settlement" includes the following where applicable: payments or quantifiable benefits to class members, separate payments to class representatives, donations to charities or public interest groups, attorneys' fees and expenses, and administrative costs of the settlement.

*Includes one case with gross settlement of $73,570,000.

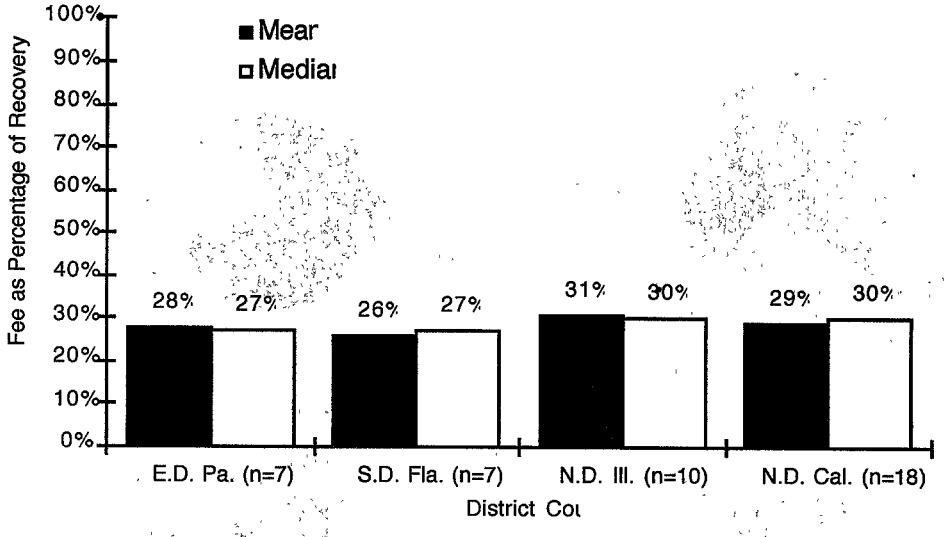
Figure 71: Fee Calculation Method in Certified Cases with Court-Approved Settlements



*Includes one of two cases where the court enhanced the lodestar calculation by a 2.5 multiplier.

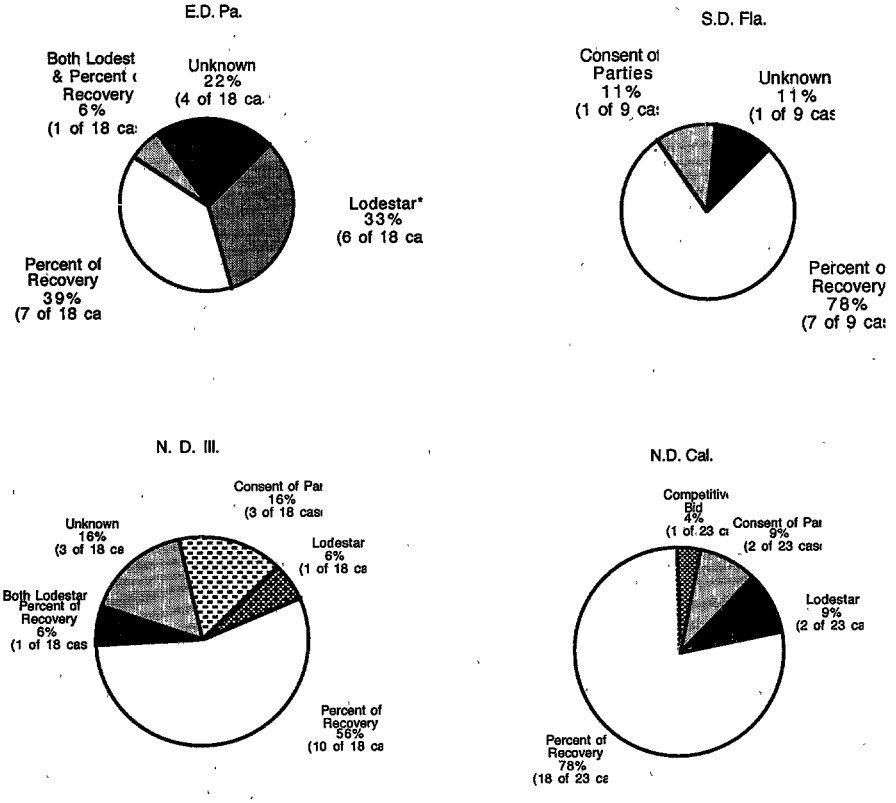
**Includes at least two cases (6% of thirty-four cases) where the court reduced the lodestar calculation by more than 25%.

Figure 72: Mean and Median Fee-Recovery Rates in Certified Cases Using Percentage of Recovery Method and Providing Net Monetary Distribution to Class



Note: "Net monetary distribution" is net of attorneys' fees and administrative expenses.

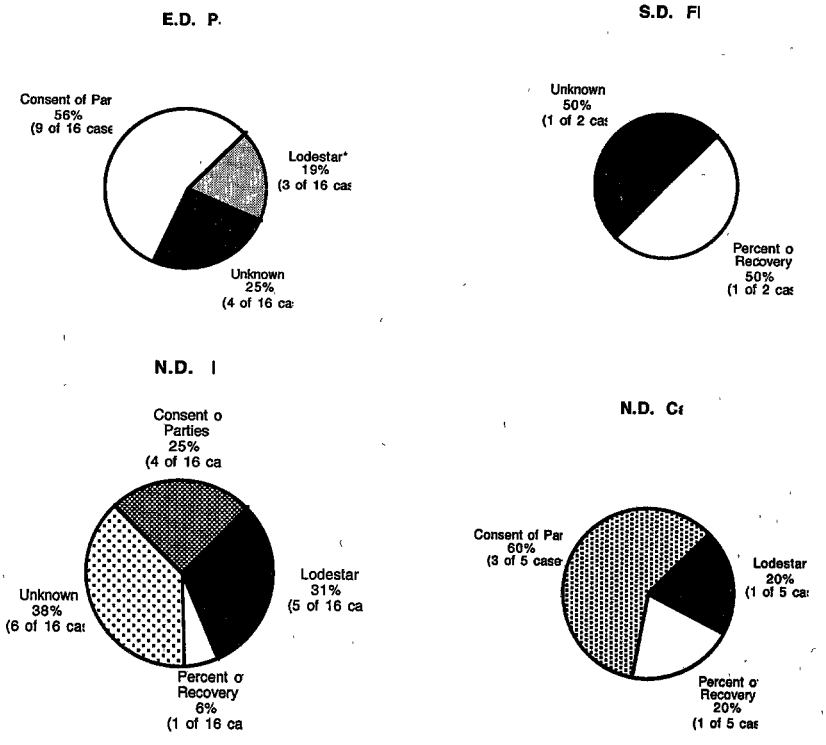
Figure 73: Fee Calculation Method in Certified Cases with Court-Approved Settlements Providing Net Monetary Distribution to Class



Note: "Net monetary distribution" is net of attorneys' fees and administrative expenses.

*Includes *Masnik v. Bolar Pharmaceutical Co., Inc.*, No. 90-4086 (E.D. Pa. filed June 15, 1990), where a 2.5 enhancer was applied to the lodestar amount.

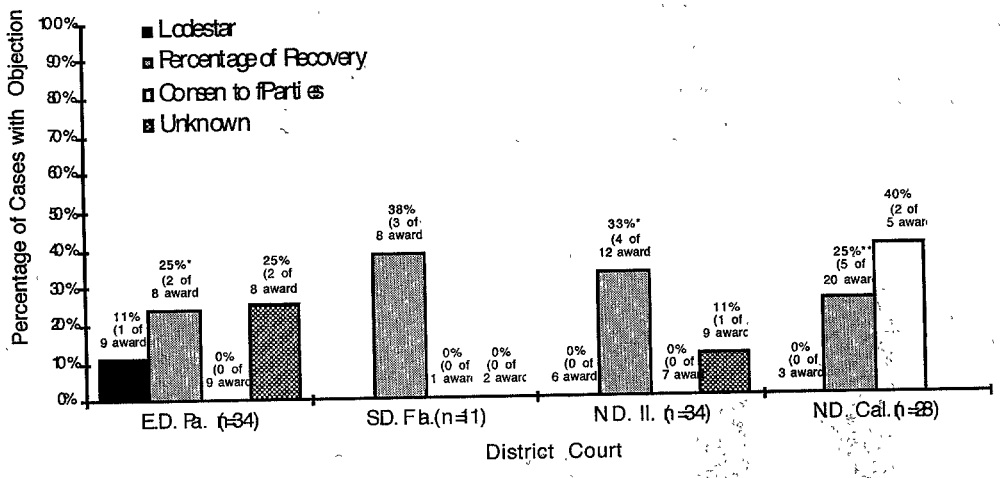
Figure 74: Fee Calculation Method in Certified Cases with Court-Approved Settlements Providing *No* Net Monetary Distribution to Class



Note: "Net monetary distribution" is net of attorneys' fees and administrative expenses. This figure includes cases where the only monetary distribution was to class representatives, to class counsel for fees, or for administrative expenses.

*Includes *General Motors Pick-Up Truck Liability Litigation* (55 F.3d 768 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1988)), where district court used both lodestar and percentage methods, including a 2.5 multiplier applied to the lodestar amount. The award was vacated and remanded on appeal.

Figure 75: Objections to Attorneys' Fees by Fee Calculation Method in Certified Cases with Court Approved Settlements



*Percentage of recovery cases include one case with both lodestar and percentage methods.

**Includes fee objections in the one case involving competitive bidding by prospective lead class counsel.

Figure 76: Percentage of Cases with at Least One Appeal (All Class Actions: Certified Cases and Noncertified Cases)

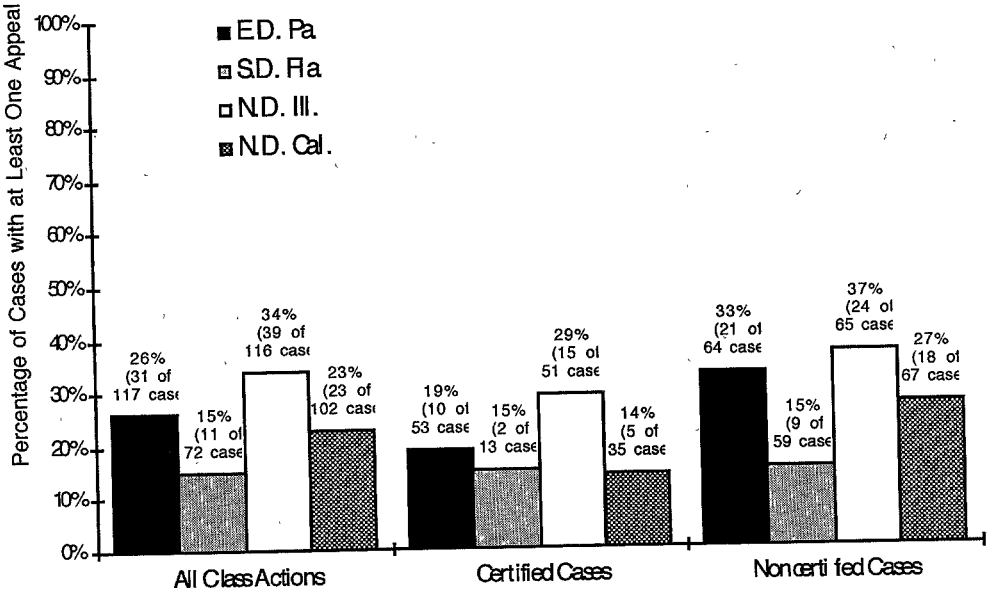
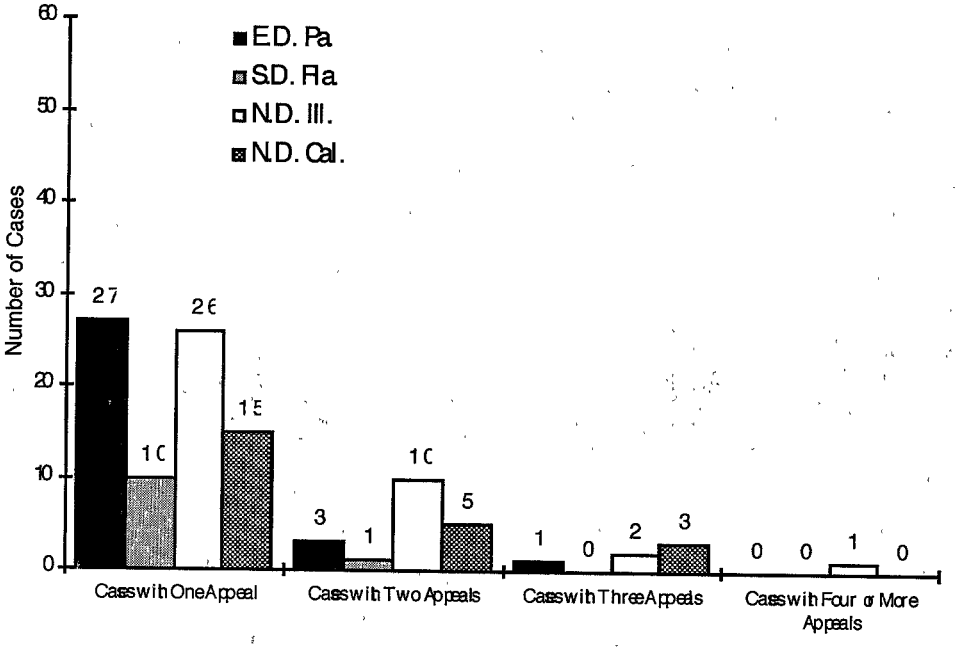
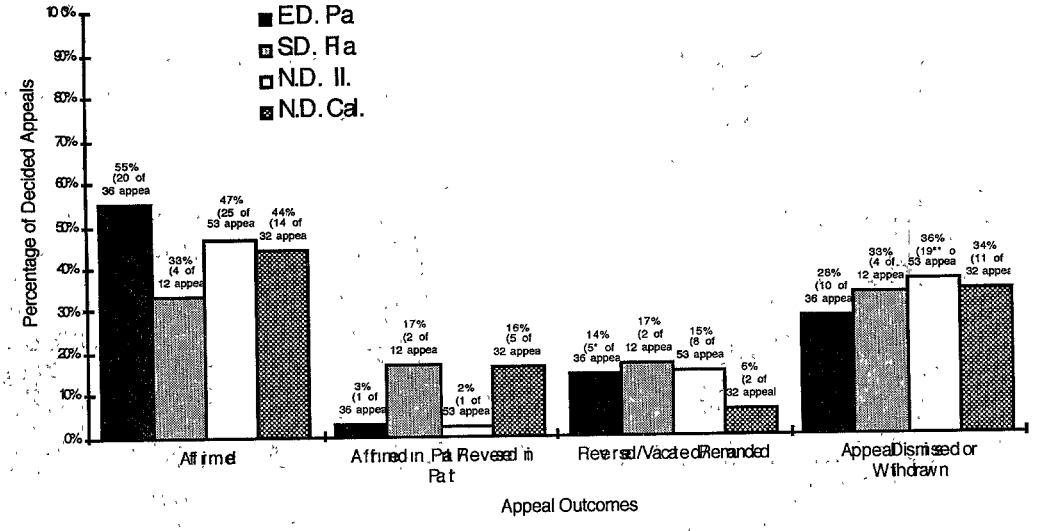


Figure 77: Cases with Only One Appeal and Cases with Multiple Appeals



Note: E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

Figure 78: Disposition on Appeal

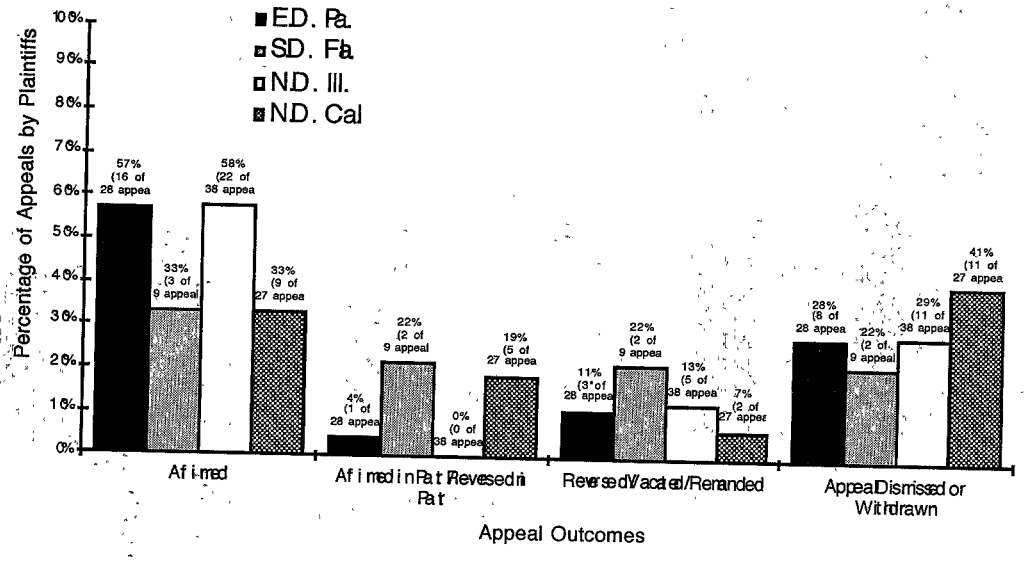


Note: E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

*Includes the Third Circuit vacating the settlement in the *General Motors Pick-Up Truck* case (55 F.3d 768 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995)).

**Includes one case where party opposing the class filed a writ of mandamus which the court of appeals denied.

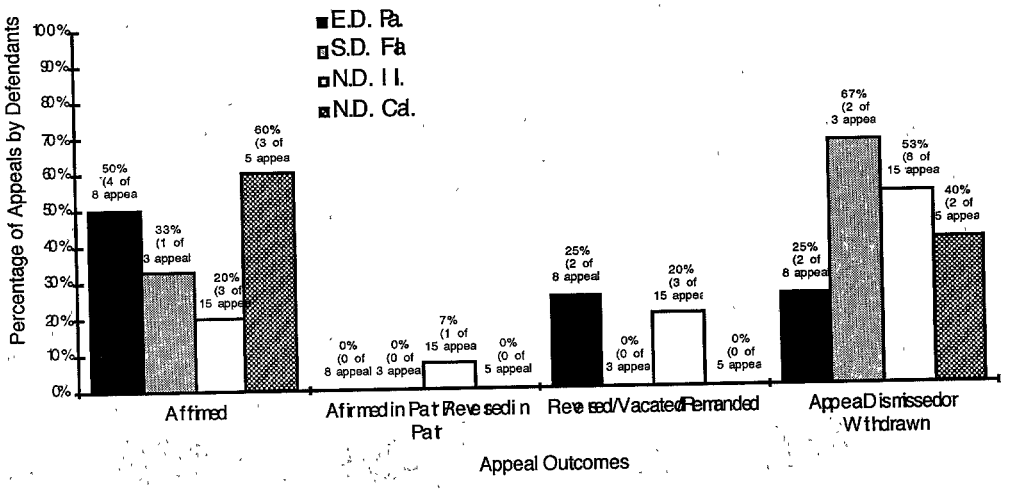
Figure 79: Disposition on Appeals Brought by Plaintiffs



Note: Most appeals were filed on behalf of the class; others were filed by individual plaintiffs or proposed intervenor–plaintiffs. E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

*Includes the Third Circuit vacating the settlement in the *General Motors Pick-Up Truck* case (55 F.3d 768 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995)).

Figure 80: Disposition on Appeals Brought by Defendants



Note: Includes defendants, third-party defendants, and proposed intervenor–defendants. E.D. Pa. = 31 cases, 36 appeals; S.D. Fla. = 11 cases, 12 appeals; N.D. Ill. = 39 cases, 53 decided appeals, 3 pending; N.D. Cal. = 23 cases, 32 decided appeals, 2 pending.

Figure 81: Percentage of Cases with Rulings on Certification

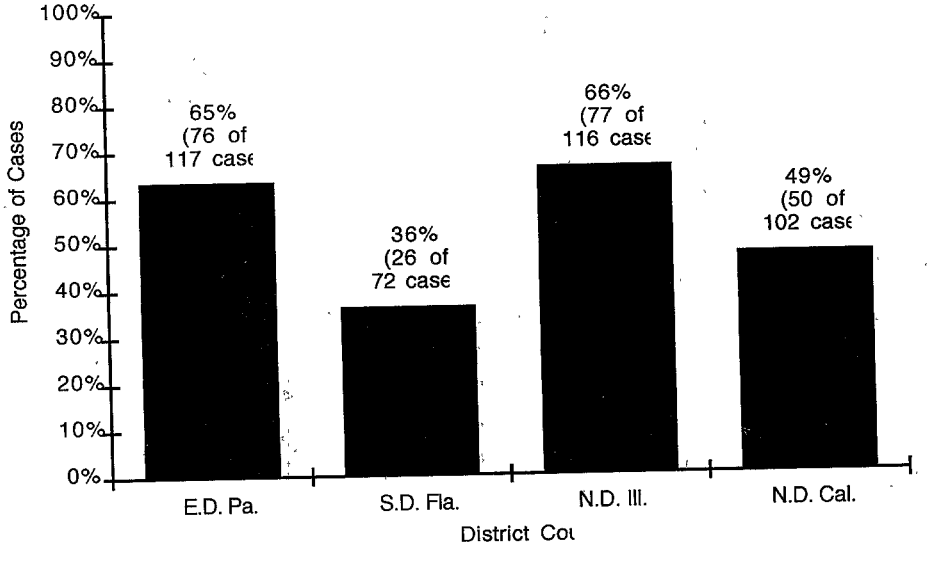


Figure 82: Appeals in Cases with Ruling on Certification

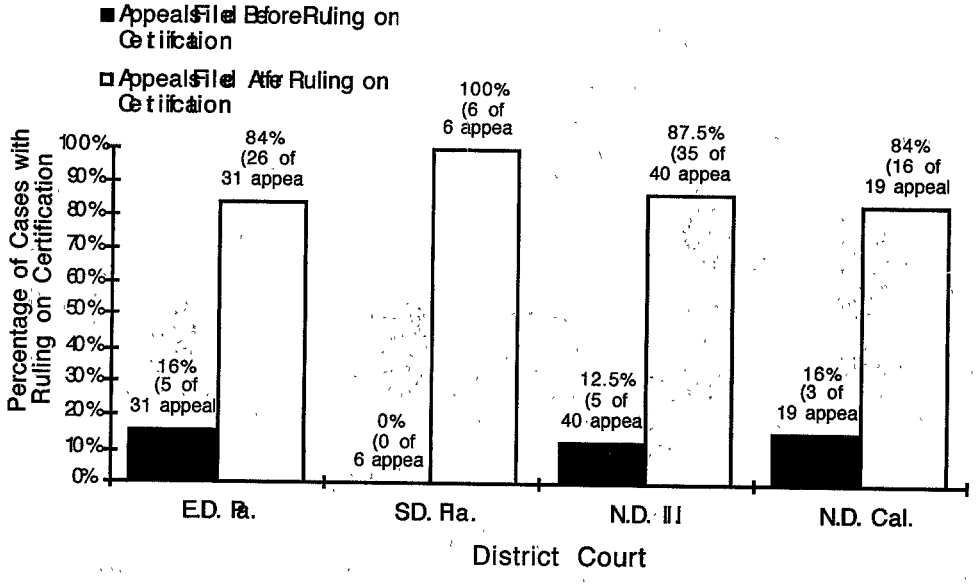


Figure 83: Number of Cases with at Least One Appeal in Cases with Ruling on Certification

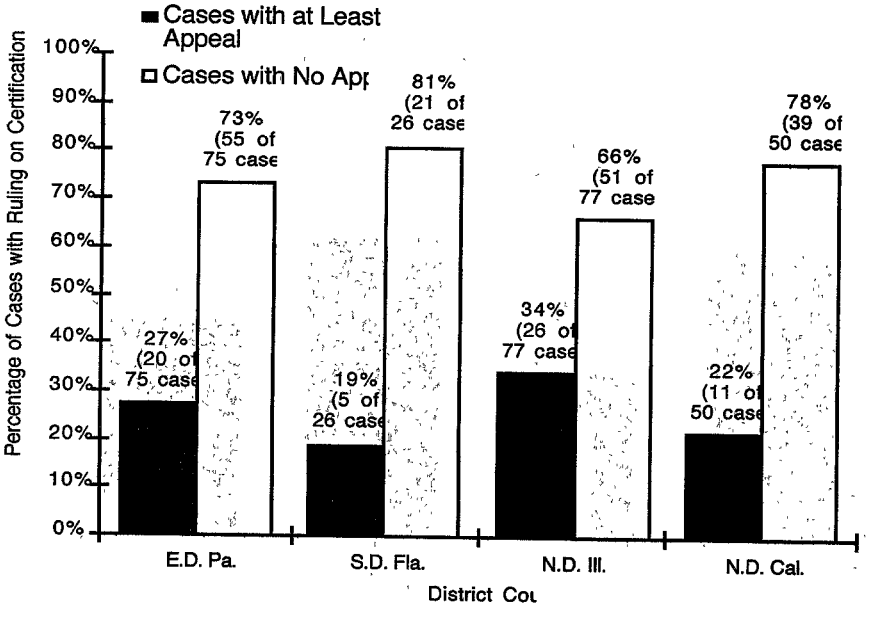


Table 1: Certified, Settled (b)(3) Classes with Average Net Distribution < $100 Per Class Member

Caption, Docket No., and District	Class Definition	Gross Monetary Award	Net Monetary Award/ No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (method) (% of gross monetary award)
(1) Masnik v. Bolar Pharmaceutical, No. 90-4086 (E.D. Pa. filed June 15, 1990).	Holders of SmithKline Beckman Corp. common stock who sold it during class period or who exchanged it in the merger	$2.55 M	$1.48 M/ 75,000 members = $19.69 per member	$6,000	None	$765,000 (lodestar) (30% of gross monetary award)
(2) Mandel v. Mortgage & Realty, No. 90-1848 (E.D. Pa. filed Mar. 16, 1990).	Purchasers of Mortgage & Realty common stock during class period	$1.33 M	$752,705/ 17,640 members = $42.67 per member	None indicated	None	$351,467 (% of recovery) (26% of gross monetary award)
(3) Hoxworth v. Blinder, No. 88-285 (E.D. Pa. filed Jan. 14, 1988).	Buyers and sellers of 21 companies' securities through defendant during class period	$5.27 M	$3.19 M/ 72,519 members = $44.06 per member	$21,000	None	$1.73 M (% of recovery) (33% of gross monetary award)
(4) Weiner v. Meridian Bancorp., Inc., No. 90-6211 (E.D. Pa. filed Sept. 26, 1990).	Purchasers of Meridian Bancorp securities during class period	$3.25 M	$2.21 M/ 45,290 members = $48.89 per member	$27,500	None	$973,320 ($975,000 requested; method not specified) (30% of gross monetary award)
(5) Cannon v. Royce Laboratories, Inc., No. 92-923 (S.D. Fla. filed Apr. 23, 1992).	Purchasers of securities of Royce Laboratories during class period	$0.85 M	$416,047/ 5,980 members = $69.57 per member	None indicated	750,000 shares of common stock and 1,975,000 warrants were included in the settlement, 70% of which were distributed to the class	$255,000 (% of recovery; plus 30% of common stock and warrants awarded) (30% of gross monetary award)
(6) Weiner v. Southeast Banking Co., No. 90-760 (S.D. Fla. filed Mar. 22, 1990).	Purchasers of Southeast Banking securities during class period	$5 M	$3.64 M/ 46,068 members = $78.95 per member	$14,000	None	$1.25 M (% of recovery) (25% of gross monetary award)

(7) *In re* GE Energy Choice Light Bulb Consumer Litigation, No-92-4447 (N.D. Cal. filed Nov. 12, 1992).	Consumer purchasers of GE Energy Choice throughout the U.S. during a 3.5 year class period	$3.25 M	$2 M/ 123,000 members = <$16.26 per member[a]	None indicated	Modifications of advertising and packaging practices[b]	$975,000 (% of recovery) (30% of gross monetary award)

(cont.)

Table 1: Certified, Settled (b)(3) Classes with Average Net Distribution < $100 Per Class Member (continued)

Caption, Docket No., and District	Class Definition	Gross Monetary Award	Net Monetary Award/ No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (method) (% of gross monetary award)
(8) Sahadi v. Stone, No. 93-20645 (N.D. Cal. filed Sept. 1, 1993).	Purchasers of Read-Rite stock during the class period	$2 M	$1.24 M/ 17,000 members = $73.17 per member	None indicated	None	$600,000 (% of recovery) (30% of gross monetary award)
(9) Nathanson IRA v. Tenera, No. 91-3454 (N.D. Cal. filed Oct. 2, 1991).	Purchasers of units of Tenera during class period	$0.125 M	$73,327/ 3,000 members = $24.44 per member	$3,000	None	$20,077 ($37,500 requested; % of recovery) (16% of gross monetary award)

Note: M = millions of dollars.

[a]The distribution per class member was probably less because purchasers of GE Energy Choice products who were not class members were also allowed to participate.

[b]Note that the monetary relief consisted of a funded rebate program with any surplus to be donated to charity or energy research purposes.

Table 2: Number of Consolidated Cases Transferred by the Judicial Panel on Multidistrict Legislation and Nature of Suit

Nature of Suit	E.D. Pa. (n=7)	S.D. Fla. (n=2)	N.D. Ill. (n=6)	N.D. Cal. (n=4)
Other contract actions	1	0	0	0
Contract product liability	1	1	0	0
Personal injury–product liability	1	0	1	0
Antitrust	2	0	2	3

Racketeer Influenced and Corrupt Organization Act (RICO)	0	0	1	0
Property rights–trademark	1	0	0	0
Securities	1	1	2	1

Table 3: Number of Consolidations by District Court and Nature of Suit

Nature of Suit	E.D. Pa. ($n=24$)	S.D. Fla. ($n=10$)	N.D. Ill. ($n=10$)	N.D. Cal. ($n=17$)
Contract	5	0	1	0
Torts–other fraud	1	0	1	1
Antitrust	1	0	0	0
Other civil rights	0	0	1	1
Racketeer Influenced and Corrupt Organization Act (RICO)	0	0	1	0
Prisoner petitions–habeas corpus	0	0	0	1
Other labor litigation	0	1	0	0
Employee Retirement Income Security Act (ERISA)	1	0	1	0
Trademark	2	0	0	1
Securities	13	9	5	13
Other statutory actions	1	0	0	0

Table 4: Number of Related Cases Not Consolidated with Similar Litigation Pending in Federal Courts and Nature of Suit

Nature of Suit	E.D. Pa. ($n=13$)	S.D. Fla. ($n=4$)	N.D. Ill. ($n=6$)	N.D. Cal. ($n=23$)
Contracts–stockholders suits	0	0	0	1
Other contract actions	2	0	0	0
Contract product liability	1	0	0	0
Personal injury–product liability	0	0	0	1
Other fraud	0	0	1	0
Antitrust	0	0	0	1
Other civil rights	2	0	1	1
Civil rights–jobs	1	0	0	2
Racketeer Influenced and Corrupt Organization Act (RICO)	2	0	0	0
Prisoner petitions–habeas corpus	0	0	0	1

(cont.)

Table 4: Number of Related Cases Not Consolidated with Similar Litigation Pending in Federal Courts and Nature of Suit (continued)

Nature of Suit	E.D. Pa. ($n=13$)	S.D. Fla. ($n=4$)	N.D. Ill. ($n=6$)	N.D. Cal. ($n=23$)
Prisoner–civil rights	0	0	0	1
Employee Retirement Income Security Act (ERISA)	0	0	0	2
Property rights–trademark	1	0	0	0
Securities	4	4	3	11
Other statutory actions	0	0	1	2

Table 5: Number of Related Cases Not Consolidated with Similar Litigation Pending in State Courts and Nature of Suit

Nature of Suit	E.D. Pa. ($n=4$)	S.D. Fla. ($n=1$)	N.D. Ill. ($n=3$)
Contract product liability	1	0	0
Personal injury–medical malpractice	1	0	0
Other personal property damage	0	1	0
Other civil rights	0	0	2
Securities	2	0	1

Table 6: Difficulties in Cases Not Consolidated in Federal Courts

Case	Type of Case	Difficulty
Case 1	Statutory action	Documents were filed in both cases—one was a class action and the other was not. On different occasions, class-related documents were filed in the nonclass case, but not in the class case, which caused confusion not only for the parties but for the court.
Case 2	Contract	Nonconsolidated case was stayed and later closed because the related case was farther along. It was not clear from the case file how much time and effort had been expended on the discovery process, but one can assume that there was duplication of effort.
Case 3	Racketeer Influenced and Corrupt Organization Act (RICO)	In this case, five other class actions were pending against the defendants who moved before the Judicial Panel on Multidistrict Litigation for transfer of all of the cases to a single district. Prior to the court's ruling on the MDL issue the case was dismissed without prejudice. Defendant later learned that to have the case transferred by the Judicial Panel the case had to be open. Defendant then had to move for reconsideration of the court's dismissal of the case. The court denied vacating the dismissal order.

Case 4	Securities	This case contained identical issues and the same defendants as in other related cases. The court found that the case was related but decided not to consolidate it.

Table 7: Difficulties in Cases Not Consolidated in State Courts

Case	Type of Case	Difficulty
Case 1	Personal injury–medical malpractice	In this case the district court decided to abstain from ruling on its case while the state court case was still pending with parallel claims. There was considerable delay in the case before the district court ruled that the state court was a better forum for the plaintiffs.
Case 2	Contract product liability	A number of class action complaints were filed in several state courts relying on state law products liability claims. Plaintiffs in those cases objected to the settlement. The court responded by coordinating the notice and settlement proposal to account for the state actions.
Case 3	Statutory actions	Class action sought on state law claims. Defendant objected because of the duplicative nature of the litigation.
Case 4	Securities	Co-lead counsel filed a motion to take action against another attorney, who attempted to dismiss voluntarily the federal action and file a duplicative class action in state court. The court held that the federal action could only be voluntarily dismissed after counsel represented to the court that he would dismiss the state class action and not file any other duplicative class actions.

Table 8: Median Case Duration (in Months) of (b)(3) Securities and Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.			S.D. Fla.		
	Securities	Non-securities	Civil Rights	Securities	Non-securities	Civil Rights
Settled Cases	27 (n=13)	13 (n=6)	25 (n=2)	24 (n=9)	50 (n=2)	— (n=0)
Nonsettled Cases	48 (n=3)	18 (n=8)	— (n=0)	— (n=0)	— (n=0)	— (n=0)
	N.D. Ill.			**N.D. Cal.**		
	Securities	Non-securities	Civil Rights	Securities	Non-securities	Civil Rights
Settled Cases	28 (n=9)	36 (n=13)	78 (n=3)	28 (n=16)	11 (n=6)	55 (n=2)
Nonsettled Cases	12 (n=4)	48 (n=1)	— (n=0)	46 (n=2)	58 (n=1)	— (n=0)

Note: The "median case duration" is from filing the first complaint to termination of the case.

Table 9: Rate of Certification in (b)(3) Securities and Nonsecurities Cases with Motions or Orders Filed on Certification

	E.D. Pa.			S.D. Fla.		
	Securities ($n=16$)	Non-securities ($n=14$)	Civil Rights ($n=2$)	Securities ($n=9$)	Non-securities ($n=2$)	Civil Rights ($n=0$)
Percentage of Cases Certified	94	64	100	100	100	—

	N.D. Ill.			N.D. Cal.		
	Securities ($n=13$)	Non-securities ($n=14$)	Civil Rights ($n=3$)	Securities ($n=18$)	Non-securities ($n=7$)	Civil Rights ($n=2$)
Percentage of Cases Certified	100	93	100	94	86	100

Table 10: Number of Numerosity and Representativeness Objections to Certification in (b)(3) Securities and Nonsecurities Cases with Disputes Over Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Securities ($n=10$)	Non-securities ($n=8$)	Securities ($n=3$)	Non-securities ($n=2$)	Securities ($n=6$)	Non-securities ($n=9$)	Securities ($n=8$)	Non-securities ($n=3$)
Numerosity objection	0 (0%)	4 (50%)	0 (0%)	0 (0%)	0 (0%)	3 (33%)	2 (25%)	2 (67%)
Representativeness objection	9 (90%)	5 (63%)	3 (100%)	2 (100%)	6 (100%)	4 (44%)	6 (75%)	2 (67%)

Table 11: Median Settlement Fund Distribution Comparisons for Certified (b)(3) Securities and Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Securities ($n=12$)	Non-securities ($n=6$)	Securities ($n=9$)	Non-securities ($n=2$)	Securities ($n=9$)	Non-securities ($n=13$)	Securities ($n=14$)	Non-securities ($n=6$)
Net distribution[a]	$2,014,370	$0[c]	$1,734,571	$123,973	$2,691,651	$44,639	$3,040,348	$1,100,000
Fee award[b]	$1,230,559	$225,000	$660,000	$175,000	$1,200,000	$338,771	$1,500,000	$1,987,500
Net settlement per class member	$299 ($n=11$)	$0 ($n=5$)[d]	$315 ($n=9$)	— ($n=0$)	$412 ($n=9$)	$562 ($n=8$)	$336 ($n=12$)	$956 ($n=5$)

[a] "Net distribution" is net of attorneys' fees and administrative expenses.

[b] "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses.

[c] Mean = $19,377.

[d] Mean = $166.

Table 12: Median Case Duration (in Months) of (b)(2) Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Settled	Nonsettled	Settled	Nonsettled	Settled	Nonsettled	Settled	Nonsettled
All non-securities	15 ($n=14$)	17 ($n=11$)	41 ($n=2$)	41 ($n=2$)	60 ($n=6$)	106 ($n=3$)	21 ($n=3$)	46 ($n=1$)
Civil rights	13 ($n=5$)	13 ($n=1$)	57 ($n=1$)	57 ($n=1$)	26 ($n=6$)	26 ($n=3$)	21 ($n=1$)	— ($n=0$)

Note: The "median case duration" is from filing the first complaint to termination of the case.

Table 13: Rate of Certification in (b)(2) Nonsecurities Cases with Motions or Orders Filed on Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Non-securities ($n=19$)	Civil Rights ($n=12$)	Non-securities ($n=3$)	Civil Rights ($n=3$)	Non-securities ($n=12$)	Civil Rights ($n=6$)	Non-securities ($n=4$)	Civil Rights ($n=1$)
Percentage of Cases Certified	95	92	67	67	83	67	50	100

Table 14: Number of Numerosity and Representativeness Objections to Certification in (b)(2) Nonsecurities Cases with Disputes over Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Non-securities (n=7)	Civil Rights (n=5)	Non-securities (n=2)	Civil Rights (n=2)	Non-securities (n=8)	Civil Rights (n=4)	Non-securities (n=2)	Civil Rights (n=1)
Numerosity Objection	5 (71%)	3 (60%)	0 (0%)	0 (0%)	3 (38%)	2 (50%)	1 (50%)	1 (100%)
Representativeness Objection	3 (43%)	2 (40%)	0 (0%)	0 (0%)	7 (88%)	4 (100%)	1 (50%)	1 (100%)

Table 15: Median Fee Awards for Certified (b)(2) Nonsecurities Cases with Court-Approved Settlements

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Non-securities (n=9)	Civil Rights (n=6)	Non-securities (n=1)	Civil Rights (n=1)	Non-securities (n=6)	Civil Rights (n=3)	Non-securities (n=2)	Civil Rights (n=1)
Median Fee Award[a]	$49,000	$34,779	$1,378	$1,378	$112,500	$224,810	$69,000	$53,000

[a]"Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses.

Table 16: Trial Rates for Nonprisoner Class Actions Compared to Nonprisoner Nonclass Civil Actions

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
Trial	Class (n=108)	Nonclass (n=7,603)	Class (n=58)	Nonclass (n=5,174)	Class (n=108)	Nonclass (n=8,264)	Class (n=94)	Nonclass (n=5,404)
Rate	5.5%	4.4%	3.4%	3.6%	5.5%	3.2%	4.3%	2.7%
Number	6	338	2	5,174	6	264	4	148

Note: Nonclass: Federal Judicial Center integrated database of Administrative Office of the U.S. Courts data; Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994.

The Administrative Office data on trial rates for the study cases differed from our data for the same set of cases. In three districts, the Administrative Office data showed fewer trials than the Federal Judicial Center data and in the other district the numbers were the same. Overall, the Administrative Office data showed thirteen trials compared to eighteen in the Federal Judicial Center database. The trial rates shown by the Administrative Office data were 4% (four), 2% (one), 6% (six), and 2% (two), respectively.

Table 17: Trial Rates for Securities Class Actions Compared to Securities Civil Actions

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
Trial	Class (n=30)	Nonclass (n=191)	Class (n=15)	Nonclass (n=187)	Class (n=23)	Nonclass (n=148)	Class (n=35)	Nonclass (n=198)
Rate	10.0%	16.7%	0%	5.8%	8.7%	5.4%	0%	0%
Number	3	32	0	11	2	8	0	0

Note: Nonclass: Federal Judicial Center integrated database of Administrative Office of the U.S. Courts data, Class: Federal Judicial Center class action project database (see first paragraph, Appendix D). The two data sets refer to civil cases terminated between July 1, 1992, and June 30, 1994.

The Administrative Office data on trial rates for securities class actions differed from the Federal Judicial Center data on the same cases in only one instance. In E.D. Pa., the Administrative Office data showed two trials, a rate of 7%, whereas the Federal Judicial Center data showed three trials, a rate of 10%.

Table 18: Number of Multiple Certifications and Rule 23(b) Certifications

Rule 23(b) Combinations	E.D. Pa. (n=5)	S.D. Fla. (n=1)	N.D. Ill. (n=5)	N.D. Cal. (n=5)
23(b)(1)(A) and (b)(2)	0	0	1	0
23(b)(1)(A), (b)(1)(B), and type not specified	0	0	1	0
23(b)(1)(A) and (b)(2)	2	0	1	0
23(b)(1)(A), (b)(1)(B), and (b)(2)	0	0	1	0
23(b)(1)(B) and (b)(2)	0	0	1	0
23(b)(1)(B), (b)(2), and (b)(3)	0	0	0	1
23(b)(1)(B) and (b)(3)	0	0	0	1
23(b)(2) and (b)(3)	3	1	0	1
23(b)(3) and type not specified	0	0	0	2

Table 19: District Judge and Magistrate Judge Time Expended

Type of Activity	Judge Time (in Hours) Certified ($n=11$)	Judge Time (in Hours) Not certified ($n=40$)	Average Hours per Case Certified	Average Hours per Case Not certified
Class certification	79	16	7.2	0.4
Motions to dismiss	61	13	5.5	0.3
Discovery	64	7	5.8	0.2
Summary judgment	30	48	2.7	1.2
Notice to class	4	0	0.4	0
Pretrial conference	1	1	0.1	0
All other pretrial conferences	1	0	0.1	0
Trial	0	10	0	0.3
Facilitating settlement	38	20	3.5	0.5
Review and rule on proposed settlement	31	6	2.8	0.2
Presiding at settlement approval hearing	16	1	1.5	0
Ruling on attorneys' fees	25	0	2.3	0
Monitoring or enforcing final order	11	0	1	0
Other	18	119	1.6	3
Total	379	241	34.5	6.1

Source: Willging et al., Preliminary Report on Time Study Class Action Cases (Feb. 9, 1995) (unpublished report on file with the Information Services Office of the Federal Judicial Center).

Table 20: Grounds Cited in Rulings on Motions to Dismiss in Relation to Timing of Ruling on Certification

Grounds Cited in Ruling[a]	E.D. Pa. Before ($n=31$)	E.D. Pa. After ($n=9$)	S.D. Fla. Before ($n=14$)	S.D. Fla. After ($n=3$)	N.D. Ill. Before ($n=28$)	N.D. Ill. After ($n=18$)	N.D. Cal. Before ($n=26$)	N.D. Cal. After ($n=6$)
Rule 12(b)(1)	6	1	0	0	3	7	1	0
Rule 12(b)(2)	0	0	0	0	0	1	0	0
Rule 12(b)(3)	0	0	0	0	0	1	0	0
Rule 12(b)(6)	18	4	6	0	11	12	15	3
Rule 12(b)(7)	2	0	0	0	0	0	0	0
Other	12	4	4	2	5	3	12	2
Unknown	3	2	5	0	9	2	5	1
Total	41	11	15	2	28	26	33	6

[a]More than one citation in some rulings.

Table 21: Grounds Cited in Rulings on Motions to Dismiss in All Class Actions Terminated Between July 1, 1992, and June 30, 1994

Grounds Cited in Ruling[a]	E.D. Pa. (n=61)	S.D. Fla. (n=31)	N.D. Ill. (n=63)	N.D. Cal. (n=48)
Rule 12(b)(1) (lack of subject matter jurisdiction)	11	2	15	2
Lack of federal question	5	0	4	0
Incomplete diversity	0	0	1	0
Insufficient class amount in controversy	2	0	1	0
Insufficient individual amount in controversy	0	0	0	0
Other	1	0	3	1
Rule 12(b)(2) (lack of personal jurisdiction)	0	0	2	1
Rule 12(b)(3) (improper venue)	1	0	1	0
Rule 12(b)(4) (insufficiency of process)	0	0	0	0
Rule 12(b)(5) (insufficiency of service of process)	0	1	0	0
Rule 12(b)(6) (failure to state a claim)	33	9	33	27
Rule 12(b)(7) (failure to join a party)	2	0	0	0
Rule 9(b) (failure to plead fraud with specificity)	7	3	3	10
Rule 41(a) (voluntary dismissal)	1	0	0	0
Rule 41(b)(by court order)	1	4	2	0
28 U.S.C. 1915(d) (frivolous)	0	5	3	3
Mootness	3	1	0	1
Abstention	2	0	1	0
Standing	1	0	2	0
Stipulated	2	0	1	4
Other	8	8	2	4
Unknown	10	13	15	8
Total	82	46	80	60

[a]Some rulings cited more than one source.

Table 22: Outcomes of Rulings on Motions to Dismiss in Relation to Timing of Rulings on Class Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
Outcome	Before	After	Before	After	Before	After	Before	After
Dismiss all	4	2	4	1	8	9	8	3
Dismiss part	6	3	1	0	11	6	11	1
Deny	16	2	8	2	7	3	5	2
Defer	0	0	0	0	0	0	1	0
No action	0	0	0	0	0	0	0	0
Other	5	2	1	0	0	1	1	0
Total	31	9	14	3	26	19	26	6

Table 23: Outcomes of Rulings on Motions for Summary Judgment in Relation to Timing of Rulings on Class Certification

	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
Outcome	Before	After	Before	After	Before	After	Before	After
Granted	1	8	1	2	4	11	2	3
Granted in part	1	4	0	0	1	2	4	1
Denied	6	6	0	5	4	3	2	0
Deferred	0	0	0	0	0	0	2	0
Other	0	0	1	0	2	0	0	1
Total	8	18	2	7	11	16	10	5

Table 24: Percentage of Cases with Rulings on Motions to Dismiss, Motions for Summary Judgment, and Sua Sponte Dismissals

Action	E.D. Pa. (n=121)	S.D. Fla. (n=72)	N.D. Ill. (n=117)	N.D. Cal. (n=107)
Motions to dismiss	61	31	63	48
Sua sponte dismissals	7	12	12	12
Motions for summary judgment	35	13	31	22
Cases with at least one ruling regarding dismissal or summary judgment	81 (67%)	48 (67%)	85 (73%)	64 (60%)
Cases with both a dismissal ruling and a summary judgment ruling	22 (18%)	8 (11%)	21 (18%)	17 (16%)

Table 25: Outcome of Rulings on Motions to Dismiss

Outcome of Motion to Dismiss	E.D. Pa. (n=61)	S.D. Fla. (n=31)	N.D. Ill. (n=62)	N.D. Cal. (n=48)
Dismissed entire complaint	26% (16 cases)	39% (12 cases)	42% (26 cases)	48% (23 cases)
Dismissed one or more claims or parties	21% (13 cases)	10% (3 cases)	34% (21 cases)	29% (14 cases)
Denied the motion	38% (23 cases)	45% (14 cases)	22% (14 cases)	19% (9 cases)
Other	15% (9 cases)	6% (2 cases)	2% (1 case)	4% (2 cases)

Table 26: Outcome of Summary Judgment Rulings

Outcome	E.D. Pa. (n= 35)	S.D. Fla. (n=13)	N.D. Ill. (n=31)	N.D. Cal. (n=22)
Granted in whole	12 (34%)	4 (31%)	17 (55%)	8 (36%)
Granted in part	7 (20%)	1 (8%)	4 (13%)	6 (27%)
Denied	13 (37%)	7 (54%)	8 (26%)	5 (23%)
Deferred	0 (0%)	0 (0%)	0 (0%)	2 (9%)
Other	3 (9%)	1 (8%)	2 (6%)	1 (5%)

Table 27: Cases Closed as a Result of a Ruling on a Motion to Dismiss or Summary Judgment

Ruling	E.D. Pa. (n=117)	S.D. Fla. (n=72)	N.D. Ill. (n=116)	N.D. Cal. (n=102)
Dismissal	24 (20%)	14 (19%)	20 (17%)	18 (18%)
Summary judgment	16 (14%)	6 (8%)	19 (16%)	11 (11%)
Subtotal	40 (34%)	20 (27%)	39 (33%)	29 (28%)
Minus duplicate cases	–3 (–3%)	–1 (–1%)	–3 (–3%)	0 (0%)
Total	37 (31%)	19 (26%)	36 (30%)	29 (28%)

Table 28: Median Times (in Months) from Filing of Complaint to Filing of First Motion to Dismiss and from Filing of First Motion to Dismiss to the First Ruling on a Motion to Dismiss

Time	E.D. Pa.	S.D. Fla.	N.D. Ill.	N.D. Cal.
Median time from complaint to first motion to dismiss	2.4	2.5	2.7	4.2
Median time from first motion to dismiss to first ruling	3.1	7.4	3.8	2.6
75th percentile of time from first motion to dismiss to first ruling	4.7	13.7	8.6	5.4

Table 29: Median Times (in Months) from Filing Complaint to Filing of First Motion for Summary Judgment and from Filing of First Motion for Summary Judgment to First Ruling on Summary Judgment

Time	E.D. Pa.	S.D. Fla.	N.D. Ill.	N.D. Cal.
Median time from complaint to first motion for summary judgment	7.8	9.6	12.2	12.2
Median time from first motion for summary judgment to first ruling	3.7	7.4	9.0	3.5
75th percentile of time from first motion for summary judgment to first ruling	7.9	15.4	16.8	5.2

Table 30: Number of Cases with Simultaneous Motion to Certify and Approve Settlement and Nature of Suit

Nature of Suit	E.D. Pa. (n=7)	N.D. Ill. (n=7)	N.D. Cal. (n=14)
Torts–other fraud	0	0	1
Antitrust	0	1	0
Civil rights–prisoner	1	0	0
Civil rights–accommodations	0	0	1
Civil rights–other	4	1	1
Racketeer Influenced and Corrupt Organization Act (RICO)	1	0	0
Labor laws–other litigation	0	0	1
Employee Retirement Income Security Act (ERISA)	0	0	2
Securities	0	1	8
Other statutory actions	0	4	0
Contract: insurance	1	0	0

Table 31: Number of Certified Cases With and Without a Simultaneous Settlement and Type of Class

	Federal Rule of Civil Procedure			
Case type	23(b)(1)(A)	23(b)(1)(B)	23(b)(2)	23(b)(3)
With simultaneous settlement	4	2	8	17
Without simultaneous settlement	11	8	18	36

Table 32: Number of Certified Cases with Motions to Reconsider or Decertify and Outcome

Outcome	E.D. Pa. ($n=11$)	S.D. Fla. ($n=1$)	N.D. Ill. ($n=6$)	N.D. Cal. ($n=5$)	Total
Certification affirmed	5	0	3	1	9
Certification reversed	1	0	0	0	1
Certification modified	0	0	1	1	2
Reconsideration denied	2	1	1	1	5
Reconsideration deferred	0	0	0	1	1
No action taken	1	0	0	1	2
Other	2	0	1	0	3

Table 33: Number of Oppositions to Certification and Nature-of-Suit Categories

Nature of Suit	E.D. Pa. ($n=50$)	S.D. Fla. ($n=21$)	N.D. Ill. ($n=45$)	N.D. Cal. ($n=25$)
Stockholders suits	0 (0%)	0 (0%)	0 (0%)	1 (4%)
Other contract actions	1 (2%)	2 (10%)	1 (2%)	1 (4%)
Contract product liability	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Torts–marine	0 (0%)	1 (5%)	0 (0%)	1 (4%)
Torts–motor vehicle–product liability	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Personal injury–medical malpractice	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Personal injury–product liability	1 (2%)	0 (0%)	1 (2%)	0 (0%)
Torts–other fraud	1 (2%)	0 (0%)	3 (7%)	0 (0%)
Torts–truth in lending	0 (0%)	0 (0%)	1 (2%)	0 (0%)
Torts–other personal property damage	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Antitrust	2 (4%)	0 (0%)	0 (0%)	2 (8%)
Withdrawal	0 (0%)	1 (5%)	0 (0%)	0 (0%)
Other civil rights	7 (14%)	2 (10%)	10 (22%)	2 (8%)

(cont.)

Table 33: Number of Oppositions to Certification and Nature-of-Suit Categories (continued)

Nature of Suit	E.D. Pa. (n=50)	S.D. Fla. (n=21)	N.D. Ill. (n=45)	N.D. Cal. (n=25)
Civil rights–jobs	5 (10%)	1 (5%)	4 (9%)	2 (8%)
Civil rights–accommodations	2 (4%)	1 (5%)	0 (0%)	1 (4%)
Civil rights–welfare	2 (4%)	0 (0%)	1 (2%)	0 (0%)
Racketeer Influenced and Corrupt Organization Act (RICO)	2 (4%)	0 (0%)	2 (4%)	1 (4%)
Prisoner–civil rights	2 (4%)	4 (19%)	2 (4%)	0 (0%)
Labor/Management Relations Act	0 (0%)	0 (0%)	1 (2%)	0 (0%)
Other labor litigation	0 (0%)	1 (5%)	1 (2%)	0 (0%)
Employee Retirement Income Security Act (ERISA)	5 (10%)	3 (14%)	6 (13%)	1 (4%)
Securities	13 (26%)	4 (19%)	7 (16%)	11 (44%)
Social security–black lung	1 (2%)	0 (0%)	0 (0%)	0 (0%)
Social Security–Social Security Disability Income, Title XVI	0 (0%)	0 (0%)	1 (2%)	0 (0%)
Tax suits	0 (0%)	0 (0%)	0 (0%)	1 (4%)
Other statutory actions	2 (4%)	1 (5%)	3 (7%)	1 (4%)
Constitutionality of state statutes	0 (0%)	0 (0%)	1 (2%)	0 (0%)

Table 34: Number of Oppositions to Certification and Nature of Suit for All Categories of Civil Rights, Securities, and ERISA Cases

Nature of Suit	E.D. Pa. (n=50)	S.D. Fla. (n=21)	N.D. Ill. (n=45)	N.D. Cal. (n=25)
All civil rights	16 (32%)	4 (19%)	15 (33%)	5 (20%)
Securities	13 (26%)	4 (19%)	7 (16%)	11 (44%)
Employee Retirement Income Security Act (ERISA)	5 (10%)	—	6 (13%)	—
Prisoner–civil rights	—	4 (19%)	—	—

Table 35: Class Notice of Certification or Settlement Issued in Certified Class Actions by Type

Type of Class	E.D. Pa. (n=53)	S.D. Fla. (n=13)	N.D. Ill. (n=51)	N.D. Cal. (n=35)
23(b)(1)(A)	100% (3)	0% (0)	75% (3)	0% (0)
23(b)(1)(B)	0% (0)	0% (0)	80% (4)	100% (2)
23(b)(2)	60% (12)	100% (3)	45% (5)	100% (5)
23(b)(3)	88% (21)	100% (11)	92% (24)	96% (22)
No type specified	60% (3)	0% (0)	67% (4)	73% (8)

Note: Some cases were certified under more than one subsection.

Table 36: Type of Notice in Certified (b)(3) Class Actions

Type of Notice	E.D. Pa. (n=24)	S.D. Fla. (n=11)	N.D. Ill. (n=26)	N.D. Cal. (n=23)
Personal	21	11	23	21
Publication	15	9	15	15
Broadcast	0	1	0	1
Other (e.g., posting)	2	1	2	3
No notice	3	0	2	1

Note: Most cases used more than one type of notice.

Table 37: Intervention Success Rates for Various Nature of Suit Categories

Nature of Suit	Attempted	Granted	Percentage Granted
Contract	2	0	0
Product liability–medical malpractice	1	1	100
Fraud personal property	2	1	50
Antitrust	3	2	67
Other civil rights	2	0	0
Jobs–civil rights	2	1	50
Welfare–civil rights	2	2	100
Racketeer Influenced and Corrupt Organization Act (RICO)	1	0	0
Employee Retirement Income Security Act (ERISA)	1	1	100
Securities, commodities, exchange	7	4	57
Social security	1	1	100
Other statutory actions	2	0	0
Constitutionality of state statutes	1	0	0

Table 38: Types of Objections Raised During Settlement Approval Process as a Percentage of All Settlement Hearings

Type of Objection	E.D. Pa. (n=35)	S.D. Fla. (n=14)	N.D. Ill. (n=36)	N.D. Cal. (n=32)
Insufficient compensation	20% (7)	0% (0)	17% (6)	6% (2)
Insufficient deterrence	3% (1)	0% (0)	3% (1)	6% (2)
Representation parties favored	3% (1)	0% (0)	8% (3)	0% (0)
Groups unfairly disfavored	11% (4)	7% (1)	3% (1)	3% (1)
Collusion with opposing party	3% (1)	7% (1)	6% (2)	0% (0)
Attorneys' fees disproportionate	17% (6)	21% (3)	14% (5)	22% (7)
Other	29% (10)	14% (2)	44% (16)	25% (8)
No objection	51% (18)	64% (9)	42% (15)	60% (19)

Table 39: Outcomes of Certified and Noncertified Cases

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Certified (n=36)	Not Certified (n=64)	Certified (n=6)	Not Certified (n=59)	Certified (n=35)	Not Certified (n=65)	Certified (n=16)	Not Certified (n=67)
Dismissed on motion	5 (14%)	23 (36%)	0	22 (37%)	4 (11%)	28 (43%)	0	23 (34%)
Summary judgment granted	2 (5%)	10 (16%)	1 (17%)	4 (7%)	7 (20%)	10 (15%)	2 (13%)	7 (10%)
Judgment after bench trial	1 (3%)	0	0	1 (2%)	0	1 (2%)	0	0
Judgment after jury trial	2 (5%)	1 (2%)	0	0	2 (6%)	1 (2%)	0	1 (1%)
Default judgment	0	1 (2%)	0	0	0	0	0	0
Voluntary dismissal by plaintiff	0	4 (6%)	0	9 (15%)	0	10 (15%)	0	4 (6%)
Stipulated dismissal	1 (3%)	12 (19%)	0	9 (15%)	0	7 (11%)	0	18 (27%)
Nonclass settlement approved	0	4 (6%)	0	4 (7%)	1 (3%)	8 (12%)	0	2 (3%)
Class settlement approved	23 (62%)	1 (2%)	6 (100%)	0	25 (71%)	0	14 (88%)	4 (6%)
Other (e.g., case transferred)	3 (8%)	12 (19%)	0	12 (20%)	2 (6%)	7 (11%)	0	8 (12%)

Note: Cases certified for settlement purposes only are not included.

Table 40: Settlement of Certified Class Actions Compared with Settlement of Cases with Class Allegations that Were Not Certified

Outcome	E.D. Pa.		S.D. Fla.		N.D. Ill.		N.D. Cal.	
	Certified (n=36)	Not Certified (n=64)	Certified (n=6)	Not Certified (n=59)	Certified (n=35)	Not Certified (n=65)	Certified (n=16)	Not Certified (n=67)
Stipulated dismissal	1 (3%)	12 (19%)	0	9 (15%)	0	7 (11%)	0	18 (27%)
Nonclass settlement approved	0	4 (6%)	0	3 (5%)	1 (3%)	8 (12%)	0	2 (3%)
Class settlement approved	23 (62%)	1[a] (2%)	6 (100%)	0	25 (66%)	0	14 (88%)	4 (6%)
Total	65%	27%	100%	20%	69%	23%	88%	36%

Note: Cases certified for settlement purposes only are not included.

[a]Case involved some class relief but not a class certification, either explicitly or implicitly.

Table 41: Disposition by Motion or Trial of Certified Cases Compared with Cases with Class Allegations Not Certified

Outcome	E.D. Pa. Certified ($n=36$)	E.D. Pa. Not Certified ($n=64$)	S.D. Fla. Certified ($n=6$)	S.D. Fla. Not Certified ($n=59$)	N.D. Ill. Certified ($n=35$)	N.D. Ill. Not Certified ($n=65$)	N.D. Cal. Certified ($n=16$)	N.D. Cal. Not Certified ($n=67$)
Dismissal on motion	5 (14%)	23 (36%)	0	22 (37%)	4 (11%)	28 (43%)	0	23 (34%)
Summary judgment granted	2 (6%)	10 (16%)	1 (17%)	4 (7%)	7 (20%)	10 (15%)	2 (13%)	7 (10%)
Judgment after bench trial	1 (3%)	0	0	1 (2%)	0	1 (2%)	0	0
Judgment after jury trial	2 (6%)	1 (2%)	0	0	2 (6%)	1 (2%)	0	1 (1%)
Total	29%	54%	17%	46%	37%	62%	13%	45%

Note: Cases certified for settlement purposes only are not included.

Table 42: Time from Ruling on Certification to Filing of Settlement in Certified, Settled Class Actions

Category	E.D. Pa. ($n=43$)	S.D. Fla. ($n=13$)	N.D. Ill. ($n=40$)	N.D. Cal. ($n=30$)
25th percentile	1.9 months	11.2 months	0 months	0 months
Median	9.2 months	18.9 months	15.6 months	14.7 months
75th percentile	14.5 months	41.5 months	36 months	22.6 months
Settlement filed before class certification	10 cases (23%)	7 cases (54%)	6 cases (15%)	11 cases (37%)
No data available	4 cases	0 cases	3 cases	0 cases

Table 43: Jury Trials

Caption, Docket No., and District	Class Status	Nature of Suit	Days of Trial	Outcome of Trial	Results on Appeal
Hoxworth v. Blinder, No. 88-285, E.D. Pa.	Certified (b)(3)	Securities	1	Default judgment for plaintiff class	Affirmed; remanded for settlement
Melendez v. Illinois Bell Telephone Co., No. 90-5020, N.D. Ill.	Not certified (b)(2) & (b)(3)	Title VII	8[a]	Injunction and damages for individual plaintiff; partial summary judgment for defendant[a]	Appeal dismissed
Jacobs v. Information Resources, No. 89-3772, N.D. Ill.	Certified[b]	Contracts	20	For defendant against plaintiff class	Affirmed
In re Atlantic Financial, No. 89-645, E.D. Pa.	Certified (b)(3)	Securities	12	For defendant against plaintiff class	Appeal dismissed
Ceisler v. First Pennsylvania Corp., No. 89-9234, E.D. Pa.	Certified (b)(3)	Securities	11	For defendant against plaintiff class	Affirmed
Schwartz v. System Software, No. 91-1154, N.D. Ill.	Certified (b)(3)	Securities	10	For defendant against plaintiff class	Affirmed
Bd. of Managers v. West Chester Areas, No. 92-3407, E.D. Pa.	Not certified (b)(2)	Civil rights	4	Directed verdict for defendant against individual plaintiff	Reversed in part; affirmed in part
Igo v. County of Sonoma, No. 90-352, N.D. Cal.	Not certified[b]	Civil rights	3	For defendant against individual plaintiff	Appeal dismissed
Stender v. Lucky Stores, No. 88-1467, N.D. Cal.	Certified (b)(2)&(b)(3)	Title VII	44[a]	Parties settled after finding for one subclass[a]	No appeal
Pucci v. Litwin, No. 88-10923, N.D. Ill.	Not certified (b)(3)	Securities	4	Parties settled	No appeal

[a]Combination bench and jury trial.

[b]Rule 23(b) type not specified.

Table 44: Bench Trials

Caption, Docket No., and District	Class Status	Nature of Suit	Days of Trial	Outcome of Trial	Results on Appeal
Packard v. Provident Nat'l. Bank, No. 91-5229, E.D. Pa.	Certified (b)(1)(A)&(B); (b)(2)	Personal property damage	4	For individual plaintiff after prior class settlement	Vacated; remanded for dismissal
Hedges v. Wauconda Community, No. 90-6604, N.D. Ill.	Not certified[a]	Civil rights	2	For individual plaintiff	Vacated in part; remanded
Dowling v. Commonwealth of Pennsylvania, No. 88-7568, E.D. Pa.	Certified (b)(2)	Civil rights	20	For defendant against plaintiff class and individual plaintiff	No appeal
Berndt v. Budget Rent-A-Car, No. 91-8294, N.D. Ill.	Not certified[a]	Civil rights	5	For defendant against individual plaintiff	No appeal
Williams v. Cordis Corp., No. 91-484, S.D. Fla.	Not certified (b)(3)	Employee Retirement Income Security Act (ERISA)	3	For defendant against individual plaintiff	No appeal
Mateo v. M/S KISO, No. 90-2357, N.D. Cal.	Not certified (b)(1),(2) & (3)	Personal injury	NA	For defendant against individual plaintiff	Affirmed
Merrill Drydock v. Longkeel, No. 90-2238, S.D. Fla.	Not certified[b] (b)(3)	Contracts	8	Parties settled (appeal on damages)	Appeal dismissed
Buttino v. FBI, No. 90-1639, N.D. Cal.	Certified (b)(2)	Civil rights	3	Parties settled after finding for plaintiff on liability	No appeal

Note: NA = not available.

[a]Rule 23(b) type not specified.

[b]Motion for certification of defendant class denied.

Table 45: Means and Medians for Fee Awards as Percentage of Gross Settlement Costs in Certified Cases with Court-Approved Settlements Providing No Net Monetary Distribution to Class

No Net Monetary Distribution to Class	E.D. Pa. ($n=16$)	S.D. Fla. ($n=2$)	N.D. Ill. ($n=16$)	N.D. Cal. ($n=4$)
Fee awards as percentage of gross settlement costs:				
Mean	96%	88%	91%	80%
Median	100%	88%	98%	100%
Maximum	100%	100%	100%	100%
Minimum	63%	77%	50%	21%
Fee awards:				
Mean award	$911,250	$171,948	$351,638	$1,826,288
Median award	$86,002	$171,948	$60,000	$1,676,076
Gross settlement costs:				
Mean amount	$915,812	$197,500	$357,566	$1,877,538
Median amount	$101,000	$197,500	$80,197	$1,676,076

Note: This table shows the thirty-eight cases where the only monetary distribution was for payments to class representatives, attorneys' fees, or administrative expenses. In addition to these thirty-eight cases, in fourteen certified cases (seven, one, four, two cases in the four districts, respectively), there was no record of a fee request or a fee award and court-approved settlements provided no net monetary distribution to the class. "Net monetary distribution" is net of attorneys' fees and administrative expenses. "Fee award" equals the total amount of fees awarded to plaintiffs' counsel, excluding sanctions and out-of-pocket expenses. "Gross settlement costs" include the following payments by defendants to fund the settlement where applicable: payments to class representatives, attorneys' fees and expenses, and administrative costs of the settlement such as notice costs.

Table 46: Certified, Settled (b)(3) Classes with No Monetary Distribution to the Class

Caption, Docket No., and District	Class Definition	No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (Method)
Brownell v. State Farm Mutual Auto Ins., No. 90-2224 (E.D. Pa. filed Mar. 29, 1990).	All insureds who submitted a medical payment claim for personal injuries	1.4 M	None indicated	Defendant agreed (1) not to use written criteria with respect to the duration, frequency, cost, and type of treatment without disclosing such criteria; and (2) not to compensate peer reviewers on a percentage or contingency fee basis	$225,000 (stipulated)
Assad v. Hibbard Brown & Co., No. 90-7420 (E.D. Pa. filed Nov. 20, 1990).	All who purchased or sold Children's Workshop Limited securities through defendant	Unknown	$6,000	Class members who file claims are to receive certificates of monetary credits to be applied to future transactions with defendant	$50,000 (method not specified; $110,000 requested)
The Lindner Fund, Inc. v. Pollock, No. 91-6901 (E.D. Pa. filed Nov. 4, 1991).	All purchasers of defendant's common stock during class period	Unknown	None indicated	Settlement stated that plaintiffs' counsel reviewed the prospectuses and, based on discovery, stated that there is no good faith basis for asserting that the prospectuses contain any false or misleading statement or omission	$225,000 (stipulated)
Cherkas v. General Motors Corp., No 92-6450 (E.D. Pa. filed Nov. 9, 1992).[a]	Purchasers and owners of specific full-size GM pick-up trucks or chassis cab models	5.7 M	None indicated	Certificates with a face value of $1,000 toward the purchase of a new GM pick-up truck (Notes: personal injury claims were not released; settlement vacated on appeal)	$9.6 M (stipulated)
Cohen v. Alan Bush Brokerage Co., No. 85-8018 (S.D. Fla. filed Jan. 10, 1985).	Purchasers of common stock of Comterm during class period	305	$8,000	Coupons of a total estimated value of $1 million representing a credit for up to 60% of standard commission rates for common stock trading on an agency basis	$168,894 (stipulated up to $420,000; award contingent on number of claims)
Rodriquez v. Township of Dekalb, No. 82-20190 (N.D. Ill. filed Nov. 10, 1982).	All applicants for General Assistance (a local welfare program)	Unknown (notice by posting)	$750	Injunction that all local government administrators adopt and consistently apply written General Assistance standards, maintained in a publicly available manual	$25,000 (method not specified)

(cont.)

Table 46: Certified, Settled (b)(3) Classes with No Monetary Distribution to the Class (continued)

Caption, Docket No., and District	Class Definition	No. of Notices Sent	Total Award to Class Representatives	Nonmonetary Relief	Attorneys' Fee Award (Method)
Harris v. DeRobertis, No. 86-5094 (N.D. Ill. filed July 14, 1986).	All inmates of Cellhouse B-West, Stateville Correctional Center, from 1/8/92 to 1/11/92	Unknown	None indicated	Claims procedure established—inmates could choose $50 payment without proof of injury or up to $3,000 for physical or psychological injuries sustained as a direct result of the lack of heat in the cellblock	$20,000 (method not specified)
Schlansky v. EAC Industries, No. 90-854 (N.D. Ill. filed Feb. 13, 1990).	Purchasers of EAC securities during class period	222	$2,000	40,000 shares of common stock and 370,000 warrants to buy an issue of stock at $4 a share during a five-year period	$200,000 plus 10,000 shares and 30,000 warrants (stipulated)
Aitken v. Fleet Mortgage, No. 90-3708 (N.D. Ill. filed June 28, 1990).	Residential real estate mortgagors with tax and insurance escrows computed by a particular method during the past year	1.58 M	$12,000	Rebates to be paid to current and past mortgage holders using a set formula	$1.35 M (stipulated, based on percentage of recovery)
Wesley v. GM Acceptance Corp., No. 91-3368 (N.D. Ill. filed May 31, 1991).	Illinois GMAC auto lessees who terminated a lease early and were assessed termination fees	848	$3,428	Recalculation of lease termination charges on an actuarial basis for post-settlement terminations; for presettlement terminations, choice of $80 cash or $300 applied to a new consumer lease within a year of the settlement	$127,542 (lodestar; $150,000 requested)
Koerber v. S. C. Johnson & Sons, No. 93-20267 (N.D. Ill. filed Oct. 6, 1993).	All direct and indirect purchasers of Raid or Raid Max during class period	2,418	None indicated	(1) Requiring the defendant Bayer to affirmatively offer a license for Cyfluthrin to all of defendant's competitors on nondiscriminatory terms; (2) provide $1.4 million in promotional benefits to direct purchasers and $6.6 million to indirect (consumer) purchasers	$2.5 M (stipulated)
McKenna v. Sears Roebuck & Co., No. 92-2227 (N.D. Cal. filed June 12, 1992).	All purchasers of auto repairs from any Sears Center during class period of more than four years	1 M	None indicated	(1) Enforcing its policy of satisfaction guaranteed or your money back and (2) establishing a method of distributing $50 coupons toward the purchase of brake calipers, coil springs, master cylinder, or idle arm upon showing proof of prior purchase of such an item	$3 M (stipulated)

Note: M = Millions.

[a]The *General Motors Pick-Up Truck Litigation* (55 F.3d 768 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995)).

Table 47: Injunctive Relief in Certified (b)(2) Cases Providing No Net Monetary Distribution to Class

Caption, Docket No., and District	Injunctive Relief	Fee Award
Bonsall Village v. Patterson, No. 90-457, E.D. Pa.	Modifying a township's zoning and development plans, encouraging development of an area occupied primarily by minorities	$140,000
Bozzi v. Sullivan, No. 90-2580, E.D. Pa.	Readjudicating claims for widow, widower, survivor and disability benefits using appropriate regulations	$167,500
Packard v. Provident Nat'l Bank, No. 91-5229, E.D. Pa.	Establishing a grievance-arbitration procedure allowing class members to challenge a bank's "sweep fees" applied to investment accounts	$90,000
Avery v. City of Philadelphia, No. 92-7024, E.D. Pa.	Replacing the psychological examination process for police officer applicants, giving class members an opportunity for psychological reexamination	$49,000
Williams v. Philadelphia Housing Authority, No. 92-7072, E.D. Pa.	Establishing a housing authority's policy that applicants will not be determined ineligible for Section 8 housing solely on the basis of a related debt to the housing authority unless that debt is the legal responsibility of the applicant; providing hearing/review procedures for applicants who disagree with authority's findings	$20,558
Felix v. Sullivan, No. 92-7376, E.D. Pa.	Changing the services offered under pharmaceutical, dental, and other medical plans for all state residents who receive medical assistance benefits	$3,997
Brooks v. Philadelphia Housing Authority, No. 93-232, E.D. Pa.	Requiring a housing authority to rewire certain housing units and install a separate meter for common area electric service	$6,624
Keith v. Daley, No. 84-5602, N.D. Ill.	Entering a consent decree (1) that allows the state to regulate abortions and (2) that protects women's right to choose an abortion and receive family planning services	$224,810
Bogard v. Duffy, No. 88-2414, N.D. Ill.	Improving treatment resources and placement opportunities for developmentally disabled Medicaid recipients	$682,681
Castaneda v. Greyhound Retirement and Disability Plan, No. 88-4184, N.D. Ill.	Refraining from denying claims for return of individual contributions to a pension plan	$75,000
Blum v. Icul Service Corp., No. 93-4399, N.D. Ill.	Agreeing that no letter shall be sent threatening consequences for failure to pay a debt before the 30-day validation period during which the alleged debtor may challenge the claim	$10,000
Hiestand v. Schillerstrom, No. 93-6657, N.D. Ill.	Agreeing to modify defendant's collection letter so that no letter is sent demanding payment until after the applicable validation period has expired	$5,500
Buttino v. FBI, No. 90-1639, N.D. Cal.	Adopting Federal Bureau of Investigation policy that "sexual orientation or preference may not be considered as a basis for a negative factor in determining one's suitability for employment"	$53,000

Table 48: Donations to Charitable or Public Interest Organizations in Certified Cases with Court Approved Settlements

Caption, Docket No., and District	Distribution for Charitable Purposes
N.D. Ill.	
M&M v. Chicago Bd. Options, No. 88-02139	*Cy pres* grants to: Chicago-Kent College of Law—$14,000; DePaul Univ. Law School—$35,000; John Marshall Law School—$35,000; Public Interest Law Initiative—$10,500; Illinois Institute of Technology—$20,000; Loyola Univ. of Chicago—$19,000.
In re Clozapine Anti-Trust Litigation, No. 91-2431	(1) Discount credits with a value of $3 million to be used by mental health agencies of thirty-four states to treat patients who do not otherwise qualify for Medicaid benefits for therapy using the drug Clozapine; (2) additional $3 million to the National Organization for Rare Diseases (NORD) for treating new Clozaril patients not otherwise qualified for Medicaid reimbursement; and (3) a 15% rebate (to be distributed through NORD) for purchases, over a two-year period, of the drug Clozaril by patients on Social Security Disability Income.
In re Scouring Pads, No. 93-6594	$150,000 to Chicago Bar Foundation for specified programs on domestic abuse, juvenile justice, and tutoring/mentoring.
N.D. Cal.	
Lucky Stores No. 88-01467	A specified donation to a nonprofit organization in a Title VII employment discrimination case.
In re G.E. Energy Choice Light Bulb Consumer Litig., No. 92-4447	Any money remaining in a rebate and coupon settlement fund to an unspecified charity.

Table 49: Reversals and Remands in Cases with Previously Certified Class

	Cherkas v. General Motors Corp., Case No. 92-06450, E.D. Pa.	Packard v. Provident Nat'l. Bank, Case No. 91-05229, E.D. Pa.	Berman v. Int'l Controls Corp., Case No. 88-06206, S.D. Fla.	Bennett v. Bombela, Case No. 83-00480, N.D. Ill.	Harris v. DeRobertis, Case No. 86-05094, N.D. Ill.	Castaneda v. Greyhound Retirement and Disability Plan, Case No. 88-04184, N.D. Ill.	Untermeyer v. Margolis, No. 87-5491, Case No. 87-05491, N.D. Cal.
Issues on appeal	Certification of settlement class; settlement approval; class counsel fees	Bench trial award of punitive damages for individual plaintiff after class settlement	Summary judgment for defendants	Second of two summary judgments for defendants[a]	Case dismissal for failure to state a claim	Summary judgment on liability; declaratory judgment for plaintiff class	Summary judgment for defendants
Appeal filed by	Objecting class members	Defendants	Plaintiffs	Plaintiffs	Plaintiffs	Defendants	Plaintiffs
Outcome of appeal	Vacated; remanded	Vacated; remanded for case dismissal for lack of subject matter jurisdiction	Reversed in part; vacated in part	Reversed; remanded	Reversed; remanded	Reversed summary judgment; remanded	Affirmed in part; reversed in part; remanded with respect to claims against auditors
Eventual outcome of case	Pending[b]	Case dismissed	Court-approved class settlement	Court-approved class settlement	Court-approved class settlement	Court-approved class settlement	Pending[b]

[a]Prior to class certification, the court of appeals reversed and remanded the first summary judgment for defendants.

[b]On remand after the study's cutoff date of June 30, 1994.

Table 50: Reversals and Remands in Cases with No Class Previously Certified

	Bd. of Managers v. West Chester Areas, Case # 92-03407, E.D. Pa.	Baby Neal v. Casey, Case # 90-02343, E.D. Pa.	O'Neill v. City of Philadelphia, Case # 91-06759, E.D. Pa.	Flores v. Carnival Cruise, Case # 92-02766, S.D. Fla.	Grant v. U.S. Parole Comm., Case # 92-00484, S.D. Fla.	Joaquim v. Royal Caribbean, Case # 92-02767, S.D. Fla.
Cert. ruling preappeal	Yes (not certified)	Yes (not certified)	Yes (not certified)	No ruling	Yes (not certified)	Yes (not certified)
Issues on appeal	Directed verdict for defendants	Denial of class certification; partial summary judgment for defendants; stipulated judgment against named plaintiffs	Appeal #1: Denial in part of defendants' motion for summary judgment Appeal #2: Partial summary judgment for defendant	Summary judgment for defendants	Dismissal of case	Dismissal of case
Appeal filed by	Plaintiffs	Plaintiffs	#1: Defendants #2: Plaintiffs	Plaintiffs	Plaintiffs	Plaintiffs
Outcome on appeal	Reversed in part; affirmed in part; remanded	Reversed; remanded (without review of partial summary judgment	#1: Vacated; remanded for dismissal of case #2: Appeal dismissed	Affirmed in part; reversed in part; remanded on compensatory claim	Affirmed in part; reversed in part	Reversed in part; vacated in part
Class certification after remand	No	No	No	No	No	No
Eventual outcome of case	Case dismissal	Case dismissal	Case dismissal	Pending[b]	Case dismissal	Pending[b]

(cont.)

Table 50: Reversals and Remands in Cases with No Class Previously Certified (continued)

	Bennett v. Bombela, Case # 83-00480, N.D. Ill.	Retired Chicago Police v. City of Chicago, Case # 90-00407, N.D. Ill.	Hedges v. Wauconda Community, Case # 90-06604, N.D. Ill.	Twenty-First Century v. Sherwood, Case # 87-05774, N.D. Cal.	Adesanya v. West America Bank, Case # 88-04342, N.D. Cal.	Miller v. Pacific Lumber Col, Case # 89-03500, N.D. Cal.	Vandenbosch v. Georgia Pacific Corp., Case # 90-00389, N.D. Cal.
Cert. ruling preappeal	No ruling	Yes (not certified)	No ruling	No ruling	No ruling	Yes (not certified)	No ruling
Issues on appeal	First of two summary judgments for defendants[a]	Denial of motion for class certification and inter-vention; dismissal of case	Permanent injunction against defendants and nominal damages for individual plaintiffs	Partial summary judgment for defendants; denial of plaintiffs' summary judgment motion	Dismissal of certain claims	Denial of class certification; dismissal of certain class representatives; partial summary judgment for defendant; disqualification of plaintiffs' counsel	Summary judgment for defendants
Appeal filed by	Plaintiffs	Plaintiffs; intervenors	Defendants	Plaintiffs	Plaintiffs	Plaintiffs	Plaintiffs
Outcome on appeal	Reversed; remanded	Affirmed in part (including affirmed of denial of class certification); reversed in part; remanded	Vacated injunction and damages; remanded on damages	Reversed; remanded	Affirmed in part; reversed in part; remanded	Reversed in part; remanded in part; affirmed disqualification of counsel	Affirmed in part; reversed in part; remanded
Class certification after remand	Yes	No	No	Yes	No	No	No
Eventual outcome of case	Court-approved class settlement[b]	Pending[b]	$1 to plaintiffs; case dismissal	Court-approved class settlement	Case dismissal	Case dismissal	Case dismissal stipulated by parties

[a] The second remand after appeal is shown in Table 49.

[b] On remand after the study's cutoff date of June 30, 1994.

Table 51: Issues and Dispositions on Appeal in E.D. Pa. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=36 appeals in 31 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
2	Defendant	Certification of class	1 affirmed; 1 not reviewable
1	Defendant	Default judgment for plaintiff	1 affirmed
1	Defendant	Denial in part of summary judgment	1 vacated, remanded for dismissal
1	Defendant	Denial of arbitration	1 affirmed
1	Defendant	Bench trial judgment for plaintiff	1 vacated, remanded for dismissal
1	Defendant	Motion for stay	1 affirmed
1	Defendant	Preliminary injunction	1 affirmed
1	Defendant	Summary judgment for plaintiff	1 affirmed
1	Defendant	Denial of partial summary judgment	1 appeal dismissed
11	Plaintiff	Dismissal of case	9 affirmed; 2 appeals dismissed
5	Plaintiff	Summary judgment for defendant	3 affirmed; 2 appeals dismissed
3	Plaintiff	Partial summary judgment for defendant	1 affirmed; 1 reversed and remanded; 1 vacated, remanded for dismissal
2	Plaintiff	Order deeming dismissal motion to be summary judgment motion; issue not available	1 appeal dismissed as interlocutory; 1 affirmed
2	Plaintiff	Taxation of defendant's costs	2 affirmed
1	Plaintiff	Directed verdict for defendant	1 reversed in part, affirmed in part
1	Plaintiff	Denial of class certification	1 reversed and remanded
1	Plaintiff	Denial of sanctions	1 appeal dismissed
1	Plaintiff	Dismissal of certain claims	1 appeal dismissed
1	Plaintiff	Verdict for defendant	1 appeal dismissed
1	Objecting class members	Certification of class[a]	1 vacated and remanded
1	Objecting class members	Award of fees to plaintiff counsel[a]	1 vacated and remanded
1	Objecting class members	Settlement approval[a]	1 vacated and remanded
1	Party opposing class	Issue not available	1 withdrawn
1	Proposed intervenors	Denial of intervention	1 affirmed

Note: Some appeals had more than one issue and some cases had more than one appeal.

[a]*General Motors Pick-Up Truck Litigation* (55 F.3d 768 (3d Cir.), *cert. denied,* 116 S. Ct. 88 (1995)).

Table 52: Issues and Dispositions on Appeal in S.D. Fla. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=12 appeals in 11 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
1	Defendant	Dismissal of case	1 appeal dismissed
1	Defendant	Award of fees to plaintiff counsel	1 affirmed
1	Defendant	Judgment for plaintiff after trial	1 appeal dismissed
5	Plaintiff	Dismissal of case	2 affirmed; 1 affirmed in part, reversed in part; 1 appeal dismissed; 1 reversed in part, vacated in part
2	Plaintiff	Summary judgment for defendant	1 affirmed in part, reversed in part; 1 reversed in part, vacated in part
1	Plaintiff	Award of fees to plaintiff counsel	1 affirmed
1	Non-named class member	Award of fees to plaintiff counsel	1 appeal dismissed

Table 53: Issues and Dispositions on Appeal in N.D. Ill. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=56 appeals in 39 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
3	Defendant	Summary judgment for plaintiff	1 affirmed; 1 appeal dismissed; 1 reversed
2	Defendant	Award of fees to plaintiff counsel	1 remanded for reconsideration; 1 pending
2	Defendant	Judgment for plaintiff	1 affirmed in part, vacated in part, and remanded; 1 appeal dismissed
1	Defendant	Petition for writ of mandamus to recuse trial judge	1 petition denied
1	Defendant	Denial of motion to dissolve preliminary injunction	1 appeal dismissed
1	Defendant	Judgment for plaintiff	1 affirmed
1	Defendant	Extension of time for filing plaintiff notice of appeal	1 remanded for settlement

18	Plaintiff	Dismissal of case	10 affirmed; 4 appeals dismissed; 1 reversed and remanded; 1 remanded for settlement; 2 pending

(cont.)

Table 53: Issues and Dispositions on Appeal in N.D. Ill. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=56 appeals in 39 cases) (continued)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
9	Plaintiff	Summary judgment for defendant	6 affirmed; 1 appeal dismissed; 2 reversed and remanded
7	Plaintiff	Dismissal of certain claims	1 affirmed; 5 appeals dismissed; 1 pending
2	Plaintiff	Verdict for defendant	2 affirmed
2	Plaintiff	Partial summary judgment for defendant	1 appeal dismissed; 1 pending
1	Plaintiff	Denial of class certification	1 affirmed
1	Plaintiff	Denial of plaintiff attorneys' fees	1 appeal dismissed
1	Plaintiff	Dismissal of third-party complaint	1 affirmed
1	Plaintiff	Sanctions against plaintiff counsel	1 affirmed
1	Plaintiff	Reduction of plaintiff fee request	1 vacated and remanded
1	Plaintiff	Transfer of case	1 appeal dismissed
1	Plaintiff and proposed intervenor	Denial of injunction	1 affirmed
1	Plaintiff and proposed intervenor	Denial of class certification	1 affirmed
1	Plaintiff and proposed intervenor	Denial of intervention	1 affirmed
1	Plaintiff and proposed intervenor	Summary judgment for defendant	1 affirmed
2	Third-party defendant	Settlement approval	2 appeals dismissed

1	Third-party defendant	Denial of motion for reconsideration	1 appeal dismissed
1	Third-party defendant	Dismissal of third-party defendant's countercomplaint	1 appeal dismissed
1	Proposed intervenor–defendant	Denial of intervention	1 affirmed

Note: Some appeals had more than one issue and some cases had more than one appeal.

Table 54: Issues and Dispositions on Appeal in N.D. Cal. Class Actions Terminated Between July 1, 1992, and June 30, 1994 (n=34 appeals in 23 cases)

No. of Appeals	Appellant	Issue on Appeal	Disposition of Appeal
2	Defendant	Partial summary judgment for plaintiff	1 affirmed; 1 appeal dismissed
1	Defendant	Preliminary injunction	1 appeal dismissed
1	Defendant	Denial of summary judgment	1 affirmed
10	Plaintiff	Dismissal of case	6 affirmed; 3 appeals dismissed; 1 pending
3	Plaintiff	Summary judgment for defendant	1 affirmed; 1 affirmed in part, reversed in part, and remanded; 1 reversed in part, affirmed in part
2	Plaintiff	Partial summary judgment for defendant	1 reversed; 1 reversed and remanded
2	Plaintiff	Judgment for defendant	1 affirmed; 1 appeal dismissed
2	Plaintiff	Denial of motion for reconsideration	1 affirmed in part, reversed in part, and remanded; 1 appeal dismissed
2	Plaintiff	Dismissal of certain claims	1 affirmed; 1 affirmed in part, reversed in part, and remanded
2	Plaintiff	Denial of class certification	1 appeal dismissed; 1 reversed
1	Plaintiff	Denial of injunction	1 appeal dismissed
1	Plaintiff	Denial of in forma pauperis application	1 appeal dismissed
1	Plaintiff	Denial of motion for modification of order	1 appeal dismissed
1	Plaintiff	Denial of motion to disqualify judge	1 appeal dismissed
1	Plaintiff	Denial of motion to vacate dismissal	1 appeal dismissed
1	Plaintiff	Denial of plaintiff attorneys' fees	1 reversed and remanded

1	Plaintiff	Bench trial judgment for defendant	1 affirmed
1	Plaintiff	Summary judgment for opposing class members	1 affirmed
1	Plaintiff	Dismissal of certain class representatives	1 remanded
1	Plaintiff	Disqualification of plaintiff counsel	1 affirmed
1	Objecting class member	Award of fees to plaintiff counsel	1 pending
1	Third-party defendant	Summary judgment for plaintiff	1 affirmed

Note: Some appeals had more than one issue and some cases had more than one appeal.

Table 55: Appeals Involving Certification Issues

	E.D. Pa. Case No. 88-00285		E.D. Pa. Case No. 90-02343	E.D. Pa. Case No. 92-06450	N.D. Ill. Case No. 90-00407	N.D. Ill. Case No. 92-07076	N.D. Cal. Case No. 89-03500	N.D. Cal. Case No. 93-03160
Issues on appeal	Appeal #1: Certification of class; preliminary injunction	Appeal #2: Certification of class; default judgment for plaintiffs	Denial of motion to certify class; partial summary judgment for defendants; stipulated order of judgment against all named plaintiffs on individual claims	Certification of class; class settlement; attorneys' fee award	Denial of motion to certify class; summary judgment for defendants; denial of intervention; denial of preliminary injunction	Denial of motion to certify class; summary judgment for defendants	Denial of motion to certify class; partial summary judgment for defendants	Denial of motion to certify class; denial of injunction
§1292(b) certification for appeal	No	No	No; prior motion for 1292(b) certification was denied		No	No; prior motion for 1292(b) certification was denied	No	No
Appeal filed by	Defendant	Defendant	Plaintiffs	Objecting class members	Plaintiffs and proposed intervenors	Plaintiff	Plaintiffs	Plaintiffs
Outcome of appeal	Injunction vacated; certification decision not reviewable	Affirmed	Reversed; remanded	Vacated; remanded	Affirmed in part (including affirmative of denial of class certification); reversed in part; remanded	Affirmed	Reversed; remanded[a]	Appeal dismissed
Eventual outcome of case	See Appeal #2 (next column)	Court-approved class settlement[b]	Class certified on remand; case pending[b]	Pending[b]	Pending[b]	No class certified; case dismissed	No class certified; case dismissed	No class certified; case dismissed

[a]Court of appeals held certification is reviewable in combination with partial summary judgment for defendant, settlement of rest of individual claims, and entry of judgment against all named plaintiffs on their individual claims. Appellate court did not review the trial court's partial summary judgment decision, but reversed and remanded it because of the reversal of denial of class certification.

[b]On remand after the study's cutoff date of June 30, 1994.

Table 56: Firms Most Frequently Serving as Lead or Co-Lead Counsel (Number of Class Action Cases)

Firm	Firm's Offices	E.D. Pa. Cases	S.D. Fla. Cases	N.D. Ill. Cases	N.D. Cal. Cases	Total No. of Cases
Chimicles Burt et al. (and Greenfield & Chimicles)	Los Angeles, Cal. West Palm Beach, Fla. Haverford, Pa.	7	4[a]	0	6	17[a]
Milberg Weiss	San Diego, Cal. New York, N.Y.	1	1	0	14	16
Berger & Montague	San Francisco, Cal. Philadelphia, Pa.	7	2	0	5	14
Lieff Cabraser	San Francisco, Cal.	1	0	0	7	8
Community Legal Services	Philadelphia, Pa.	8	0	0	0	8
Barrack Rodos	San Diego, Cal. Philadelphia, Pa.	6	0	0	1	7
Stephen F. Gold	Philadelphia, Pa.	5	0	0	0	5
Beeler Schad	Chicago, Ill.	0	0	4	0	4
Cohen, Milstein	Washington, D.C.	0	1	2	1	4
Edelman & Combs	Chicago, Ill.	0	0	4	0	4
Kohn (Nast) Savett	Philadelphia, Pa.	4	0	0	0	4
Lawrence Walner & Assoc.	Chicago, Ill.	0	0	4	0	4

Note: Some firm names changed after they were entered on court records. Each consolidation of cases is counted as one class action case.

[a]Firm was liaison counsel in two additional cases.

Appendix D

Methods

Nature of the Database. The data in this field study report represent a full census of the population of class action cases that were terminated in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal. between July 1, 1992, and June 30, 1994. Unlike the time study data presented to the committee,[358] the field study is not a random sample. It documents all identifiable class action activity in the four districts in cases terminated during the study period and is a sample only in the sense of being limited to that time period.

Selection of Courts. The four courts were selected for the field study on the basis of the level of class action activity shown in the Administrative Office of the U.S. Courts data and on the basis of geography. We undertook to study one court in the eastern, western, midwestern, and southern regions of the country and to study courts that were among the ten courts with the most class action cases filed.[359] We chose the regional approach so that we could examine class actions in different courts, in different circuits, and in different local legal cultures. Our purpose was to study a variety of approaches used by the bench and bar in litigating and adjudicating class actions.

For each case in the study, an attorney–researcher examined pleadings, documents, briefs, orders, affidavits, declarations, and, when available, transcripts. In particular, we looked at rulings on motions to dismiss, motions for summary judgment, all briefs relating to class certification, filings relating to notice and approval of settlement, applications for attorneys' fees, and any orders relating to these matters. For certified class actions, we gathered a complete set of the notices the court approved. These documents are available to researchers who wish to study the notice process.

Identification and Definition of Class Actions. With each court's assistance we conducted various searches for class actions. Our aim was to find all cases with class action allegations in the complaint or with indications of class action activity in the text of docket entries or published opinions. Because of limited resources available for the study we restricted the time period covered and selected all such cases that had been terminated[360] between July 1, 1992, and June 30, 1994.[361] Cases that were consolidated or

358. *See* Willging et al., *supra* note 26.

359. We selected the courts before we discovered a substantial undercount of class action activity in the Administrative Office data, as explained below, in this section.

360. We included in the "terminated" category cases that were closed but had issues pending appeal at the time of our field visit. Our subsequent follow-up on the outcome on appeal determined that, in a few cases,

otherwise grouped were counted as a single case. This approach avoids counting cases more than once when the post-consolidation litigation and rulings took place only once. However, for one purpose in the report, to capture the total number of class action filings, we include the number of cases included in the consolidations (*see supra* § 1(b)).

Our initial search focused on databases provided on tape by the Administrative Office of the U.S. Courts for the five years prior to August 1994. An initial visit to two courts focused on cases identified in the Administrative Office data. In both jurisdictions, a subsequent LEXIS search of published opinions uncovered a large number of class action opinions in cases that were not identified as class actions in the Administrative Office database.

Discovering these cases led us to ask both courts to conduct three searches of their electronic records: one for the class action "flag" that is entered when a case is originally docketed; another for specific "event codes," such as the filing of a motion to certify a class, that identify class action activity; and a final search of the court's electronic docketing system, looking for the word "class."[362] These searches uncovered the majority of the cases in this study.[363] In Table 57 cases in the column "class action allegation" were the only cases identified in the Administrative Office data as class actions. The class action status of all other cases that were eventually included in our study had been recorded in the Administrative Office database as "missing." As Table 57 shows, Administrative Office statistics identified from one-fifth to one-half of the class actions in the four courts.

Table 57: Class Action Status in Administrative Office Data for All Class Actions Terminated Between July 1, 1992, and June 30, 1994

Class Action Status	E.D. Pa. (n=117)	S.D. Fla. (n=72)	N.D. Ill. (n=117)	N.D. Cal. (n=102)
Class Action Allegation	22% (26 cases)	51% (37 cases)	35% (41 cases)	45% (46 cases)
Missing Data	78% (91 cases)	49% (35 cases)	65% (76 cases)	55% (56 cases)

the district court case has been reopened after remand from the court of appeals. Nevertheless, these reopened cases are included in the study because they were closed at the time of our field visit.

361. We chose this period because the advisory committee expressed an interest in recent class action activity, and July 1, 1992, to June 30, 1994, was the most recent period for which data were available. Two years of data represents the longest continuous period that could be studied with the resources available.

362. After identifying a case that appeared to be a class action, an attorney on the research team examined the docket sheet and file. If a case did not include a class action allegation, class certification activity, or class settlement activity, we excluded it from the study.

363. There may be class action cases that would escape identification by these searches, but they would be cases in which there was no detectable docket entry identifying class action activity and in which the initial complaint and cover sheet did not identify the case as a class action. Presumably, such cases, if they exist, would be rare, would have no or negligible class action activity, and would add little to the reader's understanding of class action litigation.

Those data lead to the conclusion that information on class actions reported in the Administrative Office database substantially undercounted class action activity during the study period. Data in our time study report[364] indicated that a substantial, but smaller, undercount occurred during the 1987–1989 time study period. Data from the Federal Judicial Center time study sample and from the Federal Judicial Center study of four courts support the conclusion that in the recent past there were no reliable national data on the number of class action filings and terminations in the federal courts.[365]

The time study. In the Federal Judicial Center's district court time study, district and magistrate judges maintained records of the time they spent on a random sample of 8,320 civil cases filed in 86 U.S. district courts between November 1987 and January 1990. Fifty-one of those cases (0.61%, an incidence of 61 class actions for every 10,000 cases filed) contained class action allegations. A case was defined as a class action either by reference to the case statistics maintained by the Administrative Office (36, or 71%) or, where there was no class action indicator in the Administrative Office statistics, to class action activity in a judge's time records (15, or 29%).[366] For all 51 time study cases, we reviewed docket sheets and case file documents of the type we reviewed in the four study districts, as described above.

Though informative, the time study class action data need to be used with caution. The time study data should be read as descriptive of a small national random sample of class actions. In total, the data are certainly more than anecdotal evidence; however, in many instances, information on important class action activity was available only for a small number of cases per district and these instances should be viewed as anecdotal examples. The time study data should not be thought of as representing the universe of class action activity nation-wide.[367]

Termination cohort limits. The cases studied comprise what is often called a termination cohort, consisting of all cases that terminated within a fixed time. Fluctuations in

364. *See* Willging et al., *supra* note 26, at 1, 4–5. Subsequent to the preliminary time study report, our further analysis of the time study data revealed more evidence of a serious undercount. In February 1995 we examined the published Administrative Office statistics for the period of the time study. Between January 1, 1988, and December 31, 1989, the core period of the time study, Administrative Office data indicate that there were 461,050 cases filed in all of the federal district courts and that 1,069 of these, or 0.23%, were recorded as being class actions. That incidence rate—23 class actions per 10,000 cases—is far lower than the rate of 61 per 10,000 cases found in the time study. *See* Willging et al., *supra* note 27, at 8 n.4.

365. In January 1995 the Administrative Office of the United States Courts began reminding U.S. district courts, on a monthly basis, of the correct procedures for reporting filing and termination data related to class action cases. To the extent that these efforts have resulted in a change in reporting from the courts, beginning in 1995 the reported statistics will more accurately reflect class actions in the courts. For further discussion and documentation of the lack of reliable national data on class action activity, *see* Willging et al., *supra* note 26, at 4–5.

366. One case identified in the Administrative Office data as a class action had no indication on the docket sheet or in the documents in the file that any class action allegations were involved. That case was eliminated from the sample discussed in Willging et al., *supra* note 26.

367. The time study data as a whole, of course, are fully suitable to their intended purpose of assigning case weights to various types of cases that were observed with much greater frequency than class actions. There is no separate case weight for class actions.

case filing rates affect the composition of a termination cohort. For example, if the rate of filing of securities class actions was to have increased abruptly in 1991, terminated securities class actions in our cohort might include more cases of shorter duration (e.g., perhaps more settlements than trials) than if the filing pattern had been steady. We are unable to examine the filing patterns of class actions because, as discussed above, there are no reliable national data on class action filings. But we do know that the filing pattern for all securities cases (class actions and nonclass actions) has been declining steadily at a rate of about 10% a year during the 1990s. And, securities class actions were the largest single nature of suit in our study, comprising 20% to 35% of the cases in the four districts. Other changes in filing patterns may have affected our cohort of cases. If such fluctuations have occurred, they would likely create an error of a few percentage points. Accordingly, our results—particularly on the time from filing to termination, settlement, or ruling on motions—should be viewed as approximations with a margin of error.

Limits of the data. The field study data should be read as descriptive of class action activity solely in the districts and the time period studied. We present these data as a systematic description of such activity, as four snapshots of courts selected because of their level of class action activity and their differences. Activity in one district cannot be generalized to other districts nor, of course, to a universe of class action activity nation-wide.

Appendix C

Rule 23 Challenges to the Rulemaking Process, Professor Edward H. Cooper, reporter to the Advisory Committee on Civil Rules

Rule 23: Challenges to the Rulemaking Process

Introduction

For some time now, the Civil Rules Advisory Committee has been studying the possibility of amending Civil Rule 23. Following suggestions of an American Bar Association Committee, a comprehensive draft was prepared during the time when the Committee was chaired by Judge Sam Pointer. A copy of that draft is attached as an appendix. It seems fair to describe the draft as in many ways a modest revision that would clean up many aspects of the rule, and – through deliberately flexible drafting – leave the way open for some measure of future growth. By now, the draft has been reviewed informally by a goodly number of practicing lawyers, judges, and academics. Reactions have varied. The academics, and to some extent the judges, have viewed the draft as indeed modest, a conservative but worthwhile effort to improve some obvious rough spots that does not attempt to take on the larger or more difficult questions. The practicing lawyers also have tended to view the draft as modest, but believe that the cost of adoption would far exceed the possible benefits. In their eyes, it has taken nearly three decades to beat Rule 23 into a workable instrument, an achievement that would be set back at least a decade if they were given the chance to litigate and strategize about the proposed changes.

These mixed reactions point up the questions that, in the end, are most important: Has the time come to attempt any changes in Rule 23? If so, what – and how dramatic – should they be?

Even this articulation of the questions assumes that it is appropriate to study Rule 23 with an eye to possible improvement. That assumption, at least, seems sound. The unspoken barrier that shielded Rule 23 from Enabling Act scrutiny for many years has come down. Rule 23 was last revised in 1966. The 1966 version of the rule has taken on a life that would have astonished the Advisory

Committee. Answers have been given to many questions that were not, could not, have been foreseen. A comprehensive review of this experience is now appropriate. It would be astonishing if this review were to show that we have, by a common-law process of elaborating Rule 23, developed an ideal class-action procedure. Surely there is room, both here and there, to improve the rule.

The conclusion that this is an appropriate time to study Rule 23 does not mean that this is an appropriate time to change Rule 23. Improvement carries its own costs as lawyers and judges struggle to understand, implement, amplify, and take strategic advantage of the intended changes. And if there is room to improve, there also is room to confuse, weaken, or even do great harm. Perhaps more to the point, seizing the opportunity to make modest improvements today will surely mean that Rule 23 will not be revisited for many years. If more significant or better improvements might be made in five years, or ten, it likely would be better to defer present action. There is no imperative to act once a problem is studied, no shame in inaction. Much depends on the state of present knowledge and the quality of present foresight. Foresight is particularly important, not only in developing wise answers but also in drafting them into a rule that will deliver those answers in the face of determined attempts by adversary lawyers to wrest different answers from it.

A question framed in this way cannot be answered without also determining the measure of risk aversion appropriate to the Enabling Act process. The rulemaking process works best when it generalizes the lessons of actual experience in a smaller arena. That comforting security, however, is not always available. Rule 23 might never be amended if first we must have controlled experiments, or clear empirical measurement of actual local experience with a new provision. The Enabling Act process has often relied successfully on less rigorous evidence. The aggregated experience of all of those engaged in the formal

rulemaking process, as well as the many insights provided by public comment and less formal processes such as this Research Conference, can provide a secure foundation. But judgments can and do differ about the lessons of experience. There are seldom likely to be changes to any rule that do not encounter some risk, however small the rule and the changes may seem. Some risks are properly accepted. If there is a clear problem and no experience-tested solution, real risks may justifiably be run. If there is no clear problem, an esthetic desire to pretty up a rule does not justify any significant risk. The urgency of the need is as important an element as the state of knowledge and quality of foresight.

In many ways, the pending reconsideration of Rule 23 provides a good test of the Enabling Act process. If the process can operate only when there are rigorous and clear answers to the important questions about present experience, Rule 23 must remain out of reach. If the process requires rigorous and clear predictions as to the effects of any changes, Rule 23 is even further beyond our reach. Prediction of the effects of a new rule in comparison to continued judicial evolution of the present rule, to development of other possible methods of aggregation, or to individual litigation, never will be precise. And it is simply impossible to reckon with such questions as the possible impact of new court rules in encouraging or discouraging procedural or substantive lawmaking by Congress or state legislatures.

As if these questions were not difficult enough, it also should be reflected that consideration should extend beyond the federal courts. State courts too are in the class-action business, and many are likely to adapt their rules to the federal rules. It is proper at least to consider the experience of state courts, and to attempt to draft a rule that recognizes the role of state-law claims not only in federal court but also in state courts.

The final caution is that there always is a temptation to do more than really should be done by rule. Even if firm answers can

be found for all the questions, large and small, it is better to avoid complicating the rule with answers to all the small questions. Once the framework is established, judicial evolution may provide good – perhaps better – answers, and can be better than the formal rulemaking process at adapting the answers to changing needs. The Manual for Complex Litigation enjoys similar advantages in helping to shape developing practice.

As to Rule 23, my own mood at the moment is one of optimistic caution. The caution arises from the staggering array of questions any of us can address to the state of present knowledge without receiving clear answers. Many of these questions are described below. Caution also arises from the dramatic new uses that are being made of Rule 23 in dispersed mass injury cases. In that field, a perfect grasp of today's reality would be superseded before it could be captured in a clear rule. The optimism arises from the belief that there are some ways at least in which Rule 23 can be improved without great cost. The optimism also is the shiny back side of a darker view that it will be at least ten years before we know enough to be able to undertake more sweeping changes within the confines of the Rules Enabling Act process.

Big Changes

There are two obvious occasions for potentially big changes in Rule 23, one negative – from the perspective of class action fans – and one positive. The negative changes would seek substantial curtailment of class action practice. The positive changes would seek to capture and perhaps improve the growing efforts to adapt the present rule to the needs of dispersed mass injuries. There also may be room for a third and essentially conceptual change, perhaps not so big but potentially important. This change would recognize openly that the class – amorphous, defined in the end only by judicial fiat – is an entity apart from those who volunteer (or may be coerced) to speak for it. It is, to be sure, a juridically created entity, and must speak through people just as

a corporation must speak through people. But it may help to sharpen the focus on class as client, speaking through one set of agents to another. These possible changes are addressed at the outset, before turning to the more detailed, even niggling questions that may be addressed whatever is done about the larger issues. The big changes will be described in terms that reflect assumptions about current experience that are widely shared but unreliable. One of the most important tasks is to learn more about the realities that underlie these and other assumptions, a task that the Federal Judicial Center is attempting. Reality may be different from perception, and perhaps markedly different. But large questions may provoke more diligent inquiry into reality, and thereby serve a purpose even if the questions prove irrelevant in the real world.

Cutting Back on Rule 23. Virtually all of the current discussion assumes that there is little need even to tinker with the core of (b)(1) and (b)(2) classes. This tacit assumption is hardly surprising. There may be room to change such incidents as notice and the opportunity to opt out. Creation of an opportunity to opt out would provide an indirect means of addressing the conflicts among individual members of the groups that, because of similarities that at times may be only superficial, are assumed to constitute homogeneous classes. But there is no perceived need to rethink the justification for these classes. To the contrary, it is widely assumed that (b)(1) and (b)(2) classes represent the traditional and persistently legitimate core of Rule 23. They also account for a relatively small minority of all class actions.

It may be surprising, on the other hand, that there have been few suggestions that the time has come to rethink the public enforcement function of (b)(3) classes. It is commonly accepted that (b)(3) classes, by providing a means for aggregating small claims that would not bear the cost of individual enforcement, have significantly expanded the effective reach of many substantive

principles. This effect is not beyond examination, both to assess whether it is as pervasive as some observers assert and to determine whether it is desirable. Because the question is not at the front of discussion, it deserves only brief and preliminary expansion.

One consequence of (b)(3) classes can be likened to the "freeway effect." One lesson from the early years of urban freeway construction was that pre-freeway traffic volumes expanded quickly as freeways were opened. Given an opportunity for more convenient driving, more people drove more places. The same consequence flows from procedural devices that aggregate small claims into more convenient litigating units. This effect obviously touches the aggregation court – claims that otherwise would be filed elsewhere are brought to the aggregation court. It is widely believed that beyond this reallocation of business among courts, aggregation also increases the number of claims that are made in any court. It cannot be assumed that the result always is "more justice," even accepting the underlying substantive rules at full value. One obvious risk is that defeat of aggregated claims will obliterate many claims that would have been justly vindicated in individual actions. That this risk is seldom discussed reflects the realistic assumption – of which more later – that aggregation creates a nearly irresistible force to award something to the claimants. Another risk is found in the common cynical observation that individual actions may be brought on ten or twenty percent of valid claims, while aggregated actions may be brought on one hundred and twenty percent of valid claims. Creating aggregating mechanisms that accurately sort out the unfounded individual claims may reduce the values of aggregation substantially.

A more troubling concern is that many of our substantive rules are tolerable only so long as they are not fully enforced. One version of this concern is that full enforcement simply costs more than it is worth. One illustration, not fanciful, is provided by

the class action to recover on behalf of consumers who had been duped into buying recorded music "performed" by a group that lip-synched to a performance by other artists. Putting aside any lingering doubts about the nature of the injury, great cost is incurred in mounting the action, supervising it, possibly deciding it on the merits should settlement fail, and distributing relief. It is a real question whether the cost is justified by the individual benefits of the actual award, or the aggregate benefits from deterring similar behavior. In some settings, these costs can be reduced by finding substitute means of relief – the offending musicians stage a free concert or reduce the price for the next record they actually perform themselves (if anyone will buy it), or a monetary recovery is awarded to a plausibly relevant charity, or whatever.

Whatever ingenuity might devise by way of "fluid," "cy pres," or "class" recoveries, they present a question that can be articulated in at least two ways. The direct mode is to ask whether such dispersed benefits stray too far from the connection that justifies imposing private remedies for private wrongs. The more diffuse mode is to ask whether all substantive principles really merit pervasive enforcement. Many of our substantive principles are tolerable only if they are not fully enforced. I do not offer any examples because each of my examples would offend some, whose counterexamples might at times offend me.

One response to this question would be to inquire whether three decades of experience with broad enforcement of at least some substantive rules through (b)(3) class actions justifies significant retrenchment. The absence of any suggestion that this inquiry should be undertaken may reflect general satisfaction with Rule 23 as a private enforcement means for public values. Surely there are many who do feel satisfied. Perhaps even those who are not satisfied have become reconciled. However that may be, there is a separate problem for the rulemaking process. Rule 23 has

grown into a device with sweeping substantive consequences. Substantive consequences flow from good procedure as well as bad; it is not ground for shrinking from a procedural improvement that it will facilitate more thorough enforcement of substantive principles. It is too late to argue that the 1966 creation of present Rule 23(b)(3) is invalid because of its profound substantive impact. But it would be different to cut back on Rule 23(b)(3) because of concern that it leads to over-enforcement of substantive rules. Revising Rule 23 to cut back its substantive consequences may be as much within the Enabling Act as its original adoption and subsequent amendment, but the motive would be perceived – and correctly so – as a desire to abridge substantive rights as they are now enjoyed. It may seem a paradox, but use of the Enabling Act process to correct its own excesses, even unanticipated excesses, is fraught with real controversy.

Two relatively modest steps might be taken toward cabining the substantive effects of Rule 23. One, by far the simpler, would be to permit consideration of the balance between the need for private enforcement of public values through Rule 23 and the costs of the proceeding. A court might be permitted to conclude that regardless of the merits, certification is inappropriate in light of the effort required to superintend the litigation, the trivial nature of individual benefits, and the insignificant character of the alleged wrong. Using a term perhaps not appropriate for the language of a formal court rule, this approach would enable a court to refuse certification because a class action "just ain't worth it." As compared to the second approach, certification could be denied even on the assumption that the class has a strong claim on the merits.

The second limiting approach, in some ways related, would be to undo present doctrine and permit or require preliminary consideration of the probable outcome on the merits. Although motions to dismiss for failure to state a claim or for summary

judgment are more effective than many have thought in defeating suits brought as class actions, there is genuine concern that very weak claims can survive such preliminary challenges. At least two purposes would be served by looking beyond these devices for means to consider the probable outcome, each reflecting the burdens imposed by class certification. If the class claim is likely to lose, it may be doubted whether a substantial share of scarce judicial resources should be devoted to it. And certification of weak claims can exert a strong pressure to settle, notwithstanding likely failure on the merits, because of the costs of defending a class action and even a small risk of a large judgment.

It is tempting to analogize preliminary consideration of the merits to the approach taken in deciding whether to issue a preliminary injunction. The comfort provided by this analogy unfortunately proves illusory on examination. Each of the factors in the familiar injunction formula must be considered differently. This should be no surprise, since the function of the inquiry differs in the two settings. The primary objective of a preliminary injunction is to preserve the opportunity to grant effective relief after trial, to preserve a meaningful opportunity to resolve the claim on the merits. The primary objective of refusing certification for class pursuit of claims that do not bear the freight of individual litigation is to protect against the burdens and corresponding pressures of class action litigation. This difference affects each of the four familiar factors.

There is no reason to suppose that the threshold probability of success on the merits should be measured in the same way in the two settings. At the outset, the preliminary injunction question is likely to be addressed at the beginning of the litigation on the basis of procedures affected by the need for promptness; more deliberate procedures, often including controlled discovery, are likely to be available in addressing the class certification question. More important, the required level of probability is

likely to fluctuate around a lower point in the class certification setting, particularly when it seems highly probable that individual claims never will be resolved on the merits absent certification. Reducing the required probability of success also seems justified by the differences in consequences between class certification and preliminary relief, as reflected in the remaining three factors.

The harm of denying relief must be measured in the class setting more by appraising the merits of the class claim than by the real-world impact of ongoing conduct that might be controlled by injunction. It also is possible to develop a test that considers not only the prospect of class success but also the importance of class success, akin to the first suggestion. If little individual harm is done by denying relief, a relatively strong prospect of success might be demanded.

The harm of granting relief must be measured in the class setting by the burdens of the class litigation process and the pressure to settle out of the litigation burdens, again not the real-world impact of controlling primary human activity. The importance of class success affects this assessment inseparably from the assessment of the harm of denying class relief.

The public interest, finally, must play a far larger role in class certification determinations than ordinarily occurs with preliminary injunction decisions. Class actions that aggregate small claims that cannot effectively be enforced one-by-one are more important as means of vindicating and enforcement the underlying public purposes of regulating legal rules than as means of providing often trivial relief to individual claimants. Perhaps because it is so important, measurement of the public interest must begin with the question whether it is proper for courts to distinguish -- or, in a less flattering word, discriminate -- between the levels of public importance represented by different underlying legal rules and by different asserted violations of those rules.

No real comfort can be found in the preliminary injunction analogy. The suggestion that class certification should be affected by a preliminary look at the merits also must reckon with the collateral consequences of taking a look. The time for making the certification decision, for example, is likely to be postponed in order to provide an adequate basis for going beyond the showings required on motion to dismiss. Often it may be possible to rely on a summary judgment record for the conclusion that although summary judgment is not warranted, the case is so thin that class certification can be denied. But at other times a summary judgment motion may focus on only some parts of the case, leaving the need for more global exploration and appraisal. If a significant prospect of success is required, it may be appropriate to reconsider the question whether a defendant should bear some part of the costs of notifying a plaintiff class. The proposal to create an opportunity for permissive intelocutory appeal from class certification decisions is another example – if appraisal of the merits affects the certification decision, the nature of the appeal will be changed, the probable delay increases, and the court of appeals must wrestle with the prospect that permitting appeal will embroil it in consideration of issues that will reappear on a later appeal. Many other effects are likely to emerge, some that can be foreseen with diligent imagination and others that are beyond our powers of prediction.

Either of these proposals for cutting back on Rule 23(b)(3) may be challenged as inviting improper judicial discrimination among favored and disfavored substantive principles. An unadorned provision allowing consideration of the probable outcome on the merits would be least subject to this charge, but would not be immune. Consideration of the probable outcome has strong attractions nonetheless. The simplest form would add probable outcome on the merits as one of the factors to be considered with all other factors in deciding on certification. Whether in this simple form or some more complex variation, much good might be done

in protecting against the risk – however symbolic or real – that weak claims can impose heavy burdens and, through the burdens, coerce unjust settlements.

The mood of the moment, at any rate, seems to be that Rule 23 should not be cut back significantly. At most, some support might be found for permitting consideration of the probable merits of the class claim. The questions are whether it should be expanded, or at least made to work more effectively within its present sphere.

Mass Torts. A great deal of attention is being focused on "mass torts," carefully distinguishing between "single event" cases and those that arise out of more dispersed injuries. The single event cases are exemplified by hotel fires, airplane crashes, bridge collapses, and other circumstances in which a concluded transaction has generated a known and identifiable universe of claimants. The dispersed injuries are exemplified by environmental contamination and product injuries – most prominently asbestos – in which a prolonged course of conduct produces effects that may span periods of years or even decades, generating unknown and perhaps unpredictable numbers of claimants who suffer a wide variety of injuries that range from trifling to serious or fatal. Whether or not the consequences of such events are well-suited to resolution through any variation of our adversary judicial process, courts have had to cope with them. The starting point has been traditional enough: as compared to the small claims that will not bear the costs of individual litigation, mass torts give rise to large numbers of individual actions. The questions arise from efforts to reduce the staggering costs of proceeding case-by-case, costs that include not only transaction costs but the inconsistent treatment of claimants who on any rational ground should be treated consistently. Many ingenious efforts have been made, often outside Rule 23, at times within the scope of Rule 23, and at times nominally within the scope of Rule 23 but well beyond the reach that anyone would have imagined until two or three years ago.

The mass tort phenomenon provides a particularly inviting opportunity for creative rulemaking. In broad terms, the question is whether we can invent an aggregating procedure that, as compared to present procedures, affords better net results to most claimants than now flow from individualized litigation. Many lawyers would say that present practices have not achieved this goal – that given a choice, an individual whose claim is sufficient to support individualized litigation usually is better off opting out of an aggregated proceeding. It would be a stunning triumph to develop a procedure that supersedes this judgment. The triumph would be stunning, however, because the difficulties are so great. Perhaps three groups of these difficulties merit attention – lack of knowledge, limits of the Enabling Act process, and the intrinsic limits of judicial procedure.

Lack of knowledge needs the least emphasis. We are in the infant stages of aggregating mass tort litigation. Many different approaches are being tried. The wisdom and long-run success of these improvisations cannot be measured for years to come. The only thing that can be said with confidence is that some approaches are dispatching cases. The most recent and dramatic examples seek to resolve tens of thousands of cases and incipient ("futures") cases through class-based settlements that are driven by the defendants' needs to buy "global peace." Dispatching cases, and on a reasonably uniform basis, is a great virtue. But the most dramatic approaches also are the most improvisatory. They also veer furthest from traditional judicial methods and closest to administrative systems. In one variation or another they are being applied to problems that are similar only in presenting large numbers of claims. Some settings have matured in the senses that the facts are (or seem to be) fully developed, the law is clear, and there is substantial experience with individual litigation that demonstrates the realistic strategic value of individual claims. Some settings may generate the particularly difficult questions of marshalling limited assets to meet competing present and future

claims. Other settings have none of these characteristics. But all have it in common that we are nowhere near the point of understanding evaluation.

It is confounding, for example, to contemplate the question of "maturity." The nature of dispersed torts virtually forecloses aggregation before some individual actions have been tried. If the plaintiffs should win all of a substantial number of individual actions, an aggregated adjudication that establishes liability seems sensible if courts should shy away from nonmutual issue preclusion. This approach becomes more troubling as the proportion of defense victories increases, and becomes more troubling in a complicated way. An aggregated once-for-all adjudication is not attractive at the other end of the spectrum at which plaintiffs should lose all of the same number of individual actions. If the aggregated litigation should impose liability in favor of all remaining class members, we would be troubled by doubts as to the correctness of the result, and troubled also by the prospect that the earlier losers should remain without redress when many others are compensated through the class adjudication. Our doubts as to the correctness of the result might well be enhanced by fear that the unnerving prospect of denying all recovery to every plaintiff may itself exert significant pressure to impose liability. And the alternative of a settlement that in effect establishes partial liability does not gladden all hearts. As much as we value private peacemaking, the compromise may reflect either the overwhelming power of the defendant to defeat claimants in one-on-one litigation or the overwhelming power of class litigation to coerce capitulation. Surely the outcomes of individual actions that have been tried to judgment should be considered in determining whether and how to aggregate remaining claims; the means of weighing this factor, however, cannot be easily described.

The limits of the Enabling Act are equally obvious. The Civil Rules cannot directly affect the subject-matter jurisdiction limits

that may impede thorough-going aggregation in federal courts. Indirect effects might be possible, most likely through clarifying the conceptual character of class litigation, but this prospect is uncertain at best. There may be greater hope for addressing questions of personal jurisdiction, subject only to Fifth Amendment due process constraints; Civil Rule 4(k)(2) may provide reassurance on this score. The Civil Rules cannot do anything direct about the choice-of-law problems that beset aggregation, particularly through class actions. Indirect effects may be more plausible in this area, by such devices as opt-in classes for those who agree to abide a specified choice of law or narrow issues classes that seek to resolve fact issues or lowest-common-denominator issues of law application. Such indirect effects may help, but fall far short of giving coherent focus to the traditional forces that generate widely disparate consequences, state by state, for a common course of activity pursued on a regional or national level. One approach may be to attempt a closer integration of the Enabling Act process with Congress, working toward simultaneous solutions in which new rules and new legislation follow parallel paths. Any such approach must be undertaken with great care, however, lest the great virtues of Enabling Act independence be gradually diminished.

The intrinsic limits of judicial process require reflection on what can be and on what ought to be. What is possible depends not only on procedure but also on structure: it would be possible to provide prompt individual trials by traditional procedures to all asbestos claimants, for example, if only there were enough judges — and lawyers — to handle them. Fewer lawyers and judges would be needed if common liability issues were resolved by preclusion, whether arising from a global class determination, nonmutual preclusion based on individual litigation, consent to "belwether" litigation, or some other means. To note this possibility is not to champion it even as an abstract possibility. In fact, no government is going to assume the direct costs, quite apart from a lingering wonder about the uses to be found for all those lawyers

and judges when the asbestos cases are cleaned up. More important for our purposes, it may be wondered whether traditional adjudication of such a mass of cases is desirable at all. If liability remains open in each case, there will be inconsistent determinations of liability – very few as time goes on, but some nonetheless. Even if liability is taken as established, like injuries will win dramatically different awards. We live with the inconsistencies and irrationalities that are inevitable in our system when they occur on small levels of low visibility. It is more difficult to accept them on a large and highly visible scale.

In the real world, individual litigation of all asbestos claims will not occur. If they are to be decided by courts – as they must be for default of any alternative – some expediting device must be found. Aggregation seems to be the answer, whether it is as modest as joint trial of ten or twelve cases at a time, as imaginative as projection of a selected sample of damages verdicts to a universe of claimants, or as ambitious as class-based settlement of tens of thousands of cases at one time. These and other aggregating devices share the virtues not only of saving costs but also of promoting consistent outcomes. They also reduce or eliminate individual control of individual litigating destiny, and move courts away from the traditional roles that give reassurance of legitimacy. In the more dramatic forms, they may involve courts in relatively remote supervision of administrative tasks and structures such as claims resolution facilities that bear scant resemblance to traditional adjudication. The departure from traditional structures and procedures reflects a carefully considered judgment that new means must be found to meet new needs, but the departure remains substantial.

Volumes have been written about mass tort litigation, and whole shelves will be filled. Every branch of the bench and bar is contributing. The question for the rulemaking process is whether the successful beginnings can be identified and captured in a few

hundred words that consolidate the good, discard the weak, and above all provide the flexibility needed for future growth. It is not particularly important whether the words are placed in Rule 23 or in some new Rule "23.3." But it is vitally important to know where to start. The most cautious approach is that embodied in the current draft. The draft includes an increased emphasis on issues classes, and creates opt-in classes as well as expanded opportunities for opting out or defeating any opting out. These features were deliberately designed to support further development of Rule 23 in mass tort cases without attempting to predict the direction or extent of the development. A bolder approach may be justified, but the information base must be secure.

Class as entity and client. Rule 23 requires that a class be represented by a "member" of the class whose claims or defenses are "typical" and who will "fairly and adequately protect the interests of the class." Courts rightly seek to ensure adequate representation. Representation, however, can be provided by counsel. The role of the member-representative is more ambivalent. At times courts seem to want member-representatives who can fulfill the role of sophisticated client, exercising a wise and restraining judgment. At other times courts seem more concerned with the member-representative as a token, offered up to appease memories of a superseded model of client-adversary that lingers only in tradition and the formal trappings of Rule 23(a). Representatives with no significant stake and no plausible understanding of the litigation may be accepted with good cheer. Nowhere is the ambiguity more obvious than in the decisions that recognize continued representation by a class member whose individual claim has been mooted.

The questions that surround the individual representative are reflected in current congressional attempts to revise class action procedures for claims under the securities laws. One proposal would require appointment of a guardian for the class; another

would require appointment of a steering committee of class members with very substantial individual stakes. These proposals evidently spring from a fear that there are no real clients in these actions, and — the important point — that the system suffers for the lack.

Class representation could be sought in many quarters. Many different forms of public representation are possible; none seems a likely candidate for adoption by amending Rule 23. The familiar alternatives include class members, organizations that represent group interests more than individuals, and class counsel.

The difficulties that surround class representation by a class member vary across a broad range, reflecting the broad range of class actions. When challenged acts have inflicted relatively trifling injury on many people, there is little incentive to devote any significant time or energy, much less money, to the common cause; if member representatives are not literally hard to find, the likely reason is that counsel who find representatives assure them that they need not really bother with things. Or perhaps other rewards are involved. When significant numbers of people have suffered individual injuries that would support individual litigation, the problems are quite different. There are likely to be conflicts of interest, more or less acute, beginning with selection of the forum, definition of the class, choice of counsel, setting the goals of litigation, and straight on to the end. These conflicts run almost indifferently among class members, representative class members, and counsel. Resolution is most likely to be effected by counsel, at times explicitly but often implicitly in the course of making tactical decisions. Quite different problems may be involved with "institutional reform" litigation. An employment discrimination class, for example, may include people of divergent interests and beliefs; representative members may not be aware of the divergences, or may prefer to present the image of a homogeneous class.

Organizations that maintain class actions behind the facade of

individual representatives often provide highly effective representation, driven by commitment to lofty ideals and fueled by experience and sophistication. There is a risk, however, that ideological commitment may create as much conflict with the views and interests of class members as ever arises from divergences among class members themselves. There is little reason to believe that all problems disappear when an interest group assumes the role of client.

Class counsel often enough provide the originating genius of class actions. Very often they are the only source of informed, sophisticated judgment about the goals to be pursued, and in all but the exceptional case must choose the means of pursuit. In most cases, effective representation will be provided by counsel, without substantial let or hindrance, or it will not be provided at all. Adverse reactions to this phenomenon arise from an array of concerns. A familiar concern is that class counsel in fact are the class: they seek out token representatives, pursue the class claim primarily for the sake of fees, and measure success by their own fees rather than class relief. A somewhat different concern is that ideologically driven counsel may persist in pursuing imagined class goals far beyond the point of optimum class benefit. In greater extremes, there may be a concern that nearly frivolous claims are pursued for nuisance or strike value, without any thought of class benefit.

These tensions surrounding adequate representation will not be resolved by any likely revision of Rule 23. Some help might be found, however, in subtle changes that focus on the class more and the member representatives less. One direct approach would be to focus directly on representation of class interests, considering the involvement of class members as simply one factor bearing on adequacy. The class would be regarded as the client, and adequate representation by counsel as the test. The greatest virtue of this approach may be derided as little more than esthetic – it would

greatly reduce the unseemly spectacle of recruiting representatives who know little or nothing of the dispute and are no more than token clients. But esthetics count for something; the cynicism that readily surrounds representative class members can taint the occasional genuinely representative member. More important, this common sham can exert a gradual corrosive effect that weakens more important constraints on the behavior of counsel. Beyond the esthetics, focus on the class as the client might improve our approach to other problems. Mootness doctrine could focus solely on the life and death of the class claim, without the complicated doctrines of relation back, continued representation by a mooted representative, and the like that now cloud the picture. Discarding the image of the representative's claims as typical might encourage a more direct focus on the definition of the class and on the conflicts that may require multiple classes or subclasses. And courts would become more obviously responsible for ensuring adequate representation.

The entity concept of the class might afford one useful perspective for addressing the question whether class counsel also should represent individual class members. At least when individual class members have claims that would support individual litigation, there is a risk that duties to an individual client and prospects of personal attorney advantage may conflict with duties to the class. Even if individual claims would not support individual litigation, there is a risk of conflict if class reprsentatives are allowed compensation for the effort devoted to pursuing the class claim. If the class is seen as a separate client, these questions can be addressed more thoughtfully.

Quite different advantages might flow from treating the class as an entity in dealing with questions of jurisdiction. A Rule 23 amendment that defined the class as an entity might of itself be sufficient to establish the class claim as the measure of the amount in controversy required for diversity jurisdiction. A

rather neat intellectual trick would be required, justifying interpretation of the amount-in-controversy requirement as a means of identifying the cases suitable for federal adjudication by the total amount involved and the importance of the defendant's stake, while simultaneously continuing to permit focus on individual representatives to avoid the frequently disabling impact of the complete diversity requirement.

Focus on the class as party also might influence thinking about due process constraints on exposing individual claimants to adjudication in a distant forum having no apparent contact with their individual claims. Connections to the interrelated events underlying all claims can be viewed as connections to the class, and membership in the litigating class as itself a tie to the forum. Jurisdictional concepts are thoroughly – and often foolishly – conceptualistic. Providing a clear concept is proper business for the Enabling Act process.

Really imaginative use of the entity concept might even support a more rational approach to choice of law. Viewing a class of victims as a whole, it is very difficult to understand why different people should win or lose, or win more or less, because different sources of law are chosen to govern the self-same conduct. If it were possible to imagine a class claim, it would be possible to choose a single law to govern the single claim, or – more likely – to choose a single law to govern the claim as to each defendant. It need not matter which variation of choice-of-law theory is selected after that point. As attractive as this prospect might seem to a true heretic, it probably reaches too far for present acceptance. It is too easy to argue that class certification can do no more than take individual claims as they exist in the nature of individual choice-of-law processes, however much those processes depend on the choice of forum. As a mere procedural device, class treatment cannot alter the conceptual substance of the individual claim, no matter how drastically the

claim is affected in fact. Separate sovereignties account for the unseemly differences in outcome, and their interests cannot be thwarted by this trick.

Entity treatment also might help in confronting the preclusion consequences of a class action judgment. In one direction, it would underscore the proposition that the claim pursued by the class often is narrower than the claim that would be defined for purposes of individual litigation. Although an individual would, for example, be expected to join statutory discrimination and contract theories in a single action for wrongful termination, a class action for discrimination often should leave the way free for an individual contract action. This benefit could become particularly important in settings that involve many claimants with small damages and a few with large damages growing out of the same setting. Illustrations are offered by the purchasers of defectively designed motor vehicles. Many will have relatively small claims based on depreciated value; a few will have large claims based on personal injury. It is unthinkable that either settlement or litigated judgment in a class action on behalf of all should preclude individual actions by those who suffer personal injuries, either before or after the class judgment. Recognizing that the class claim is limited to the common injury would help to express and ensure this conclusion. Matters are more confused in another direction. Class actions may augment the risks of litigation that is premature in relation to advancing knowledge. A claim on behalf of millions of users of an over-the-counter drug might be brought and fail because of inability to prove that it causes a particular side-effect. Ten years later, convincing proof might become available, and be most convincing as to users who were members of the original class. We are prepared to accept preclusion in individual cases that present this problem. It is not clear whether we should be prepared to accept preclusion by representation on such a grand scale. Open recognition of the distinctive character of class litigation would at least help open

the question for direct investigation and response.

Attempts to pursue overlapping or successive class actions are less likely to yield to an entity vision of the class, but some progress might be made even in this direction. Certification of a class in one court could be found to engage the class claim, invoking the rules that are appropriate when two or more actions are brought by the same plaintiff on the same claim. Courts are often surprisingly willing to allow two actions to proceed on parallel tracks, however, and it may be unduly optimistic to hope that a different approach would be taken when different representatives presume to voluntarily submit the same class claim to different court. Successive attempts to certify a class after failing in one action may prove even more difficult to control. It would be convenient to assert that the asserted class is bound by the determination that it does not exist, but the seeming self-contradiction will be difficult to accept. The initial refusal to recognize the class as an entity seems to leave no one to be bound when a different putative representative appears with a second request for recognition.

Entity treatment of the class also could provide the paradoxical benefit of encouraging more careful thought about the individuals who constitute the class. Because the entity is obviously artificial, its separation makes it more difficult to pretend that the class <u>is</u> its members. Greater care may be taken in addressing questions of class membership and conflicts of interest, and in considering whether to frame the action as a mandatory, opt-out, or opt-in class. The sharp distinction between the class as entity and its constituting members, moreover, may underscore the need to think clearly about the members' rights to participate both individually and through influence on class counsel.

Increasing judicial responsibility for adequate class representation may be the most important single reason for

rejecting a change that would define the class as the client. Although courts now are responsible for policing adequacy, treating the class as entity would make it clear that this responsibility is not shared with any particular class representative. It also would be clear that the representatives cannot be relied upon to make the initial selection of counsel (or, perhaps more realistically, ratifying self-selection by counsel who sought them out). At the outset, courts would be more responsible for the identity of counsel. There is no reason to allow class counsel to be selected by the first representative who appears, much less by a representative recruited by would-be class counsel. At a minimum, the court could be required to give notice of any action seeking class certification and to invite competing applications to appear as counsel for the class. As exciting as it may be to contemplate such devices as auctioning the oppportunity to represent the class, judicial responsibility for selecting counsel for one of the adversaries makes substantial inroads on a system that relies on the court to remain impartial between adversaries who appear before it on their own motion. Even more troubling, courts would remain responsible throughout the litigation, taking on a role that necessarily involves particular consideration of the interests and position of one party. Maintaining a distinction between neutral assurance of adequate representation and acting as guardian of class interests must be difficult, and perhaps not fully possible. The token class member representative may not do much to assure adequate representation, and courts now are responsible for assuring adequate representation, but the change could be troubling nonetheless.

If focus on the class as client might have esthetic advantages, moreover, it also might have symbolic disadvantages. We can pretend that class member representatives are clients. It is more difficult to pretend that a class is a real client. Cries of barratry, champerty, and maintenance – or the more contemporary buccaneering – would redouble.

And of course the urge to focus on the class as client provides another illustration of generalizing from one or two class action phenomena. The need for a client is most real in cases that aggregate large numbers of small claims and do not win the involvement of any class members with substantial stakes. Entity treatment may seem most promising in such cases. Yet it is possible — although just barely — that in fact named representatives often monitor counsel in genuine and important ways, a proposition that will be almost impossible to disprove by any readily available means of empirical research. The problems that arise from actions brought by organizations that may not speak for the purported class are quite different, while the problems that arise from aggregation of large numbers of substantial individual claims are of a still different order. For that matter, defendant classes should not be overlooked. The idea of suing a class without naming at least one real defendant-representative is not plausible.

The Current Draft

An Outline. This is not the occasion for a detailed review of the current Rule 23 draft. In broadest terms, it would make three major changes in present practice. The present line between "mandatory" classes and opt-out classes would be blurred by empowering the court to permit opting out from any class, to deny opting out from any class, or to certify an opt-in class. Notice provisions would be generalized, explicitly requiring notice in all class actions but relaxing to some extent the strict requirements now exacted in (b)(3) classes. And the present opportunities for certifying subclasses and "issues" classes would be emphasized. These changes inevitably blur the sharp differences in consequence that have flowed from the choice between (b)(1), (b)(2), and (b)(3) classes. They need not necessarily blur the conceptual differences between these categories of classes; it is possible to craft a rule that allows opt-out of a (b)(1) class, that explicitly requires

notice in all classes, and so on, without collapsing the categories. Nonetheless, the draft transforms the "superiority" requirement of present subdivision (b)(3) into a subdivision (a) prerequisite for any class. The (b)(1), (2), and (3) categories become merely factors to be considered in determining superiority, adding the "matters pertinent" of present (b)(3) to the list of superiority factors. In addition to these changes, a number of smaller changes also deserve note.

The Changes. One item that has drawn strong reaction is the addition of a requirement that a representative party be "willing" to represent the class. It is widely believed that this requirement will sound the death knell of defendant classes -- except perhaps for the most dangerous case in which a named defendant is willing to "represent" the class because its interests diverge from class interests, and may even converge with the plaintiff's interests.

Quite different reactions are provoked by the allied requirement that the representative member "protect the interests of all persons while members of the class until relieved by the court from that fiduciary duty." This provision is intended to underscore the fiduciary responsibilities borne by a representative party. It does not, however, explain in any way the nature or extent of those duties. There is no indication of any specific change in present practice. Practicing lawyers in particular react to the provision with dismay. They view present understanding of the fiduciary responsibilities of counsel and representatives as satisfactory, and fear that this opaque invocation will generate much contention and no improvement.

Subdivision (b)(2) is rewritten to make it clear that it is proper to certify a defendant class in an action for injunctive or declaratory relief. Apart from the question whether a willing representative should be required, this change seems noncontroversial.

The subdivision (b)(3) requirement that common questions of fact or law predominate is mollified, making "the extent to which" common questions predominate one factor in calculating superiority. This change is one of many that are intended to ease the path toward certification of issues classes.

Difficulties in management are made relevant to the classes that were (b)(1) and (b)(2) classes as well as (b)(3) classes, but essentially are subordinated by requiring comparison to the difficulties that will arise from adjudication by other means.

The new opt-out and opt-in provisions are set out in subdivision (c)(1)(A), perhaps the single most important portion of the revised rule. The list of "matters pertinent to this determination" is intended to discourage opt-out (b)(1) or (b)(2) classes, but not to forbid them. Opting out of such classes is designed, at least in part, as a means of revealing the conflicts of interest that may lurk in a class that seems homogeneous to the court. The illustration in the Note is an employment discrimination action in which employees who are members of the class as defined by the court may prefer to align with the employer on questions of liability or relief. Provision is made for imposing conditions on those who opt out, including a bar against separate actions or denial of nonmutual issue preclusion should the class win. (The bar against separate actions may need to account for class judgments that do not bar separate actions by those who remain class members.) Opt-in classes are proposed as solutions for at least two sets of problems. Opt-in defendant classes may prove plausible in some circumstances, greatly reducing the difficulties that now appear in defendant classes. Opt-in plaintiff classes may be particularly useful as to classes that include many members whose claims would support individual actions, and may help avoid problems beyond the reach of the Enabling Act. Those who opt into a class, for example, would surrender any objections to "personal jurisdiction" and could be forced to

acquiesce in a stated choice of law. For all that appears on the face of the draft, finally, it may be possible to combine all features in a single class: opting out could be prohibited to some claimants and permitted to others, while defining a class that includes nonmembers only if they choose to opt in. As one possible illustration, the class might be mandatory as to small-stakes claimants, optional as to large-stakes claimants, and defined to exclude those who already have suits pending unless they choose to opt in.

The new notice provisions are set out in subdivision (c)(2). Notice of class certification is required in all class actions. The court has discretion in determining "how, and to whom, notice will be given," considering among other factors the nature of the class, the importance of individual claims, the expense and difficulty of providing individual notice, and the nature and extent of any adverse consequences from failure to receive actual notice. There has been no adverse reaction to the choice to adopt explicit notice requirements for what now are (b)(1) and (b)(2) classes, nor, perhaps surprisingly, to the softening of individual notice requirements in what now are (b)(3) classes.

Subdivision (c)(4) is the focal point for a phrase that recurs throughout the draft amendments. A class may be certified as to particular "claims, defense, or issues." Although subdivision (c)(4) now provides for issues classes, there is a deliberate attempt to focus attention on, and to encourage, this practice. Once again, mass torts are not far from view. One potential use of issues classes would be to resolve common elements of liability, leaving for separate actions resolution of individual elements of liability such as comparative fault and damages. Adroit definition of the "issue" also might help to reduce choice-of-law problems, particularly with respect to fact-dominated issues such as general causation.

A new subparagraph (d)(1)(B) expressly recognizes a practice

followed in most courts, permitting decision of motions under Rules 12 or 56 before the certification determination. This confirmation of general practice seems unexceptionable.

Subdivision (e) is amended to make it clear that court approval is required for dismissal of an action in which class allegations are made whether dismissal is sought before determination of the certification question or after certification is made. It also provides that a proposal to dismiss or compromise a certified class action may be referred to a magistrate judge or "other special master." The role of the special master is not defined. The Note refers to "investigation" of the fairness of a proposed dismissal or settlement, to the need to consider sensitive information, and to the problem that when all parties seek approval of a settlement the court cannot rely on genuinely adversary presentation of information that might undercut the proposal. There could be real advantages in independent investigation by a master, but the more independent and thorough the investigation the greater the departure from the ordinary role of court officers. There may be real advantages as well in confidential submissions to an officer who will not be called upon to decide the merits if the settlement should fail, but to preserve this advantage the master may need to report to the judge in terms that do not allow effective evaluation of the master's own recommendations.

New subdivision (f), finally, authorizes the court of appeals to permit an appeal from an order granting or denying certification. The only change is to eliminate the requirement of district court certification that may defeat appeal under 28 U.S.C. § 1292(b). This subdivision rests on two judgments. The first is that interlocutory review of the certification decision can be very important, to protect against both the "death knell" effects of a refusal to certify and the "in terrorem" (reverse death knell) effects of certification. The second is that the courts of appeals will exercise sound judgment, granting permission to appeal only in

cases in which the certification determination is manifestly important and at least subject to fair debate. Routine determinations in mature areas of class action practice are not likely subjects for permission. This provision has drawn strong support but also, although less often, vigorous disagreement.

Some Obvious Questions. The outline of the amendments suggests the most obvious questions.

Should the now-accepted (b)(1), (2), and (3) distinctions be collapsed? The direct reason for the collapse is the desire to change opt-out practice, create an opt-in practice, and improve the notice provisions. This reason ties to a second reason, the belief that unnecessary energy is wasted on disputing the choice of class category as an indirect means of affecting notice and opt-out decisions. This second reason may be unimportant – even if there is significant litigation of class category determinations in areas that have not developed a routinized class practice, direct changes in the opt-out, opt-in practice, and in notice, should redirect energy toward the intended target.

The risk of collapsing class categories may lie in part in surrender of the legitimacy lent by the traditions that underlie (b)(1) and the moral force lent by the contemporary civil rights uses of (b)(2). More important risks may arise from the prospect that class members might be allowed to opt out, particularly from (b)(1) classes. Equally important risks may arise from the opportunity to defeat opting out from (b)(3) classes, particularly as to class members who wish to pursue individual litigation in hopes of better results. Flexibility and discretion have carried us far in modern procedure, but perhaps these are situations that call for the rigidity of present rules. Even if more flexibility is appropriate, the rule should provide as much guidance as possible for its exercise.

The question whether class representatives should be willing

has focused attention on defendant classes. There are many reasons why a defendant should be unwilling to assume the obligations of class representative. As representative, the defendant has fiduciary obligations to the class. Presumably one duty is to defend vigorously in proportion to the stakes – and the stakes are expanded, perhaps exponentially, by class certification. (Even if the representative is theoretically subject to joint liability for the plaintiff's entire claim, the very reason for pursuing a defendant class is to enhance the prospects of actual recovery.) Freedom to settle or even abandon the defense is sharply curtailed. And if the representative defendant is allowed to escape the duties of representation by settling individual liability alone, the burdens of representation may exert a coercive force to settle on unfair terms. Barring an extraordinary congruence of interest between the representative and all other class members, the duty of counsel is changed and made more difficult (if not impossible): fiduciary obligations run to absent class members as well as the original client. And any attempt to find means of compensating the representative for these added burdens will remain difficult. Opt-in defendant classes make clear sense; opt-out classes that involve sophisticated defendants with clear actual notice can make equal sense; in other settings, these problems seem acute. Addressing them by adding a "willing" representative requirement may not be as effective as some alternative.

It is not clear, moreover, that a willing representative is any more to be welcomed. Long ago I stumbled across a case that certified a (b)(2) defendant class in an action to enjoin patent infringement. Quite apart from individual questions of infringement, different infringers may have very different stakes in the question of validity; the representative defendant, for example, could enjoy a technology that yields a scant 5% cost saving with practice of the invention, while all other class members compete with an older technology that yields a 25% cost saving with practice of the invention. The representative

defendant may be made better off by a holding of validity that binds the industry. The potential conflicts may be much more subtle than this simple illustration, but equally dangerous.

The willing representative requirement also provokes the question whether defendants should be able to force plaintiff class treatment. The idea may seem far-fetched, but it is not clear whether it should be hobbled by dropping a willingness requirement into Rule 23(a)(4). The question can easily be turned back to the defendant class issue, moreover, by the device of a transposed parties action in which the plaintiff names a defendant class and seeks a declaration of nonliability. In some settings this device would be ludicrous. Imagine, for example, an action by a government official against a class of public benefit recipients for a declaration that a new restrictive regulation is valid.

This illustration suggests that it may be appropriate to think about defendant class actions in terms that extend beyond the immediate problems of the representative defendant. Concerns about the willing representative requirement have been expressed by pointing to situations in which defendant classes seem important. The most common examples include securities law actions against underwriting groups and actions against many-membered partnerships. These examples are particularly persuasive because the class members have formed a real-world entity whose activities give rise to the claim; recognizing the entity for this limited legal purpose, even if for no other legal purpose, is appropriate. A more exotic example is an action to resolve the identical rights of hundreds or thousands of owners of fractional interests in mineral rights leases. This example seems persuasive because the class members have willingly engaged in a set of closely related and indistinguishable transactions. Another setting that has posed difficulties under present Rule 23(b)(2) is an action against numerous public officials pursuing seemingly identical policies but so far independent that there is no common superior to name as

defendant. The classic illustration was an action against county sheriffs who, in defiance of local federal decisions and state policy, denied contact visits to pretrial detainees. This illustration may seem persuasive because there is a strong suspicion of conscious parallelism, if not outright conspiracy, and because of the clarity of the violations both in law and in fact. The question is whether Rule 23 should attempt to capture these features in a way that clearly distinguishes between the requirements for certifying plaintiff and defendant classes.

One possibility would be to limit defendant classes by a "transaction or occurrence" requirement similar to the Rule 20 requirement for joining defendants. Others would be to stiffen the Rule 23(a) requirements of typicality and adequacy of representation, to require individual notice to all defendant class members, or to expand the right of individual participation to the limits that would be applied had all class members been joined as individual defendants. Or the plaintiff might be required to name several representative defendants, and to name those who have the most substantial stakes if class members have substantially different levels of interest in the outcome. It might even prove feasible to require the plaintiff to name all members of the defendant class that can be identified with reasonable effort -- including preliminary discovery -- so that the court can select a group of representatives and develop a cost-sharing plan.

Perhaps better approaches will come to hand. The important point is that we cannot blithely rely on the abstract assertion that there is no difference between precluding a potential right and imposing a liability. We must reflect on the human intuition that there is a difference, whether expressed as the psychological reality of present endowments, as the ephemeral character of "individual" rights that practically can be asserted only on a group basis, or as some more profound perception.

The almost casual reference to fiduciary responsibility may

touch too lightly on the single most troubling set of class-action issues. It is not enough to assert that everyone understands that both representative class members and class counsel have fiduciary responsibilities to the class. The trick is to elaborate that principle in ways that respond to the special difficulties of class actions, difficulties that arise whenever there are possible conflicts of interest between individuals joined as if a homogeneous class in which anything that advances the interests of one must automatically advance the interests of all others in equal measure. The most familiar analogy may be to the problems that confront a single lawyer who represents two plaintiffs, each of whom seeks to win the maximum possible individual advantage in litigating or settling with a common defendant. The problems of class representation, however, are far more complex. The lawyer with two clients can help each client to develop and articulate that client's own best understanding of personal needs; each of the two clients at least is in a position to supervise the lawyer's representation. Counsel for the class seldom is in a position to consult with each class member to determine inidividual interests and needs, or to measure and reconcile the conflicts among individual interests and needs. Many class members likely will prove unable to supervise the class lawyer at all, and reliance on the representative class members provides a pale substitute.

The difficulties presented by the attorney-class client relationship are exacerbated by the wide variousness of classes. Much current debate focuses on settlement classes that join mind-boggling numbers of members whose individual claims would support the costs of individual litigation, but who paradoxically may fall into the group of "futures" claimants who do not yet even know that they may have been injured. Such settings may present the most troubling opportunities for truly irreconcilable conflicts, and for conflicts that are not easily resolved by creating subclasses. Rigorous notice requirements and clearly explained multiple opportunities to opt out may help. The same devices may not help

in other settings, particularly if the typically small size of individual claims makes opting out the equivalent of surrendering any individual claim. And quite different problems are likely to arise if the class action actually goes to trial, although the relative infrequency of trials provides little foundation for speculating even about the nature of the problems, much less about the nature of possible solutions.

Rule 23 is silent on the nature of the fiduciary duties borne by class representatives and counsel. There would be real advantages in addressing these questions through the rule. Federal courts would be released from the common reliance on state law to govern issues of professional responsibility, although as members of state bars lawyers might face dual regulation. In addition, it may be possible to free these questions from the constraining impact of association with matters of "ethics" – it is easier to discuss the question whether a lawyer has conformed to a procedural rule than to frame the debate in terms of ethical behavior, as discussions of current class settlements demonstrate. Yet it will be extraordinarily difficult to articulate any explicit provisions. Since outright repeal of Rule 23 does not seem to be an option, it seems responsible to make other improvements even if ignorance forces continued silence. The challenge that may be made by those who hope for some guidance in the rule, however, is daunting and must be addressed even if it is not accepted.

The encouragement of resort to masters to evaluate proposed settlements raises broader questions about judicial review of class settlements. These questions become all the more important as we enter an era in which settlement classes are sought out by defendants, eager to buy global peace by agreement with volunteer representatives of thousands or tens of thousands of claimants. Extraordinarily complex arrangements are being made, at the cost of pushing Rule 23 beyond all of the limits that would have seemed invulnerable until tested by the force of so many claims. In some

of these cases the uncertainties seem so great that reasoned evaluation of fairness may not be possible by any means. In others there is a strong attraction to independent investigation and report, but the means seem elusive. A master, charged as the court to be impartial but armed as a party to undertake independent investigation, is one possibility. Developing practice with judgment-enforcement masters in institutional reform litigation may provide some guidance. Another possibility is to appoint an independent representative for the class, whether or not called a guardian, charged with reviewing the settlement in ways that duplicate the responsibilities of class counsel but work free from the fear of self-interest. Reliance on a master may help solve the problems of judicial time, but does little to address the questions that arise from blending advocacy and investigation with the judicial role. Reliance on a class guardian may confuse the roles of counsel and representative members, and create a framework that conduces to inadequately informed second-guessing. If the problem is real, the most obvious solutions all seem weak.

A quite different settlement role involves the familiar use of masters to facilitate settlement. Involvement of a master in the process that leads to a settlement agreement may not only improve the process but also provide a measure of reassurance that the settlement is reasonable. Good experience with this practice ensures that it will continue, even without explicit provision in Rule 23 or any obvious support in Rule 53. It may be desirable, however, to consider the question whether a master who has promoted a settlement should be responsible for advising the court on the fairness of the settlement. Despite the great advantages of familiarity, it might be better to rely on a magistrate judge or a new and independent master if the court, unwilling to rely entirely on class member objectors, seeks advice from people who do not have a stake in the settlement.

The provision for invoking the aid of masters or magistrate

judges hints at the more pervasive provisions that might be created to spell out the process of reviewing and approving class-action settlements. The first set of questions arise from the common resort to "settlement classes," either by an initial certification that makes it clear that the class may be decertified if settlement is not reached, or by simultaneous presentation of a motion for certification and a motion to approve a settlement already negotiated. The most basic question is whether the basic criteria for certification should apply differently to class settlement than to class litigation. It seems difficult to argue that there should be any significant differences in the prerequisites of numerosity, commonality, typicality, and effective representation. If superiority becomes an additional prerequisite, however, there may be more room to argue that there are very substantial differences between the superiority of class settlement and the potential superiority of class litigation. Application of the other factors that bear on a determination of superiority, moreover, is likely to be quite different with respect to settlement than with respect to litigation. Not all of the differences favor settlement; the court's ability to determine the importance of individual litigation, for example, may be much better informed by adversary argument than by the cooperative presentation made when class and adversary join to urge acceptance of a settlement. And at a deeper level, it has been argued that counsel for a class that has been certified only for purposes of settlement bargains at a great disadvantage, and perhaps with a conflict of interest. The defendant's incentive to settle is no longer the prospect of trying this case on the merits, but instead the hope of avoiding vast numbers of individual cases. And counsel for the class stands to gain nothing if settlement fails, a prospect that becomes most unsettling when class certification is sought simultaneously with a "done deal" with a defendant who might have aborted all negotiations with that counsel.

Many other details could be added to Rule 23 to spell out the

nature of the court's duties in reviewing and approving class settlements. Among them is the question whether class members should be allowed to opt out of a settlement. By far the cleanest way to draft such a provision would be to recognize a right to opt out that in form extends to all class actions; it would be difficult to justify any provision that allowed the court to distinguish between class members who might reasonably bring individual actions and those who might not. An unconditional right to opt out of a settlement might, however, impose unreasonable notice costs. Perhaps this problem can be met by an indirect qualification of the right, giving the court discretion as to the means of notice to be employed, anticipating that aggregate methods of notice would be used only when individual claims are small, and perhaps relying on actual notice to a substantial sampling of class members on the theory that a significant opt-out rate should prompt reconsideration of the adequacy of the settlement. If we come to accept classes of people who have not yet experienced injury, moreover, the right to opt out might properly carry forward to the time when injury occurs and the class member chooses whether to participate in the class settlement or to pursue an individual remedy.

Other proposals for regulating settlement include various means of bringing more lawyers into the negotiation on behalf of different subclasses, bargaining for allocation among differently situated members of a nonhomogeneous "class"; providing some means of representation independent of the lawyers who have been recognized as class counsel; improving the information made available to objectors, both by detailed notice to all class members of settlement terms and by more specific response to objectors, before they are forced to articulate their grounds for objecting; and recognizing the court's power to modify the terms of settlement so long as the defendant's total obligation is not materially increased.

Discussion of settlement also involves issues of attorney fees. Simultaneous negotiation of class relief and fees creates manifest conflict-of-interest problems. Partial solutions might be found in requiring that the basis for fee determinations be determined before settlement can be undertaken, or that fee issues be settled only after approval of settlement on the merits. The obstacles that either approach might create to settlement might be reduced by simply considering the occasion for fee negotiations as part of the process of approving settlement and any fee award.

These and related possibilities deserve to be a major focus of the continuing study.

Many other questions could be put to the details of the draft. They get caught up, however, in the long list of questions set out next. These questions are among the number that may fairly be addressed to present practice. For the most part, they recast as questions a welter of anecdotal information, the things that experience has suggested as today's truths to more or fewer class action observers and practitioners. Taken together, they pose the embarrassing question whether we really know enough about Rule 23 to be able to make sound predictions as to the effect of the current draft or any other.

What We Might Wish To Know of Current Experience

When asked for reactions to the current state of Rule 23, one very thoughtful committee replied that it was difficult to achieve any consensus wisdom because its members individually had experience with only a few fields of class litigation. Those with substantial experience in securities litigation did not have any working knowledge of employment discrimination litigation, and so on. This response is a useful warning. The Committee must hear from many voices, reflecting the full spectrum of experience, if it is to learn much. It also must hear voices that speak with as much candor and disinterest as possible. And, to the extent possible,

it must encourage independent investigations of the sort now underway at the Federal Judicial Center. The following collection illustrates the array of assumptions that should be questioned.

Individual Actions and Aggregation. What relationships can be identified between aggregation and numbers of individual actions growing out of the same transactional setting? Does it often happen that large numbers of individual actions proceed in the same court, or in different courts, without any attempt at aggregation? Is it possible to identify elements that encourage or discourage consolidation, considering such things as relative filing dates, progress toward disposition, identity of counsel, size of claims, numbers of claimants, substantive principles, and the like? What elements – the same, or others – influence the means of aggregation? Is actual consolidation ever pursued across the lines that separate different court systems? Are class actions more likely to be pursued after some experience with individual adjudication, or does this depend very much on the substantive area: are class actions the first resort in some fields, as may be in some areas of securities law, and a last or never resort in other fields? How often is class certification denied because it is not desirable to concentrate litigation in one forum, because of the importance of individual control of individual actions, because of the advanced progress of many individual actions, or because of a judgment that individual actions – perhaps bolstered by nonmutual preclusion, or tacit acquiescence in belwether litigation – will prove more manageable?

A quite different question is how many members of certified classes would have maintained individual actions absent the class action. A clear answer in general terms would help shape a good general rule; the expectation that clear answers could be given for individual cases would justify a rule that delegates case-by-case discretion to individual judges. But clear answers are likely to remain elusive, even if shrewd guesses may be possible in some

settings. For that matter, it would be even nicer to know what would have been the outcomes of individual actions, how frequently conflicting results would be reached on the merits, whether results on the merits would tend to converge over time, and how to measure the recoveries both in the aggregate and in individual cases.

Routine Class Actions. One common hypothesis is that a substantial portion of all actions filed with class allegations are virtually invisible because they are somehow standard or routine. This hypothesis may be translated into the judgment that Rule 23 is working well in most applications, that we should not be misled as to the need for reform by the occasional dramatic departures. The hypothesis seems to have at least two parts. The first part, encountered most often in speculation about the reasons that may explain the substantial under-reporting of class action filings recently uncovered by the Federal Judicial Center study, is that boilerplate class allegations are routinely ignored or dispatched without fuss. The second part, encountered regularly in the reactions of experienced class-action lawyers from various fields, is that Rule 23 has been beat into shape by the bench and bar and presents few grounds for dispute in most cases. Everyone recognizes the appropriateness of (b)(3) certification in securities law cases, understands the notice drill, knows how to present and win approval of a settlement and fee awards, and so on. It seems likely that indeed many actions play out in one of these ways. But it would be nice to know, and particularly to know more about the correlations between easy application of Rule 23 and the substantive subjects of dispute. It also would be nice to know what happens in the routine applications: how often is certification granted? What is the relationship between certification and settlement? How often do certified classes go to trial, and how often do they win? Is there any way to get behind bare numbers? Suppose, for instance, it should be found that the same distribution of outcomes occurs in all actions with class allegations as in all other actions, and that the distribution also

is the same for actions in which certification is granted, denied, or ignored — could we know what this really means for common protests that class actions exert a pressure that subordinates the merits of the action to the need to escape alive? True confidence would require an unattainable measure of the merits of all the cases compared; is it enough to assume that class allegations are not added deliberately to bolster weak claims, and that class action procedure — including the cost of notice in (b)(3) cases — is sufficiently hospitable to strong claims?

Whatever can be made of these questions, we should be able to learn more about smaller issues. What is the frequency of (b)(1), (2), and (3) classes? The rate of certifications granted, denied, or ignored? The correlation between substantive area and frequency of class allegations and certifications? The time consumed by class actions (and, would that it could be known, the time that would have been devoted to separate actions)?

Race To File. The lore includes tales of "parachutists," who scramble madly to be the first to file class claims in hopes of assuming a lead role in managment and fees. How often are securities class actions filed immediately upon announcement of a disappointing earnings report, or single-event tort actions before the ashes have cooled? Is there support for the claim that immediate filing is necessary to preserve evidence, particularly in the tort cases, and are class allegations important to achieving that result? Is anything lost, apart from seemliness — are inconvenient forums chosen, is first-filing negatively correlated with the strength of the claim or ability of counsel, do overlapping actions cause unnecessary confusion and clean-up costs? Is there, on the other hand, any reason to reject a simple rule that there is no presumption that counsel who files first should be counsel for the class, and that there must be a competition to select class counsel?

Representatives: Who? Whence? Why? The role of class-member

representative parties is one of the richest sources of anecdotes, and particularly cynical anecdotes. Pending securities litigation reform bills implicitly reflect the view that class-member representatives do not adequately fill the role of client under present practice. It has become a bromide that the beauty of many class actions is that the lawyers don't have any clients to get in the way. These occasionally querulous observations raise many questions.

Perhaps the first question is where representatives come from. Do they search out counsel, or are they recruited by counsel? How are they recruited -- what reality, if any, underlies the provision in the pending securities litigation reform bills that would prohibit brokers from accepting remuneration for assisting an attorney in obtaining the representation of a customer? Are there "professional" representatives who appear repeatedly, at least in particular subject areas? How often do representatives have more than nominal interests? Is there a correlation between the stakes of individual representatives and the form of action -- are (b)(1) actions more likely to draw representatives with substantial stakes than (b)(3) actions? Are representatives in (b)(2) actions for injunctions more likely to be as much affected by the outcome as other class members? And how often are they recruited by interested organizations because they present particularly attractive illustrations of a group interest or injury? What is the real impact of the requirement that the representative's claims or defenses be typical of the class -- does it really add weight to the requirements of common questions and adequate representation? Does it at least provide one illustrative bundle of facts that may facilitate discovery and trial?

Most directly, what are the working relationships between representative class members and class counsel? Do the representatives play any role as clients, participating in the decisions that shape the litigating goals and strategies? How much

time, effort, and expense do representatives actually devote to the litigation? Do courts often attempt to supervise this dimension of adequate representation after the adequacy determination, and, if so, how? In place of reviewing representation directly, do courts attempt to rely on substitutes such as seeking out additional representatives who are not nominated by class counsel, forming class-member committees, or even appointing independent counsel or guardians to represent the class in dealing with class counsel?

Are there significant efforts to supervise class representation by evaluating the performance of class counsel directly? What means of evaluation are chosen, and what steps are taken to reduce the implicit intrusion on the adversary process?

What do representatives get out of it all, whatever the "all" may be? Simply the satisfaction of pursuing justice, and doing good for others when the class claim succeeds? Are they rewarded in some measure for the time and perhaps risk involved in their roles by recoveries that are more favorable than other class members win?

Time of Certification. Is there any pattern to the point at which the first certification decision is made? How often are actions filed simultaneously with proposed settlements and motions for certification? How often are preliminary motions on the merits decided before addressing certification? What is the effect of local rules requiring that a motion for certification be made within a stated period, perhaps 90 or 100 days – do they impede settlement efforts, encourage prompt resolution, or have little effect? How regularly is discovery controlled and focused on the certification question – is it more feasible in some substantive areas than others to separate discovery on the merits from certification discovery? How often are class definitions changed after an initial certification, is an initial denial followed by later certification, or an initial certification by decertification?

Certification Disputes. How much time is spent contesting certification? Are there correlations between the subjects of litigation and certification disputes? Is much effort devoted to contesting the choice between (b)(1), (b)(2), and (b)(3) classes, and does this correlate to the subject of litigation? How much thought – expressed or unexpressed – is given to the impact of the class definition on the prospects for settlement?

Plaintiff Classes. Do defendants ever seek and win plaintiff class certification over opposition of plaintiffs? How often do defendants acquiesce in certification of a plaintiff class, apart from settlement classes? How frequently do defendants agree to settlements that include chancy class certifications that may not deliver the hoped-for preclusion benefits?

Defendant Classes. How common are defendant classes? Are there identifiable but narrow settings in which they are most likely? What happens if a (b)(3) class is certified – do class members opt out in great numbers? Have means been found to alleviate the added burdens inflicted on representative defendants? Are there formal or informal means of costsharing? How often are defendants willing to represent a class? Are unwilling representatives effective? Are willing representatives to be trusted? How do counsel identify potential conflicts between obligations to the representative client and obligations to the class, and how are the conflicts resolved?

Issues Classes and Subclasses. How frequently, and in what settings, are issues classes used? Subclasses? How diligent and sophisticated is the inquiry into possible conflicts of interest within a class whenever relief is (or should be) more complicated than winning the maximum number of dollars to be distributed according to the only possible measure of uniformity? Consider a securities fraud action in which, inevitably, different class members bought and sold different numbers of shares at different times; a "class" of all may disguise differing interests in proving

the ways and times at which the fraud affected the market. Are such subtleties routinely ignored? Is it in fact better to ignore such complications, because the costs of making distinctions outstrip the benefits? What of actions that touch deeper social interests, such as surviving school desegregation cases in which a "class" of all students, or all minority students, almost inevitably includes people with a wide range of views about appropriate remedies?

Is there any experience at all to illuminate the post-class experience with issues classes? How often is a class-based resolution of some issue of liability followed by independent actions in different courts? How are these actions coordinated with any appeals in the issues class? Are any efforts made to ensure that subsequent proceedings to not effectively thwart the class determination? Do the results of individually litigating individual issues diverge substantially – for example, do claimants in some states or regions win systematically greater or lesser recoveries than those in other states or regions?

More fundamentally, is enough care taken to ensure that issues certified for class treatment are usefully separate from issues that remain for individual disposition? It is frequently suggested, for example, that issues of fault and general causation are suitable for class treatment, leaving issues of comparative fault, individual cause, and proximate cause for case-by-case resolution. But how is fault to be compared without retrying the issue of fault, and perhaps implicitly impugning the class finding? And how are individual and proximate cause issues to be resolved without retrying the evidence of general causation? If the answer is found in brute force, will the results in fact achieve sufficient uniformity to justify the attempt?

Notice. What types of notice, at what cost, are required in (b)(1) and (b)(2) actions? Is there any reason to believe that notice in (b)(3) actions is not generally adequate? How much does notice

cost, and does the cost defeat legitimate actions seeking small individual recoveries on behalf of many claimants? Is much effort devoted to litigating notice issues? How often is notice provided of steps other than certification, at what cost, and with what benefit? Do notices of impending settlement provide sufficient detail to enable intelligent appraisal, if any class member should wish to undertake or hire it? And, of course, how many class members even attempt to read the notices?

Opt-Outs. How frequently do members opt out of (b)(3) classes? Can this be correlated with specific subject areas, size of typical individual claims, or something else? Why do members choose to opt out or remain in? Does the fear of involvement conduce more toward doing nothing, or toward getting out? How many opt-outs bring independent actions, and again what correlations might be found? How often is (b)(2) stretched, or (b)(1) distorted, to defeat opt-out opportunities? Is there any significant converse practice, such as defining subclasses in (b)(1) or (b)(2) actions that effectively permit opting out? Is it common to structure settlements that allow the defendant to opt out of the settlement after finding out how many plaintiff class members opt out?

Opt-Ins. Are devices employed to create what essentially are opt-in classes, by such means as defining the class to include only those members who file claims?

Individual Member Participation. How frequently do nonrepresentative class members seek to participate before the settlement stage? What resistance do they meet from designated representatives, class counsel, and the party opposing the class? How much communication is there between class counsel and nonrepresentative members? If nonrepresentative members attempt to seek out class counsel, how are they received? How often to nonmembers challenge settlements? Seek to appeal judgments? Intervene for any purpose? Is there any working concept of the right in a (b)(3) class action to enter an appearance through

counsel that distinguishes it from intervention? Is there experience with this concept that might show whether it should apply to all forms of class actions?

Settlement. Many of the questions have been touched above. Does certification coerce settlement of frivolous or near-frivolous claims? What means have been used to support effective judicial supervision when all parties submit information in support of settlement? And if certification is first sought at the settlement stage, is the attempt to ensure compliance with notice and certification requirements more effective than the attempt to evaluate the merits of the settlement? How frequently do nonrepresentative class members appear to contest settlement, and with what effect? Are significant problems of conflicting interests within the class papered over? Do settlements often include provisions that are, by some reasonable measure, disproportionately favorable to class representatives?

Trial. How often are certified class actions actually tried on the merits? With what results? Is there a correlation with subject matter and class type – are trials more common in (b)(2) actions that pursue still developing legal theories, less common in (b)(3) actions with large sums at stake?

Small Claims Classes. How frequently do certified (b)(3) classes result in relatively trivial relief for individual class members, measured by mean, median, or mode recoveries? Is it possible to guess at the social enforcement value of a significant total parcelled out in many small shares? Are there meaningful parallel questions for other class types, such as trivial injunctive relief in a (b)(2) action, perhaps coupled with significant fees? How often do courts experiment still with substitute modes of recovery, such as distribution to charitable institutions?

Fee-Recovery Ratios. Another cynical belief is that many class actions serve only to confer benefits on class counsel. Token

class benefits are accompanied by handsome fee awards. The pattern of relationships between fee awards and total class recovery will be interesting. The FJC study of a very small number of cases from a sample chosen for other purposes suggested that class benefits regularly exceed fees, and that fees are a larger percentage of class recovery in cases that yield small total recoveries. If this pattern is generally true, it provides substantial reassurance. Additional reassurance would be supplied if there are enough cases tried on the merits to support meaningful comparison of the fee awards and ratios with settled cases.

A more elusive concern lies beyond the simple ratios. A high ratio of fees to recovery may reflect high-quality work done to support weak but deserving claims. It also may reflect the coercive benefits of pursuing undeserving claims, or the betrayal of strong class claims by bargain settlements. This concern may prove almost impossible to test.

If there is any experience to measure, it also would be useful to learn the means by which courts have attempted to regulate fees beyond use of a "lodestar" approach. How often is special importance attached to the actual benefits won for the class? Is there any significant attempt, by auction or otherwise, to stimulate competing offers of representation?

Is there any way to get at such intriguing information as a comparison between the economic gains from representing classes as compared to the economic gains from opposing classes? And is there anything to be learned from such information if it can be found: if, for example, it were concluded that class counsel average a higher return per hour of apparently equal effort, would that tell us more than an equal or lower average rate of return?

Overlapping Classes. How often are overlapping class actions brought in different courts? What means are found to arrange a coherent resolution that avoids parallel proceedings? Are the

problems more severe if one or more overlapping actions are filed in state courts? One description has painted a startling picture of competing class actions, in which the proposed settlement in an opt-out class is met by formation of a rival class with promises of better results: does this really happen? If it does, what are the results for class members? What about more imaginative possibilities, such as formation of a rival class and delegation to the class representatives of the power to opt out of the initial class on behalf of all members of the new class?

Counterclaims and Discovery. There does not seem to be much concern with the prospect of counterclaims and discovery involving nonrepresentative class members. Is there regular acceptance that these devices are not worthwhile? That they are employed, but only in special settings – individual discovery of individual liability or damages issues, for example, is disciplined and occurs only when it becomes immediately relevant? Are there unknown problems that should be addressed?

Res Judicata. Peace is the tradeoff for a class judgment, win or lose. The theory is reasonably clear. But reported cases do not give much sense of actual impact. To the extent that class actions involve claims that would not support individual litigation in any event, there is little reason for concern. But it would be useful to know how often class judgments deter individual actions that otherwise would have been brought; how often individual actions are attempted but fail on preclusion grounds; and how often individual actions overcome preclusion defenses because of direct limits on preclusion, inadequate representation, inadequate notice, or other grounds.

Summary

Several purposes are served by posing a daunting list of questions that are difficult or impossible to answer. The one that may be most important is to demonstrate a central challenge of the

rulemaking process. Courts have cases and must decide them. Procedure must be adapted as well as can be to changing circumstances and needs. If all procedural reform were held hostage to the slow progress of information that meets the rigorous standards of good social science, there would be precious little reform. Nowhere is this prospect more evident than with class actions. What is needed is wise judgment on the balance between the enthusiasm arising from perceived needs for change and the caution engendered by perceived ignorance, and recognition that more confident judgment is needed to justify more dramatic departures from practices proved by at least some experience. When rigorous evidence is lacking, judgment is properly informed by a consensus of anecdotes, encouraging as much anecdotal input, drawing from as much shared experience, as can be. At the same time, judgment is restrained by recognition of the inadequacies of present knowledge and the fallibilities of prediction.

Individual judgments will differ on the results of the last leap into the unknown with Rule 23. The career of the 1966 amendments surely teaches a humbling lesson on the fallibility of foresight, however good the unforeseen consequences may be. Perhaps we know enough to justify modest changes in Rule 23. Possibly we should have the courage to experiment with more drastic changes. If no changes are made, we never will know their fate. If changes are made, it will be years before we even think we know. The greatest cause for concern in the midst of all this is that there seems to be little collective sense of any need for signifcant change, apart from the area of mass torts. There is a real sense that we need to find better means of addressing mass torts, but almost no sense yet as to the blend of substantive and procedural means that will prove better. Rule 23 is only one alternative, and the foundation that might securely anchor a new structure still needs to be sunk.

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