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

Volume Two



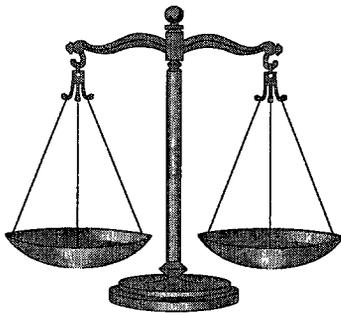
Leonidas Ralph Mecham, Director
Administrative Office of the United States Courts

May 1, 1997



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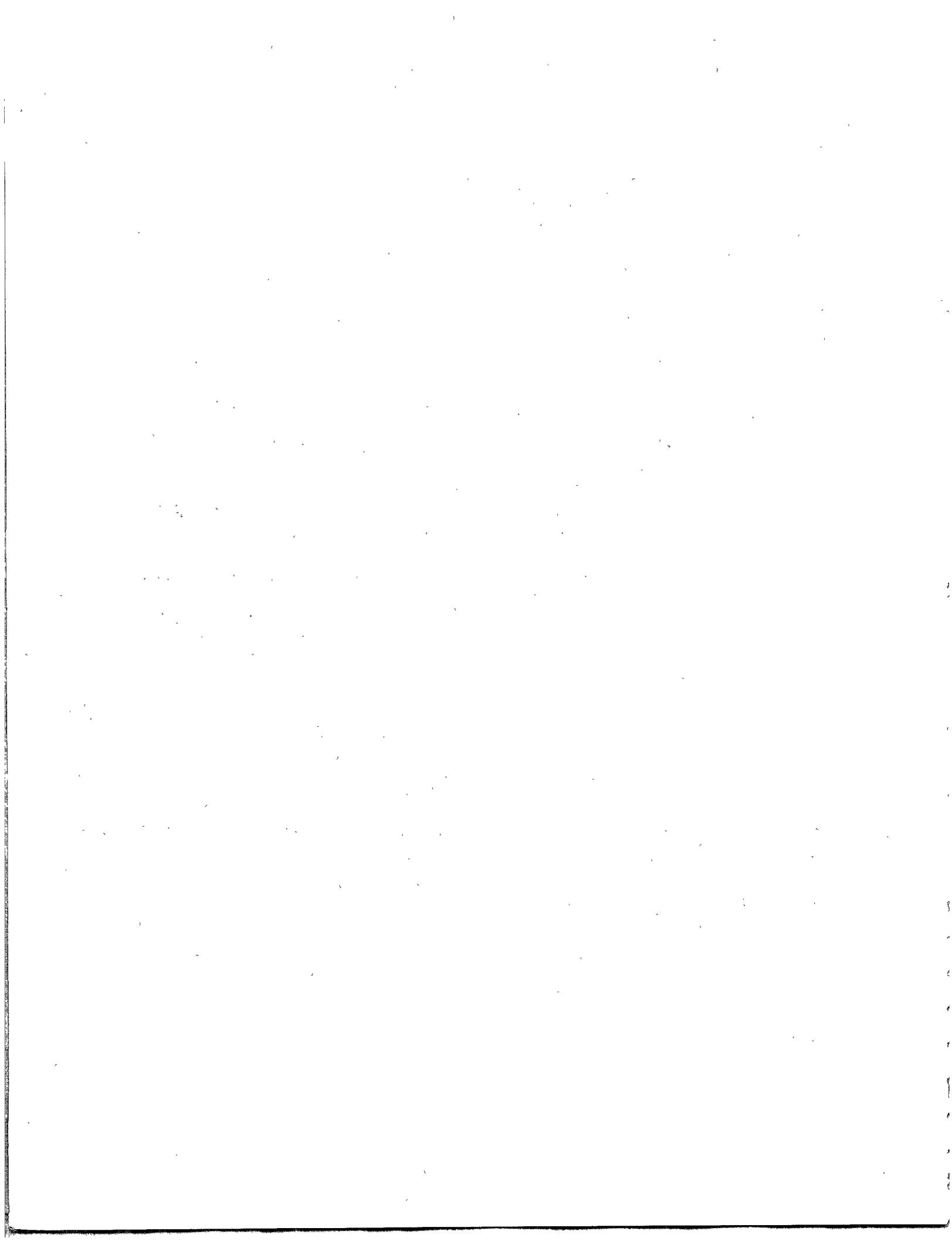
Volume Two



Compiled by the
Rules Committee Support Office

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

May 1, 1997



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

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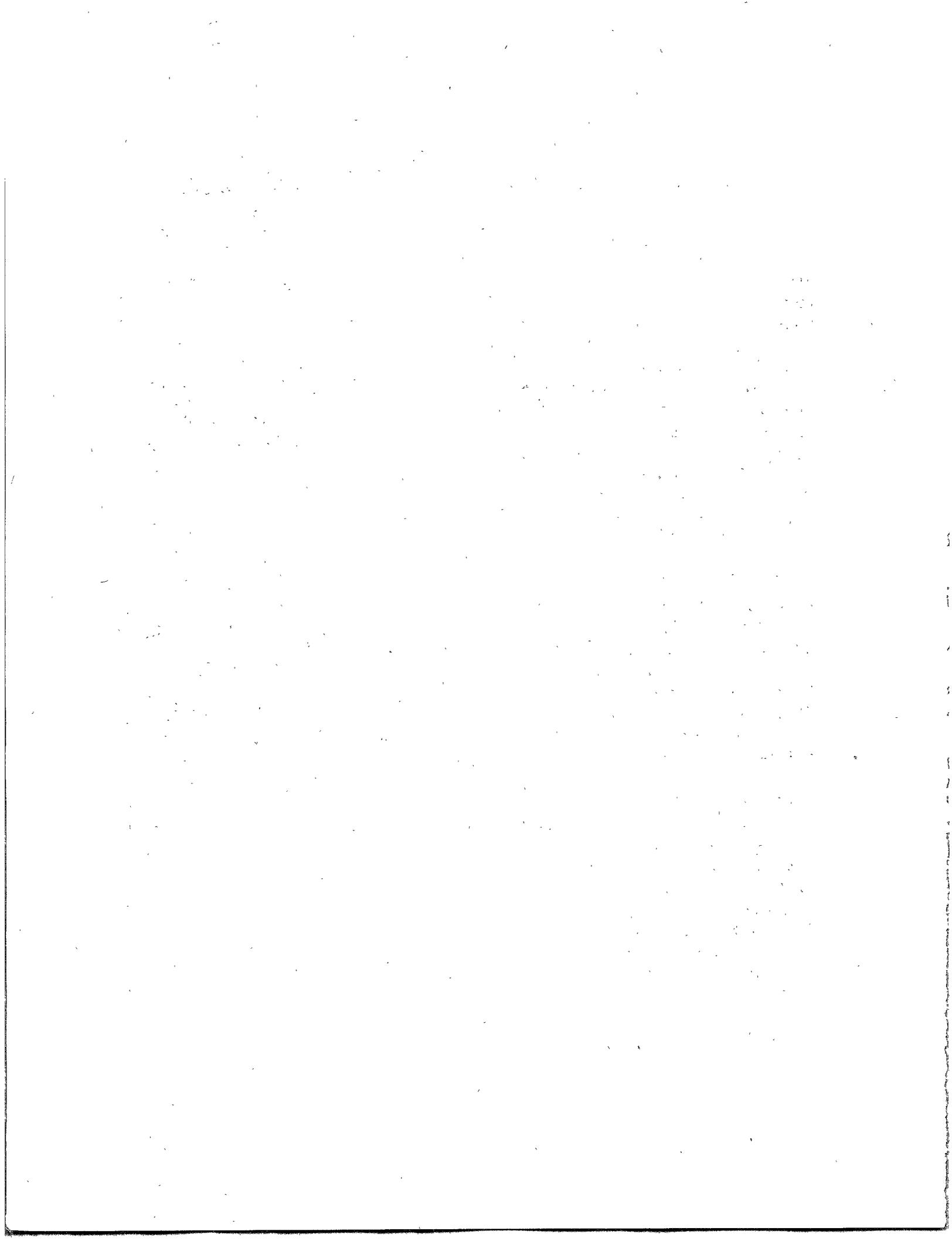
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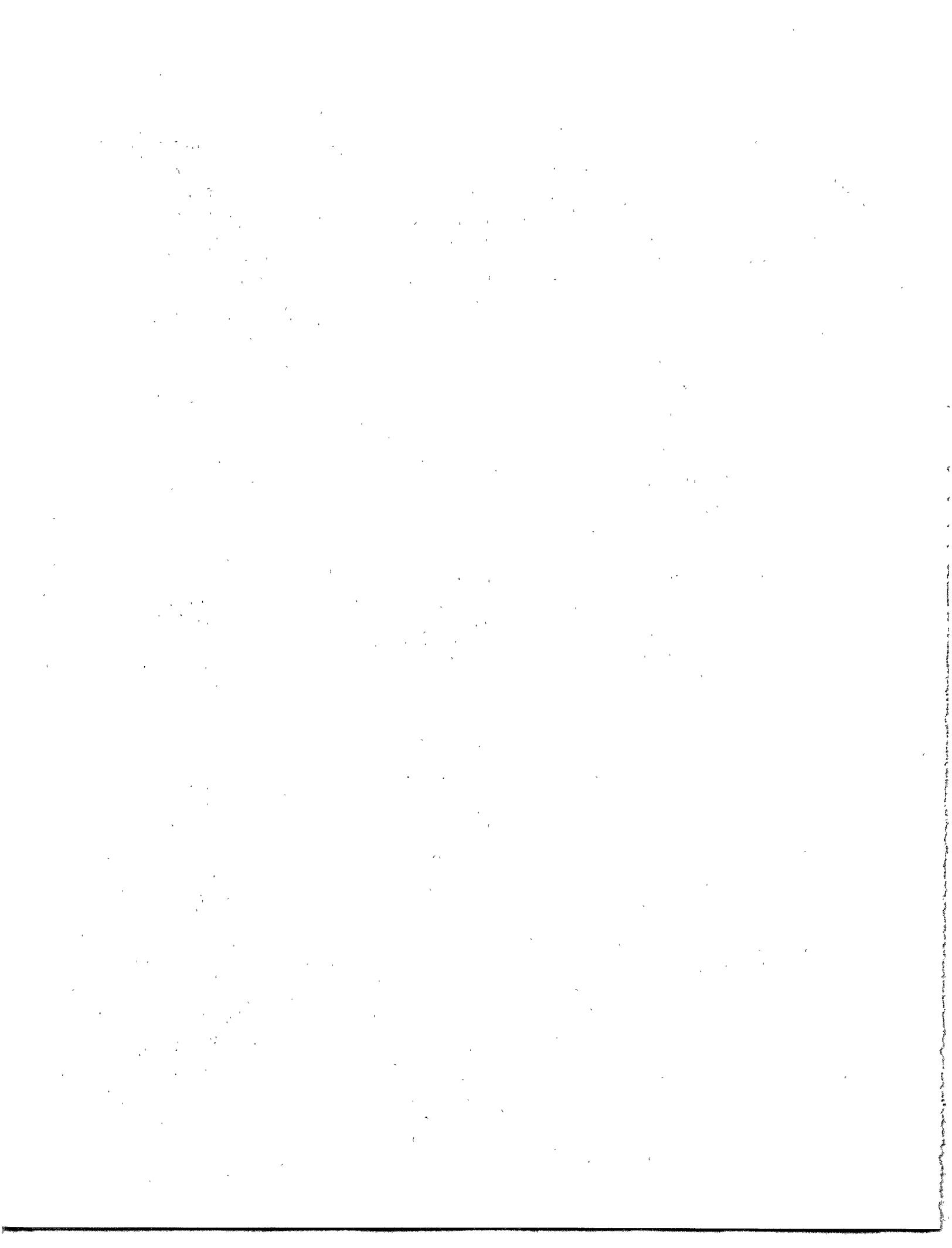
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PROPOSED RULE 23

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Geoffrey P. Miller, New York University Law School
Henry P. Monaghan, Columbia Law School
Jeffrey O'Connell, University of Virginia Law School
Deborah L. Rhode, Stanford Law School
William H. Simon, Stanford Law School
Laurence H. Tribe, Harvard Law School
David B. Wilkins, Harvard Law School
Charles W. Wolfram, Cornell Law School

May 28, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Judge Stotler:

We, the 129 law professors listed at the end of this letter, write to urge the Standing Committee on Rules of Practice and Procedure to reject two substantial changes to Rule 23 proposed by the Advisory Committee on Civil Rules: subdivision (b) (4), an open-ended authorization of settlement class actions that may not be suitable for trial; and the addition of a new factor (F) to subdivision (b)(3) that threatens the viability of small claimant class actions.

I. SETTLEMENT CLASSES

Subdivision (b) describes the types of actions that may be maintained as class actions provided that the prerequisites listed in subdivision (a) are met. The current rule lists three types of maintainable class actions and the proposal adds a fourth type defined as follows:

- (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.

This provision is flawed for three reasons: first, it contains no limiting principles, standards or other guidelines, except for the basic requirements of 23(a), to help trial judges decide when a settlement class is desirable and what form the class should take; second, it raises serious constitutional and statutory questions that have not been adequately addressed by the Advisory Committee; and third, it lends official approval to an extremely controversial practice, one plagued by serious agency problems and risks of collusion, and

threatens to make those problems worse by insisting that all settlements in settlement classes be negotiated before class certification is sought or approved by a court.

A. The Open-Ended Nature of (b)(4)

As now drafted, proposed subdivision (b)(4) provides no meaningful guidance whatsoever. In effect, it allows the trial judge to certify a global settlement class whenever the judge thinks it would be a good idea to do so. This is extremely unwise.

The potential problems with settlement class actions, especially those involving global settlements of mass tort cases, have been much debated recently. Many in the judiciary and academia have elaborated on the serious agency problems that undermine the accountability of class counsel and create a substantial risk of collusion between class counsel and defendants. Even those of us who believe that there may be benefits from settlement class actions in some circumstances cannot support this proposal. At the least, the rule must limit the court's discretion to authorize such settlement classes to those instances where the risks of abuse have been minimized and the potential benefits justify the risks that remain.

By allowing a settlement class when the requirements of (b)(3) are not satisfied, the proposed subdivision (b)(4) unhooks the settlement class from (b)(3)'s limits and substitutes nothing, leaving it constrained only by the relatively weak 23(a) requirements. This open-ended approach should be rejected.

There are three possible objections to the argument we have just presented: that Rule 23(a) alone is a sufficient limit; that the absentee's right to opt out provides adequate protection; and that the trial judge has power under the current federal rules to safeguard class members. Given the special concerns that settlement classes raise, the limited efficacy of opt out, and the strong pressure many trial judges feel to resolve mass litigation expeditiously, these responses will not do.

First, the Rule 23(a) requirements--numerosity, common questions of law or fact, typicality of named representatives' claims and adequate representation--cannot and should not alone bear the burden of constraining settlement classes. It is worthwhile mentioning at the outset that the 23(a) requirements have never been thought sufficient by themselves to justify representative adjudication. This is, after all, why 23(b) was included. Yet, new subdivision (b)(4) contains no additional restrictions and thus allows class treatment on the strength of the 23(a) requirements alone. Including such restrictions in the notes to the rule is not an answer because material in the notes is not binding on courts and may be ignored as the existence of mass tort class actions demonstrates.

With few exceptions, 23(a) requirements have traditionally been construed liberally to favor class treatment. As a result, 23(a) precedent hardly supports the kind of rigorous and careful scrutiny of attorney incentives that certification of a settlement class demands.

Moreover, in the usual class action, the defendant has a powerful incentive to expose problems with class counsel. In the settlement class, defendant's incentives are exactly the opposite; the defendant joins with class counsel to urge certification of the class. This means that court findings under 23(a) are likely to be less reliable, not more.

Second, opt out is hardly a panacea. For one thing, the proposed Rule does not expressly extend opt-out rights to the new (b)(4) class. Subdivision (c)(2), which is unchanged, still mandates individual notice and gives an opt-out right only in the (b)(3) class action. To continue to guarantee an opt-out right for class actions that aggregate individual claims for trial for purposes of convenience and efficiency, while denying it to claims aggregated for settlement on the same grounds makes little sense, particularly given the greater opportunities for collusion in settlement actions. Placing an opt-out right in the notes to this rule is not an adequate response because the express language of (c)(2) suggests no opt-out is required and, as we have already mentioned, the notes are not binding. Even if an opt-out right for (b)(4) actions were guaranteed by the rule, that right would not suffice to cure the problems with (b)(4). Many ordinary Americans do not understand that they should read class notices to decide whether to forego their right to sue. Moreover, many among those who do read the notices have trouble understanding that action is required to avoid being part of the court proceeding described. Because the "consent" implied by a class member's failure to exclude himself from the class is often no more than a legal fiction, Rule 23 (b) has always limited the kinds of claims that could be treated as class actions.

Finally, it is not wise to leave these important issues to relatively unconstrained trial judge discretion. While trial judges have power under the amended Rule to review settlement classes for conformity with 23(a) and to review the settlement itself for fairness and reasonableness under 23(d), they are not likely to exercise that power vigorously without an explicit directive in the Rule. We have already mentioned the pressure to resolve mass litigation expeditiously. Many people have argued that trial judges in general are too strongly inclined to approve settlement classes, especially in mass litigation, and thus not sufficiently interested in scrutinizing a settlement class closely.

Controversial normative questions going to the fundamentals of a procedural device like the class action should be resolved in a uniform and centralized way through the deliberative process established by the Rules Enabling Act. It is an abdication of rulemaking responsibility to leave these questions to trial judge discretion and case by case resolution. Because the settlement class action is such a major innovation, it is imperative that the Advisory Committee, the Standing Committee, and the other bodies with a role in the formal rulemaking process grapple with the fundamental questions that the new device presents. Subdivision (b)(4) falls way short of this standard.

B. Constitutional Concerns

Whether courts have the power to approve the settlement of a "matter" that could not be tried as a dispute between the named parties is an unresolved question of constitutional proportions. An argument could be made that many "actions" within (b)(4)'s purview are not "cases" or "controversies" that may properly be heard by Article III judges because when they are filed nothing remains in dispute between the named representatives and the defendants. An argument could also be made that "actions" that cannot be tried as class actions are not "cases" or "controversies" that Article III judges may settle, which would seem to implicate all (b)(4) actions. Proposed Rule 23 (b)(4) ignores these problems and by doing so invites much litigation over such thorny constitutional questions. Moreover, the constitutionality of class settlements that involve such untriable matters as claims for "future injury" is currently pending before appellate courts, and it is inappropriate to employ rulemaking to suggest how such matters should be resolved.

The new rule may also raise questions under the due process guarantee of adequate representation for absent class members. Under Rule 23 (b)(4) the only lawyers who could qualify as class counsel would be those lawyers who had succeeded in striking a deal with the defendant. One risk of authorizing class actions that can be settled, although not tried, would be that such a regime vests defendants with the ability to select class counsel of their choosing in all Rule 23(b)(4) actions and defendants could shop for the lawyer who asked the least on behalf of the class. If a settlement class action regime, such as that contemplated by (b)(4), were to produce such a race to the bottom, it would raise serious constitutional problems. In any event, (b)(4) is likely to increase the number of collateral attacks on settlements based on claims of inadequate representation, which would itself undermine many of the supposed benefits to be gained by the proposed rule.

C. Inviting Collusion

The serious threat of collusion in class action settlements is one acknowledged by virtually all judges and academic commentators. The proposed rule is, however, silent on the problem. Worse, the proposed rule not only fails to suggest any guidelines or criteria to limit the collusion problem, it appears to increase the opportunities for collusion, particularly given that it requires that the lawyers approach the court only after a settlement has been reached and that it provides no guidelines for the kinds of claims appropriate for (b)(4) treatment.

As we have mentioned, proposed Rule 23 (b)(4) arguably licenses a regime under which plaintiffs' lawyers are encouraged to compete to sell-out the claims of people in order to gain the defendant's acquiescence to a (b)(4) class. The plaintiffs' lawyers cannot leverage the defendant into settling by threatening trial: by definition (b)(4) actions need not be triable. Thus, instead of the best plaintiffs' lawyers being able to negotiate a settlement

because the defendant fears opposing those lawyers at trial, we have a situation in which the plaintiffs' lawyers least committed to the class' interest are most likely to serve as (b)(4) counsel: lawyers most willing to collude with the defendant in exchange for an award of class counsel fees. Class counsel in (b)(4) actions may often be the lawyers most willing to join with the defendant to help convince a court to accept a settlement providing meager benefits to class members by arguing that their own clients' claims are not worth much and that the meager recovery provided by the settlement should be valued at some inflated rate. Given that a court's fairness judgment is so dependent on the joint petition of class counsel and the defendant and that objectors are rare and have limited information, to encourage such collusion only undermines the ability of courts to assess what it is they are being asked to approve in fairness hearings that are rarely true adversary proceedings.

Moreover, the collusion that the proposed rule would encourage is not limited to the collusion engaged in by a few consciously corrupt lawyers. Upstanding, well-intentioned and committed members of the bar are invited to convince themselves that any settlement of a (b)(4) variety is better than no settlement because walking away from the negotiating table means no fees for all one's efforts. Moreover, the well-intentioned lawyer must walk away from a bad settlement with the almost certain knowledge that somewhere there is a lawyer who would accept it and reap the fees. We know of no cases in which a class lawyer has been sanctioned for underselling a class nor do we expect courts or disciplinary committees to begin imposing such sanctions. The well-intentioned lawyer then must walk away, although there is a good chance--given the high rate of court-approval of class settlements--that the class will end up with the bad deal anyway or one worse. Any well-intentioned lawyer with all his or her fees riding in the balance is more than capable of convincing himself that the bad deal he would strike is more "fair and reasonable" than the bad deal some less scrupulous lawyer would strike. Thus, it would take something more like an impractical saint and not just an ordinarily ethical and well-intentioned lawyer to forego settling the kind of open-ended (b)(4) action contemplated by the new rule.

II. SMALL CLAIMS LITIGATION

New factor (F) in subdivision (b)(3) asks a court, when deciding whether to certify a (b)(3) class, to consider: "whether the probable relief to individual class members justifies the costs and burdens of class litigation."

The purpose of this new factor is to exclude class action treatment of small claims when the relief to individual class members is so slight that somehow the costs of a class action are not justified. The Standing Committee should reject this change for three reasons: first, it contains no standards to limit its reach; second, if construed broadly, it risks overturning decades of well-established precedent authorizing small claimant class actions under (b)(3); and third, it misunderstands the point of the small claimant class action.

This new factor could be read to require that the relief to each individual justifies the burdens and costs of litigation. Read that way, it is difficult to imagine this new factor cutting in favor of class certification in any case. Even assuming the new factor is read to require that the aggregate relief provided to class members must justify the burdens of class litigation, many small claims actions would not survive this test. For example, would a class action that provided \$100 to 1,000 people justify the burdens and costs of class litigation? It is easy to imagine a court deciding \$100,000 relief was not enough; certainly \$50.00 for 1,000 people would likely fail this test.

Proposed Rule 23(b)(3)(F) ignores the importance of deterring wrongful conduct that injures each individual slightly but in the aggregate costs society a good deal. Rule 23(b)(3) was conceived originally as a procedural device to facilitate the enforcement of laws that prohibit socially costly behavior that involves small wrongs to large numbers of people. Proposed Rule 23(b)(3)(F) would operate to defeat those same laws. If wrongs are too small to be handled as individual claims and also too small, according to Rule 23(b)(3)(F), to be handled as class actions, the result is predictable: what the law says is wrong would become acceptable practice. That result is unwise and an inappropriate result to be reached through a change of procedural rules. For these reasons, we oppose the adoption of proposed (b)(3)(F).

For the foregoing reasons, we urge the Standing Committee to reject the proposed changes we have discussed.

Sincerely,

Anthony V. Alfieri, Miami
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Stephen R. Barnett, Berkeley
John A. Beckerman, Cardozo
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Academic affiliations are provided for identification purposes only and do not signify institutional sponsorship of the views expressed herein.

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All those named above have authorized the Steering Committee to list them as signatories to this letter.

MEMORANDUM

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

From: Steering Committee to Oppose Proposed Rule 23

Re: Additional Signatories to Letter from Law Professors Dated May 28, 1996.

Date: May 31, 1996

VIA FAX

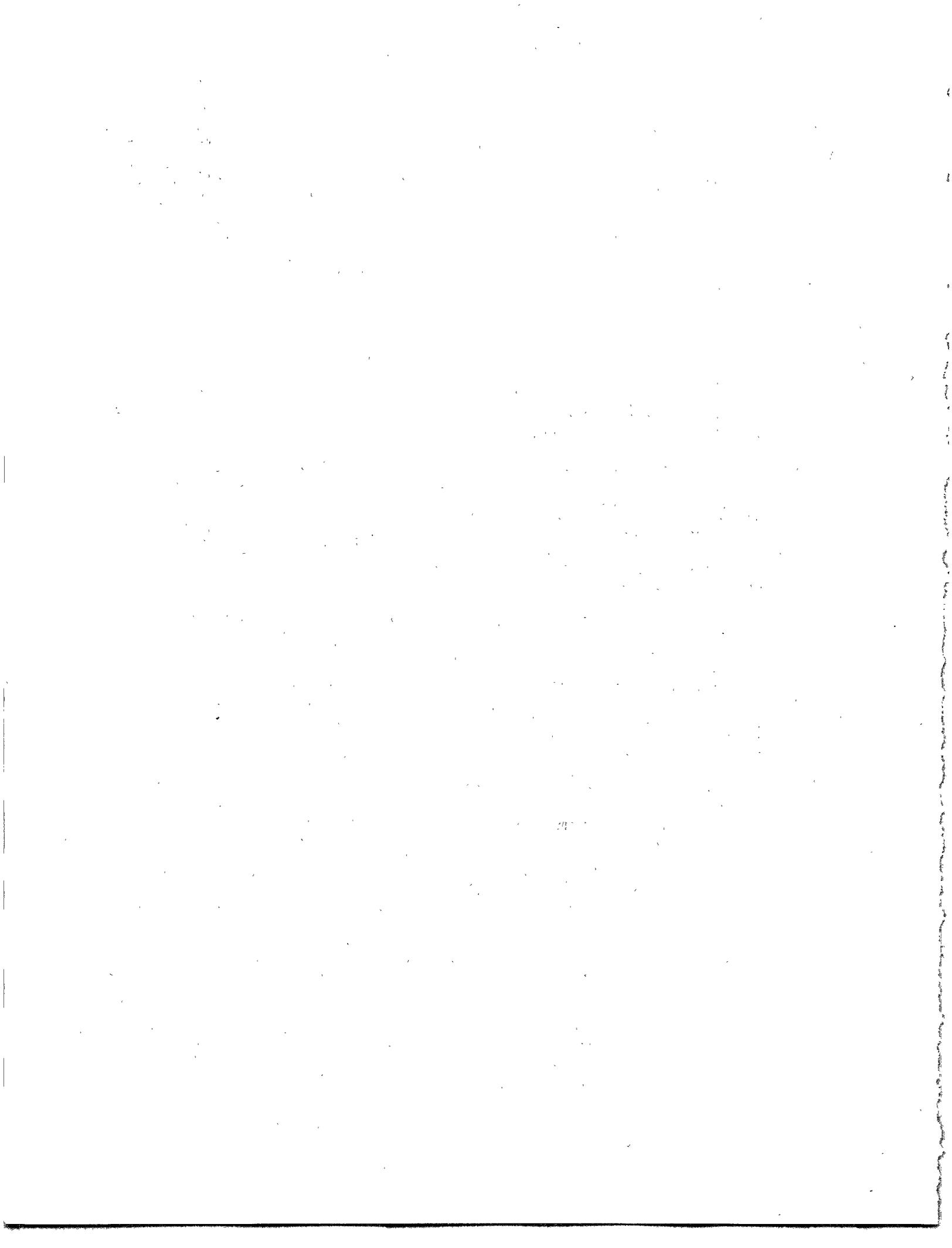
The following law professors have asked that their names be added as signatories to the letter sent to you on May 28, 1996 from law professors across the country.

Robert J. Bartow, Temple
JoAn Cho, Berkeley
Richard B. Cappalli, Temple
Jo Anne A. Epps, Temple
Anita Faye Hill, Oklahoma

Stephen L. Pepper, Denver
Jeffrey J. Rachlinski, Cornell
David Swank, Oklahoma
Elizabeth G. Thornburg, Southern Methodist
William J. Woodward, Jr., Temple

Jonathan M. Hyman, Rutgers-Newark
Andrew L. Kaufman, Harvard
Judith L. Maute, Oklahoma
Peter Murray, Harvard
Louis M. Natali, Jr., Temple

With these additions, a total of 144 law professors have endorsed the May 28, letter. We hope that the comments of these academics prove useful to the Committee. Once again, thank you for considering our views.



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May 28, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Judge Stotler:

I have signed the joint letter to you from over 100 law professors across the country and am in agreement with the views expressed therein, but I write separately to address some of the arguments, as I now understand them, of those who would have the Standing Committee send this proposed rule forward rather than back to the Advisory Committee.

To send the proposed rule out as a method of generating helpful comments is a flawed approach, which may generate expectations that some rule substantially like this draft will soon be proposed and may end up impeding the kind of thoughtful redrafting that should take place. As to generating helpful comments, many commentators have already weighed in with detailed and specific recommendations, for example Judge Schwarzer's writings on this subject. A proposal that reflected some of the many thoughtful contributions that have already been made might generate more useful dialogue, but a rule that makes little use of the commentary to date is likely to generate only repetition of what has already been said or doubts about the usefulness of commentary that seems to provide so little aid to those who draft the rules.

Before further conversation will be productive, something other than the broad license contained in the present draft of 23 (b)(4) needs to be on the table. If the Standing Committee were to send this open-ended draft out for comment, it would suggest that this open-ended rule is one viable approach. Such a message seems unwarranted, given the proposal's failure to include meaningful limits or protections against the many abuses associated with settlement-class-action practice.

Are those of us who keep harping on abuse, merely crying wolf? I have heard it argued that the case for abuse is

overstated, that a few visible cases (like Georgine--the asbestos case) have been used by alarmists to condemn a practice that is by and large benign. The joint letter that I have signed sets out the reasons to believe that the proposed rule will generate widespread collusion in settlement class actions, and I will not repeat those arguments here. I do, however, want to add that by suggesting that class action settlements be filed simultaneously with the class complaint and the request for certification, the new rule makes collusion easier, not harder. That is so because it invites settlements made without discovery and makes court-selection of class counsel and competitive bidding for that position less likely.

In addition to the arguments given in the joint letter that would predict widespread collusion in settlement class actions, there is anecdotal evidence about not-so-visible cases that suggests that the visible cases are the tip of an abuse iceberg. One class action settlement approved by a federal district court involved a pesticide that allegedly caused bladder cancer.* Members of the class included many who are not now sick, but who may be very sick in the future, and who thus had little reason to pay attention to the details of the settlement when it was made or little incentive to consider the wisdom of opting-out. At first, there were a number of objectors to this settlement. Then most, if not all of them, were gone, although it is questionable whether the changes made to the settlement were substantial. The lawyers for the objectors allegedly made some sort of agreement with class counsel that resulted in the abandonment of the objections. Was this settlement bad as a matter of substance for the class? I do not know. What's more few can make such an evaluation because the opinion approving the settlement is not published in any readily available source and received no major press coverage. This case was as close to invisible as a case can be, yet it involved substantial claims and objectors who conveniently disappeared. Moreover, I have been informed that following this settlement a very similar settlement was entered by another company that produced the same chemical under a different name, again covering future claims. Frankly, I am much more troubled by invisible settlements, such as these, than the visible cases subject to close scrutiny by the media and academics.

Finally, the argument that most settlements are free of gross abuse and good for the class members involved is not supported by the Federal Judicial Center's own study, at least it was not supported by the preliminary report of that study, which is the only copy I have seen. The preliminary study results I have reviewed showed the following: apart from several outlier

* Price v. Ciba-Geigy Corp., Civil Action 94-0647-B-S (S.D. Ala. 1995).

cases, the average fairness hearing lasts about 41 minutes. At 60% of such hearings, the court hears from no objector, so the presentation is non-adversarial: two competent sets of lawyers (class counsel and the defendant's team) explaining how the settlement is fair and how counsel represented the class in exemplary fashion. Because objecting lawyers generally receive no fees and problems with class settlements may be difficult for non-lawyers to discern, it is unreasonable to conclude that the lack of objections means the settlement is indeed fair or reasonable or that class counsel did a good job. But without adversary process how is any court supposed to discern otherwise?

The study suggests courts cannot. The statistics in the preliminary report show that in one district 100% of all class settlements are approved with some modifications, which I take it are generally modifications to the attorney's fees, not substantive changes to the deal, because most courts adhere to the notion that settlement terms, unlike class counsel fees, are take-it-or-leave-it propositions for the court system. The high approval numbers demonstrated by the study suggest that whatever abuse exists, it is going unchecked by current process, yet the new rule does nothing to beef up the process of settlement review, it assures courts will be less involved in the selection of counsel, and it is silent on the critical question of subclassing.

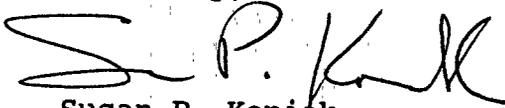
Three final points: the Advisory Committee's notes do not make this rule better. They are not binding and thus are incapable of fixing the basic flaws in this rule. If the notes on (b)(4) were meant to limit the scope of that rule, those limits should be in the rule, not in the notes. Second, the notes state that proposed (b)(4) is intended to resolve the new disagreement on settlement class actions created by recent appellate decisions. The two most prominent recent cases, both from the Third Circuit, GM Truck and Georgine, are barely dry on the page. Few judges or academics have had a time to digest the reasoning of those cases, no less to reach a reasoned judgment that they deserve to be overruled by a rule change. While it is true that in Georgine the Court alluded to the fact that a rule change might be appropriate, it is clear from the context that any such change should pay close attention to the due process rights of class members and other serious concerns raised by class action practice.

Third and finally, if the Standing Committee rejects the proposed rule, what instructions should it give to the Advisory Committee? Two approaches suggest themselves to me. First, the Standing Committee could instruct the Advisory Committee to leave both the question of settlement class actions and small claims class actions to the common-law-like process that has already begun and to legislative initiative. If, on the other hand, the Standing Committee feels some sense of urgency about resolving by

rule the thorny questions presented by settlement class actions, the Standing Committee should instruct the Advisory Committee to formulate a rule that includes safeguards against collusion, beefs up the review provided by fairness hearings, provides a clearer role for the court in the selection of class counsel, elaborates on the standards for adequate representation under 23(a) and addresses the due process concerns presented by settlements in which the right to opt-out is ephemeral for one reason or another.

I understand that the task of rule drafting is difficult and that the Advisory Committee has struggled with the class action rule for some time. It is thus with a sense of gratitude and respect for all those involved in this process that I make these comments. I thank you and your colleagues for considering the points in this letter.

Sincerely,

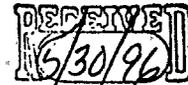


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93-CV-00

May 29, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

By Overnight Mail

Dear Judge Stotler:

I am writing in opposition to the proposed revision of Rule 23 that is now pending before the Standing Committee. I am also a signatory to the joint letter that has been submitted to you. I thought I would also write separately to state my own views clearly and to elaborate on several points not addressed in detail by the joint letter.

At the outset, I would like to make clear that although I oppose this particular proposed Rule, I do not oppose settlement class actions *per se*. The potential costs of settlement classes are well known: agency problems can undermine accountability and facilitate collusion between class counsel and defendants; scheduling of recovery and damage averaging can force class members with high damages to subsidize those with low damages; and adverse selection effects can dilute individual recovery in claims resolution facilities. On the other hand, the potential benefits are considerable as well: transaction cost savings, more rapid recovery, and potentially more equitable distribution of a limited fund. Furthermore, settlement classes are not confined to the highly visible and much publicized cases involving mass torts or small claims, and their use in other settings may entail lower costs (but also smaller benefits). And even in the most controversial cases, it might be possible to justify a settlement class action as an administrative-type solution to an otherwise intractable, large-scale compensation problem, where there is reason to believe that the affected parties would have agreed to the same scheme in a suitable bargaining situation *ex ante*.

The question is whether this particular proposal is good enough to circulate for public comment. In my view, it is not. The text of the new (b)(4) is largely empty of content; the Advisory Committee Note is extremely thin, and in any event cannot substitute for explicit limits and guidelines in the text of the rule itself; and the new (b)(3)(F) factor rests on an implicit and highly problematic assumption that deterrence alone cannot justify small claimant class actions, an assumption that could end up mangling the small claimant class. Not only is a proposal this deficient unlikely to elicit helpful input, but it could easily gather momentum

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and stand in the way of developing a superior alternative.

The potential costs of settlement classes are so high that it is imperative that an authorizing Rule be crafted carefully, with guidelines and limitations in the text of the Rule that help assure settlement classes are used only when strongly justified and then only in a form that minimizes the potential costs. Furthermore, settlement classes raise fundamental normative issues that are not addressed carefully in either the text of this proposed Rule or the Advisory Committee Note. These issues include the proper role of individualized versus aggregative litigation, the proper limits on court involvement in facilitating settlement, and the appropriate reach of participation norms. I recognize that these are very big issues, but it seems to me that the formal rulemaking process is the right place to grapple with them.

To be sure, the Advisory Committee Note to (b)(4) provides some guidance. It states that the (b)(3) factors should be considered, and mentions a few concerns in a general way and without elaboration. But this falls far short of what is needed. For one thing, the concerns that the Note mentions should be reformulated as explicit factors in the text of (b)(4) itself. We all know that general language in a Note is no substitute for express requirements in the text.

Furthermore, while the Note states that (b)(3) factors are relevant, the text of (b)(4) itself places no limits whatsoever on the permissible extent of deviation from the (b)(3) factors. Although ordinarily I am willing to place more faith in trial judges, the stakes in a class settlement are just too high and the risks too great to leave the decision to practically unreviewable discretion. As I now understand from conversations with several people, the Advisory Committee intends that the (b)(3) factors be satisfied for settlement, just not necessarily for trial. However, the Rule should clarify what it means for (b)(3) factors to be satisfied "for settlement, but not for trial." Moreover, it seems to me that the better approach is to develop factors specifically designed for settlement class actions rather than to bootstrap settlement classes into (b)(3) -- and also to state those factors in the text of the rule rather than just in the Advisory Committee Note.

In addition, the discussion in the Note does not go far enough. The Note is written in a style typical of Committee Notes: it nods at some problems, describes them in highly general terms without specifics, adds a few equally general cautions, and in the end provides little normative guidance and no firm requirements. Such a Note can be a useful interpretive supplement to a well-crafted rule, but it is not an effective substitute.

Finally, there are many important normative issues that the Note does not address and that should be mentioned and discussed. These include, for example, whether and how approval of a settlement class depends on the reasons for class treatment (including

distinctions between small claim and large claim litigation); how the availability of alternative forms of aggregate litigation (including consolidation and smaller sized class actions) should affect settlement class approval; what degree of adversity between class counsel and the defendant should be required and how adversity should be evaluated when adversaries come to court agreeing on the settlement; and whether and how the court should take account of any differential treatment between class members and similarly situated injured parties who are not members of the class. Moreover, the Note should give explicit guidance on how to weigh the multiple factors, and also address the use of precautions to safeguard the interests of absentees, such as the availability of discovery into the genesis of the settlement and the appointment of a special master or guardian ad litem to protect the interests of the class.

The challenge, of course, is to provide guidance in a way that constrains, yet still leaves trial judges with enough flexibility to take account of the most salient specifics of individual cases. The Advisory Committee can do this, I believe, by providing reasons in the Note for its choice of factors and possibly also by giving some examples of how the factors should be applied. Trial judges would then be able to rely on the reasons and the examples by analogy to work out the implications of Committee intent for particular cases.

I have heard some people argue that this proposal should be circulated, even without Standing Committee approval (if that is possible), because doing so would credit the Advisory Committee's hard work and stimulate conversation and public input. I agree that the Advisory Committee has worked hard, and I can only assume that the Committee is having trouble reaching agreement on a new Rule 23. But the answer is not to circulate a deficient proposal for public comment -- with or without Standing Committee approval. In my view, the answer is to work harder.

I believe there are at least two serious risks associated with circulating this proposal. First, the proposal is not likely to elicit much helpful input. The Advisory Committee received quite a number of thoughtful comments on its earlier proposed revision and has also had the benefit of several conferences and much discussion devoted to the class action and the special problems of settlement classes. What more can the Committee learn by circulating this proposal? To be sure, lots of people will make comments, but the comments are bound to be general and abstract since the proposal is too amorphous to focus and frame a useful debate.

Second, I fear that any proposal publicly circulated with knowledge that it has passed the Advisory Committee is more likely to be adopted, whether or not it also receives the approval of the Standing Committee. I am aware of examples to the contrary. However, it

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seems to me that this proposed Rule 23 is likely to garner support among divergent interest groups precisely because it has so little content. If I am right and the proposal gathers momentum, there will be no room for considering a more substantive alternative.

This last point is especially important given the possibility that the Rand Institute will do an empirical study of settlement class actions. Although I am not up-to-date on the Institute's current plans -- and I recommend that the Committee check with Professor Deborah Hensler before deciding to circulate the Rule 23 proposal -- I believe that there is strong interest in doing such a study at Rand. The fact is that we desperately need hard data. There are some good theoretical reasons to worry about settlement classes and much anecdotal evidence of concern. But there are substantial benefits too. In the end, we have to weigh the benefits against the costs, in light of institutional limits and available alternatives. Reliable data will help enormously with this task. The problem is, however, that it may become impossible to use the results of a Rand study, should such a study be completed in the near future, if momentum builds in support of the current proposal.

I can certainly understand that the Committee might feel some frustration at this point. Any revision of Rule 23 is bound to be difficult and controversial. The answer, however, is not to propose a largely empty rule, but to work harder to reach agreement on something worthwhile. If, as I assume, the Committee is engaged in a process of reasoned deliberation, then it should be possible for a majority to coalesce around a proposal with more content than this one. After all, there was considerable controversy in 1964 and 1965 over the new (b)(3) category, but the 1966 Committee persevered and eventually reached agreement on a workable, if not ideal, provision. At worst, the current Committee will reach a stalemate. In that event, courts will continue to deal with settlement class actions under the existing Rule. This outcome is not optimal -- and perhaps for those worried about the strict approach of *GM Truck*, rather flawed -- but a gradual, common-law-type process of development seems to me preferable to an open-ended delegation of power under a toothless Rule.

Honorable Alicemarie H. Stotler
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Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Bone". The signature is fluid and cursive, with a large initial "R" and "B".

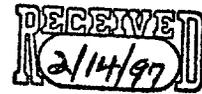
Robert G. Bone
Professor of Law

cc: Honorable Patrick Higgonbotham, Chair, Advisory Committee
Professor Edward Cooper, Reporter to the Advisory Committee

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96-CV-176

February 13, 1997

Peter G. McCabe, Secretary
Committee of Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

OVERNIGHT MAIL

Dear Mr. McCabe;

I write in response to the invitation for comments on the proposed amendments to Rule 23 of Federal Rules of Civil Procedure, published at 167 F.R.D. 535-566 (1996). I join others in recommending that the current draft be sent back to the Advisory Committee on Civil Rules for revision. In particular, I believe the addition of subdivision (F) to Rule 23(b)(3) is undesirable. Moreover, although a Rule addressing the special problems of class action settlement is advisable, I believe that the proposed 23(b)(4) falls short of the mark for reasons discussed below.

I have taught Civil Procedure every year since I began my academic career in 1983. I have written a number of articles in the field, including one on the history of the class action and one reviewing an earlier proposal for revision of Rule 23. I also have a keen interest in complex litigation and aggregative adjudication, evidenced by an article on nonparty preclusion and another on statistical methods of collective adjudication. I also wrote the Standing Committee last May 1996 to recommend against publishing the current Rule 23 proposal for comment.

My opposition to the Rule 23 proposal focuses on new (b)(3)(F) and (b)(4). I approve of the authorization for discretionary appeal in 23(f), the amendment to 23(c)(1) relaxing the requirement of early certification, and the alteration to 23(e) clarifying the need for a hearing with prior notice. I also approve new 23(b)(3)(A) and the modification to 23(b)(3)(B). Factor (A) usefully codifies one of the important inquiries relevant to certifying a small claimant class and also reflects the importance of considering the externalities of individual litigation in large claim situations; that is, the effect of individual suits by some class members on the ability of others to obtain effective relief. The addition of the maturity factor to (b)(3)(C) is also useful for reasons the Advisory Committee Note addresses.

Before presenting my criticisms of (b)(3)(F) and (b)(4), I wish to thank the Advisory Committee for struggling with these difficult issues. Many practitioners and academics hold strong views about the class action, and the resulting divergence of opinion makes the

Committee's task unusually challenging. But this is exactly the sort of topic that the Committee should address, for it implicates fundamental questions about the proper role of the judiciary, the proper function of adjudication, and the values of procedural justice. Furnishing guidance on such matters is, I believe, the main reason for the Rules Enabling Act process today. I object to the current proposal because I believe the Committee can and must do more.

I. The Scope of My Remarks

The Committee has already received a great deal of input on this proposed Rule. Rather than plough that same ground again, I shall briefly summarize my views on points I know others have already addressed and devote the bulk of my remarks to points I believe are at least somewhat new (if anything can possibly be new in this debate). In addition, writing at this late date, I have the benefit of reviewing the proposed Rule 23(b)(4) drafted by Professors Judith Resnik and Jack Coffee and sent to Judge Paul Niemeyer by letter dated January 8, 1997, and I shall comments on that proposal as well.

II. 23(b)(3)(F)

The Advisory Committee Note describes the purpose of new subdivision (b)(3)(F) as a "retrenchment in the use of class actions to aggregate trivial individual claims." 167 F.R.D. at 563. In my view, however, the proposal is based on an ill-conceived and poorly justified theory of the small claimant class. The value of a small claimant class action lies not in providing individual relief to class members, which for most (though not necessarily all) is usually too small to make a significant difference. The principal value of the small claimant class action lies in deterrence of future wrongdoing (and perhaps also in serving corrective justice goals). The small claimant class forces the defendant to internalize the costs of a violation when the wrongdoer causes small harms to a large number of persons. This is especially important for those activities, such as securities fraud and antitrust, that tend systematically to cause small harms. In such cases, the class action can serve as a useful supplement to public enforcement.

None of this is new to the members of the Committee. It is the conventionally accepted wisdom about small claimant class actions, and the Committee Note recognizes that "one of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts." 167 F.R.D. at 561.

For this reason, I was surprised to see (b)(3)(F) included in the proposed Rule. Why should a judge focus on "the probable relief to individual class members" when providing individual relief is not the main point of the small claimant class action and when the relief in most cases is likely to be extremely small, even trivial, by definition?

The Committee Note sheds some light on this question:

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. 167 F.R.D. at 563 (emphasis added).

Moreover, the Draft Minutes elaborate further on the theme:

The traditional focus and justification for individual private litigation is individual remedial benefit 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. Focus should hold steady on the objective cash value and subjective intrinsic value of the relief available to actual class members. 167 F.R.D. at 542 (emphasis added).

Reading these two passages together leads to a disturbing conclusion. The new (b)(3)(F), it would seem, reflects a particular view of the proper limits of adjudication. On this view, public enforcement goals are subsidiary to private compensation goals, and the reason appears to rest on a belief that private compensation is the main source of adjudication's "legitimacy" and the "core justification" for class enforcement. Without this anchor courts should certify classes where deterrence is the only significant benefit only when Congress explicitly mandates private enforcement procedures. *See also* 167 F.R.D. at 540 ("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").

As the Committee knows, this view is controversial. After all, in most of the small claimant class actions which have federal jurisdiction, there is an express or implied authorization from Congress for a private remedy. Moreover, in many of these cases, it is understood that private suits are a useful supplement to public enforcement. And the small claimant class action has many of the ordinary earmarks of conventional adjudication: It redresses a past wrong with a damages remedy and often provides individual class members with at least some compensatory relief.

Despite all of this, the Committee insists that courts focus on individual relief and deny certification when that relief is not significant relative to the costs of class treatment. But why? What is the "core justification of class enforcement" that requires this threshold rule? And why is this additional element required for the "legitimacy" of adjudication -- if it is? Suppose deterrence was the main goal of the particular substantive law at stake in a class

action case¹ and that litigation costs presented a practical obstacle to vindicating that goal for a set of cases involving systematic imposition of diffuse small harms. If the point of adjudication is to enforce the substantive law, then why is it not a perfectly "legitimate" use of adjudication to further deterrence in such a case, and why is it not squarely within the "core justification" of the class action to lower the cost barrier to vindication of the deterrence goal?

The Committee has an obligation to answer these questions with reasoned argument. It is not enough that a majority of the Committee happens to hold a particular view. Our procedural system cannot be hostage to the personal views of whomever happens to constitute a Committee majority at a particular time. The Committee must justify its views and in doing so, it must show how those views fit the key elements of our current system of adjudication. The Committee, after all, is making a set of procedural rules for *American adjudication* and so those rules should fit the main features of that adjudicatory system.² Thus, in the case of small claimant class actions, the Committee must point to support for its position in current procedural practice and deal with arguably contrary evidence.³

One reading of 23(b)(3)(F), supported by John Frank's comments, 167 F.R.D. at 544, is that it is meant to put the burden on Congress to authorize small claimant class actions for very small amounts. On this view, the inclusion of subdivision (F) means that courts should generally deny certification of a (b)(3) class action when the only significant reason is deterrence and the class action would be quite costly -- unless Congress *explicitly* authorizes class enforcement. This approach may have some merit, though the political realities are such that Congressional action is unlikely. There is a serious line-drawing problem, however. How is a judge supposed to identify cases in which the only significant reason for class certification is deterrence? By definition, the small claimant class action involves *small claims*, so a judge must decide how "large" a small claim has to be. The risk is that judges will refuse to certify any small claimant class action unless Congress has approved, which is a clearly undesirable result unless one accepts the private compensation view of adjudication discussed above.

¹ This is not by any means a far-fetched assumption. Indeed, as Committee members are aware, some judges and many lawyers who take an economic approach to law believe that most legal norms are about changing behavior through deterrence rather than transferring wealth through compensation. However, one need not go this far to believe that, say, a private antitrust claim is primarily about deterrence.

² This is not the place to elaborate this theme in detail. I hope this cursory reference is sufficient to convey the basic thought adequately.

³ Such as perhaps the long history of private attorney general practice, the recognized importance of accomplishing deterrence through adjudication, and the group nature of civil rights remedies.

There are portions of the Note and Minutes that suggest that the Committee's goal is much more modest -- simply to eliminate class actions for such trivial amounts that it seems silly to take up expensive public resources in adjudicating the case. While this position has a certain common sense appeal, it does not square with a deterrence rationale.⁴ Once 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. This does not mean that all small claimant class actions should be certified. Far from it. It means that judges should evaluate the desirability of a class action not by the amount of individual relief, but by what really matters -- the deterrence value of the class action.⁵

There are problems with small claimant class actions, to be sure, but the (b)(3)(F) factor is not the best, or even a terribly sensible, way to address these concerns. If the problems are serious enough to warrant attention, measures should be adopted that fit the nature of the problem more closely.

Thus, I recommend that the Committee delete (b)(3)(F). If the Committee decides to retain the factor, then for the reasons discussed above, the following sentence should be removed from the proposed Committee Note: "If probable individual relief is slight, however,

⁴ Indeed, the Committee's telephone overcharge example reported in the draft Minutes illustrates the point. 167 F.R.D. at 542, 547. The Minutes report that at least some Committee members believed factor (F) would permit a class action for telephone overcharges where individuals expected 24 cents recovery, provided the class action could be resolved and the remedy administered at low cost. But why would this be so? Clearly, individual relief in the amount of 24 cents is vanishingly small and of no practical consequence to anyone. Moreover, whatever "subjective intrinsic value" might mean (as opposed to "objective cash value," see 167 F.R.D. at 542), it is hard to imagine there is any in such a case. The only reason for class treatment is deterrence, a reason that could well be quite important depending on the facts. If the Committee is willing to tolerate a class action in this situation, then the Committee must approve of a deterrence justification for the class action after all. But if this is so, then factor (F) is misleading insofar as it focuses on individual relief -- especially since none of the other (b)(3) factors clearly admits deterrence into the balance.

⁵ Factors might include: (1) whether class actions are consistent with the legislative enforcement scheme, if any (e.g., whether a class action would overdeter, and whether the legislature contemplated private enforcement through class actions), (2) whether nonadjudicative enforcement mechanisms exist and whether they are likely to be deployed (e.g. whether an administrative agency or the attorney general is already in the process of seeking penalties against the defendant or is likely to correct the condition), (3) the costs and burdens of class treatment, and (4) the likelihood that the general type of wrongful conduct at issue will be repeated by others (e.g., there may be less need to use a class remedy for deterrence when public officials have adopted regulations to deal with future wrongdoing). In fact, judges today consider many of these factors when deciding whether a class action is superior.

the core justification of class enforcement fails." 167 F.R.D. at 563.

III. 23(b)(4)

The Committee has received much input on 23(b)(4), the settlement class action provision. I will try not to repeat those points in detail. My views on 23(b)(4) are close to those expressed by Professor David L. Shapiro of Harvard Law School in his letter to the Committee.⁶

I am not opposed to class action settlements or to settlement classes in general. The potential costs of settlement in the class action setting are well known: agency problems can undermine accountability and facilitate collusion between class counsel and defendants; scheduling of recovery and damage averaging can redistribute wealth among class members (depending on how the entitlements are defined); and adverse selection can dilute individual recovery in claims resolution facilities. On the other hand, the potential benefits are considerable as well: transaction cost savings, more rapid recovery, and potentially more equitable distribution of a limited fund. Furthermore, settlement classes are not confined to the highly visible and much publicized cases involving mass torts or small claims, and their use in other settings may entail lower costs (but also potentially smaller benefits). And even in the most controversial cases, it might be possible to justify a settlement class action as an administrative-type solution to an otherwise intractable, large-scale compensation problem, where there is reason to believe that the affected parties would have agreed to the same scheme *ex ante*.

An ideal rule would provide guidance to district court judges on how to balance these costs and benefits in particular cases and also how to design procedures, such as appointment of guardians, attention to subclassing, and careful review of attorney compensation, that can reduce costs while still achieving substantial benefits. The Committee's modest approach is risky, for the proposed (b)(4) invites more settlement classes without signalling the need for and without defining suitable constraints. Of course, trial judges must have discretion in this area, but it is important that their discretion be constrained both for good outcomes and for empowering more expansive appellate review.

As the Note makes clear, the Committee intends the constraints of 23(a) and 23(b)(3) to apply to settlement classes.⁷ New (b)(4) is meant to authorize district court judges to consider the fact of settlement when evaluating these requirements. There are two problems

⁶ I also agree with Professor Shapiro's recommendation that the Committee clarify the matters to be addressed in a fairness hearing, that it revisit the (c)(2) notice requirement for small claimant class actions, and that it reconsider the opt out requirements for every type of class action under Rule 23.

⁷ This should be made much clearer in the text of the Rule itself.

with this approach. The first is that the Rule does not make clear how much of an effect on the 23(a) and (b)(3) analysis settlement is permitted to have. For example, there is no reason in theory that the prospect of settlement should not entirely eliminate the need to show (b)(3) predominance. After all, there is no judicial economy gain to be had from trying the case. Similarly, there is not likely to be much left of the (b)(3) superiority determination as a practical matter, at least for large claim class actions. When a settlement appears reasonable on its face and when class members who know about the case and want individual trials can opt out, it seems likely that a judge would indulge a strong *de facto* presumption in favor of "superiority" without inquiring too closely into all the factors. By the same token, a judge might well ignore or at least downplay (a)(3) typicality or (a)(2) common questions when confronted with a case that will settle.

I assume the Committee does not want to authorize such a substantial departure from the Rule 23 requirements, especially if it views these requirements as imposing meaningful constraints. But the Committee never explains how far a district court judge is permitted to go on the ground that a settlement is involved -- and, more importantly, the Committee never explains why.

Even if 23(a) and (b)(3) still impose meaningful constraints, there is a second set of problems with the Committee's proposal. The settlement class has its own special features that warrant additional constraints. Others have discussed some of these. For example, some critics have described how a more indulgent attitude toward settlement classes can weaken the bargaining position of class representatives and thus reduce recovery for class members. Of course, the marginal gain from collective adjudication might exceed the marginal loss from the bargaining disadvantage, but this risk should be considered in certifying a settlement class. Furthermore, critics have pointed out how (b)(4)'s requirement that parties have concluded a settlement before coming to court only exacerbates the agency problems by making it easier for class attorneys and defendants to arrive at settlements that are not optimal for the class.

The proposal drafted by Professors Judith Resnik and Jack Coffee makes an effort to address these and other concerns. I conclude this letter by discussing their proposal briefly. The Resnik/Coffee proposal has four important elements:

1. It requires specific findings on the (b)(3) requirements. This is useful to assure careful consideration of the factors and to provide a record for appellate review. District court judges often make findings today, but it is important for the rule to make it clear that the practice is mandatory.
2. Proposed 23(b)(4)(B)(iii) extends the requirement of specific findings to such matters as subclassing, guardians ad litem, special masters and the like. This is a very desirable addition both because it instructs district court judges to consider these potential safeguards in each case and because it makes a record for appellate review. I only recommend that the requirement be applied to "litigating certifications" under 23(b)(4)(A) as well.

3. Proposed 23(b)(4)(B)(ii) addresses one of the serious problems with settlement class actions -- the possibility of wealth transfers from disfavored subgroups to favored ones. And it does this in a way that can be implemented by district court judges -- by requiring the judge to determine whether any subclasses might do significantly better outside the class action. The judge might have some difficulty obtaining the information necessary to make this assessment, especially if all the lawyers have the same incentives to secure certification. However, the fact that proposed (b)(4) has the judge appoint a plaintiff's steering committee might help somewhat to assure at least some more cooperative members. And perhaps the court could also invite participation by others.
4. Proposed 23(b)(4)(C) requires disclosure of information important to assessing the fairness of a class settlement. This information is critical to any serious settlement review.

These are all important elements. Nevertheless, I would modify the proposal in two ways.⁸ First, I would add explicit reference to the potential benefits of class action settlements.⁹ I mention some of these benefits in the beginning of this section, such as transaction cost savings, more rapid recovery, and potentially more equitable distribution of the remedy. The reference to superiority in current (b)(3) and the factors listed there do not specifically address the potential benefits of settlement classes in particular. These should be listed, so judges will know to make specific findings on them as well as on the other factors.

Second, I recommend that the Committee include examples in the Note to illustrate the application of the factors. Judging from the draft Minutes, the Committee has in mind actual instances of effective use of class actions for settlement purposes. The Note should discuss these examples, not just cite to them. The draft Note does discuss some situations near the beginning, *see* 167 F.R.D. at 561, but not with the sort of care I have in mind. The Committee should explain why its examples are good applications of 23(b)(4) and what the district court judge did in the case that was effective in reducing the potential problems.¹⁰ The Committee's examples should be chosen to illustrate the range of possible applications

⁸ The proposal needs some editing, as the authors admit. I would break up some of the longer paragraphs into subdivisions to separate and clarify the distinct points. I know this proliferates the number of sub-sub-subdivisions, and for this reason, it might be better to make 23(b)(4) a separate subsection of Rule 23 -- perhaps 23(g) -- or maybe even a separate rule in itself devoted to class settlement procedure -- perhaps Rule 23.3.

⁹ While the proposal covers a lot of the potential dangers, it could be a bit clearer and more direct in some places.

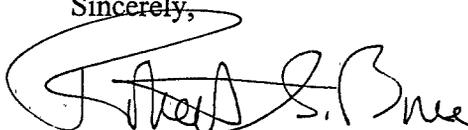
¹⁰ Although this is more delicate for obvious reasons, the Committee might also consider including examples of bad applications, with some discussion about what makes them bad.

and the various reasons for, and potential problems with, settlement classes.

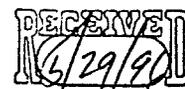
I have in mind here something along the lines of the "Illustrations" that accompany commentary in the ALI Restatements -- except that the Committee's examples would be more complex and the discussion somewhat more extensive. These examples could serve as paradigms to help guide the exercise of discretion by district court judges. Illustrative paradigms, it seems to me, strike a nice balance between constraint and discretion. They give normative guidance in a pragmatically useful way, while leaving latitude for the trial judge to adapt procedures to the specifics of the particular case.

I hope this letter is helpful to the Committee. I hope too that the Committee does not give up on the job of improving Rule 23. The task is challenging, not the least because of the controversy it sparks. However, it is also important -- perhaps even essential. I wish to join others in thanking the Committee for stimulating the extremely useful discussion that has taken place. Whatever else happens, this alone is an important benefit of the process.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert G. Bone". The signature is written in a cursive style with a large, sweeping initial "R" and "B".

Robert G. Bone
Professor of Law



96-CV-004

#916

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May 21, 1996

Memorandum to
The Standing Committee on Rules of
The Judicial Conference of the United States

I urge the Standing Committee to remand proposed Rule 23(b)(4) to the Civil Rules Committee to reconsider in light of the text of Section 2072 of Title 28, the constitutional principle of separation of powers underlying that legislation, and the public interest in directing to Congress, and away from the Supreme Court, the political energy of those who would have their rights substantially affected by the proposal.

I should disclose that, in addition to being a teacher of Civil Procedure for almost four decades, I was the Reporter for the Advisory Committee on Civil Rules from 1985 to 1992. I should also disclose that I am chairman of the board of the Private Adjudication Center, Inc., a subsidiary of Duke University engaged, among other things, in service to the federal courts. A part of that work has been the provision of ADR services in the Dalkon Shield bankruptcy in the United States District Court for the Eastern District of Virginia, the design and administration of an ADR program for the United States District Court for the Middle District of North Carolina, and sundry other services, often in connection with "mass tort" litigation. We have most recently undertaken to assist in the Piper Aircraft bankruptcy and the silicon gel breast implant proceeding. In short, the corporation of which I am co-founder and present head is deeply involved in matters that are the subject of the proposed rule revision. We might benefit from the promulgation of the proposed rule in that we might hope to be called upon to help in the administration of claims facilities created by settlement class actions. Whether or not the settlement class is legitimated by rule of court, I hope that our Center will be of assistance to federal courts in the future in handling mass tort litigation and in diverse other matters.

I am, I believe, fully aware of the problems presently faced by the district courts, and I share the belief of many judges that mass tort litigation cannot be handled in conventional ways. The problem of mass tort litigation is, however, too substantive to be a proper subject of a rule of court. This is a problem to be addressed by Congress, who, so far as I know has not been seriously importuned to consider it.

I have joined in a letter signed by a number of other scholars and teachers of Professional Responsibility, Civil Procedure, Constitutional Law, Torts, and Corporations that will in due course be circulated to your committee. That letter objects to proposed Rule 23(b)(3)(F) and (b)(4). I especially approve that letter's objection on the merits to proposed Rule 23(b)(4), as a rule that is far too open-ended and vulnerable to abuse. I am less keen on the group letter's objections to proposed Rule 23(b)(3)(F), but am frankly uncertain of the effect of that proposal. The group letter is silent with respect to the proposed addition of subparagraph (f) to Rule 23. I

support that proposal; it is my perception that the interlocutory review it would permit is often desirable.

I would not, however, have agreed to sign that letter if my opposition went merely to the merits of the proposed revision. Particularly at this stage of consideration of the proposed rule, I would counsel the Standing Committee to exercise caution in challenging the merits of a proposal that has received earnest consideration by a very able Civil Rules Committee led by a distinguished Chair and served by an esteemed Reporter. Indeed, during my time as a Reporter, I observed several occasions when well-intended modifications imposed by the Standing Committee proved to be improvident impulses serving only to delay and obstruct the process of useful reform. Especially at this preliminary stage, any doubts the Standing Committee may have about the merits of a proposed rule should be resolved in favor of withholding its amending hand.

There is, however, an exception to this principle of restraint that I now earnestly commend to the Committee. It is the duty of the Committee to intercede when an advisory committee recommends a proposal that, if promulgated, would exceed the quite limited rulemaking power of the Supreme Court. Indeed, I importune the Standing Committee to be cautious in protecting the Court and its rulemaking power from any possible misuse. Misuse bears a great cost for it harms relations with the other branches of the government and erodes the esteem in which the federal courts are held by the profession and by the public. If there are legitimate doubts as to whether a rule is within the rulemaking power of the Court, it ought not be recommended by the Judicial Conference or by the Standing Committee, nor promulgated by the Court. It would be best to abort consideration of such a rule before harm to public acceptance of judicial rulemaking is incurred.

It is my belief that proposed Rule 23(b)(4) cannot withstand sober examination under the Rules Enabling Act or the constitutional principle underlying that legislation. While the limits of the rulemaking power are not marked, I perceive this proposal to be clearly outside its bounds. Accordingly, it should not, in my judgment, be allowed to see the light of day. I would adhere to that position even if I thought so open-ended a rule were desirable on its merits.

The Court's power to promulgate rules governing district courts is, of course, derived from Section 2072(a). That statute restricts the Court to making "general rules of practice and procedure." To make doubly certain, subdivision (b) of that statute further explicitly forbids the Court to make rules modifying substantive rights. The principle expressed in the statute rests on elementary constitutional principles. The lawmaking power of the United States is vested in Congress; that legislative responsibility includes the power to establish inferior courts to exercise the judicial power. The Court's constitutional mission is to decide cases brought to it by disputing parties. Congress could not, if it would, authorize the Court to sit as a legislative house enacting general laws to govern future cases. It possesses, and can be given, no roving commission to effect global peace. Nor would it be in the public interest for it to exercise such a responsibility if the Constitution and Congress permitted it, for the Court is not a politically accountable institution and it lacks the means to appraise the political forces generated by lawmaking that substantially impairs or enlarges the rights and duties of citizens. No better means could be suggested for diminishing the status of the Court than to thrust it into the political cockpit in which the Congress serves.

The text of the statute and of the constitutional principle underlying it are informed by our experience with judicial rulemaking over the last three decades, and it is important that judicial rulemakers be mindful of that history; there is a danger that some of it may be unfamiliar

to some members of your Committee. I therefore beg your indulgence in presenting a two-page summary of recent history.

Judicial rulemaking is a nineteenth century idea. Its aim was to remove technical issues of court routine from the realm of factional politics. Whether rulemaking power could be conferred on the Supreme Court of the United States was a debatable issue prior to the enactment of the Rules Enabling Act in 1934. It is now established by our tradition that Congress can confer such a power on the Court, and its use over the last sixty years has proved beneficial to courts in pursuit of the aims expressed in Rule 1. But the limits of the authority that can be conferred on the Court remain unsettled.

For the last quarter century, there has been growing mistrust of judicial rulemaking, in Congress and among the profession. This mistrust first surfaced in the aftermath of the 1966 revision of Rule 23. That revision had a substantial impact on substantive rights. In hindsight, it might have been wise for the committee, and the Court, in 1966, to have drawn paragraph (b)(3) more narrowly to avoid the risk of altering substantive entitlements, or to suggest its enactment by Congress in lieu of its promulgation by the Court. Citizens adversely affected by the new Rule 23(b)(3) questioned the propriety of the Court's action creating new substantive rights for, and imposing new duties or liabilities on, citizens not before it as parties. In the early 1970s, there was active support for the repeal or radical modification of the rule, and also active support for its extension. The rule was, and remains, one on which political factions divide; that fact is itself a signal that it was not well-suited to promulgation by the Court. The debate over the rule persisted; in the late 1980s, two sections of the American Bar Association simultaneously made conflicting recommendations for the revision of the rule; the hierarchy of the Association transmitted both drafts to the Civil Rules Committee, which declined to consider either, reaffirming an earlier action tabling all consideration of the rule. It was then still believed by the committee that Rule 23 was politically too sensitive to permit further consideration by the Court.

The prudent caution of the Civil Rules committee in avoiding Rule 23 for these many years was driven in part by an awareness of other dissatisfactions with the Court's rulemaking. Dissatisfaction was apparent when the Rules of Evidence promulgated by the Court were withdrawn by Congress as improperly substantive and then enacted as legislation in the mid-1970s. To prevent further excesses by judicial rulemakers, Congress began to consider tightening the rules enabling legislation. Serious proposals were made to abrogate the Court's power. Interest in those proposals was elevated in the early 1980s by the consideration given to amending Rule 68. Prolonged consideration was given to amendments putting teeth in that toothless rule for the purpose of encouraging settlement of pending actions. Critics, not without reason, argued that the drafts under consideration would not be within the power of the Court as delimited by the Rules Enabling Act. The Civil Rules Committee, in 1985, in response to such criticism, concluded that the matter was one for Congress and tabled further consideration of the rule. And the Rule 68 issues have since received attention in Congress.

Public concern over possible misuse of the rulemaking power did not abate when the Committee abandoned consideration of enlarging Rule 68. Congress in 1988, after years of discussion, at last revised the rules enabling legislation. Those revisions were modest, but Congressional oversight became steadily more exacting, and factional political interest in the Civil Rules has continued to grow over the last decade. Many critics saw in the 1983 revision of Rule 11 an effort to do an end run on Congress with respect to our civil rights laws. The Civil Justice Reform Act of 1990 was an expression of the high level of political interest in certain procedural issues, and that law imposed a deep bruise on the institution of rulemaking by the

Supreme Court. The 1993 revision of Rule 26 was driven by the desire of the Civil Rules Committee to avoid unnecessary conflict between the Court's rules and plans being promulgated under that Act, but that revision, too, was seen by some lawyers, perhaps including the leadership of the American Bar, as an overreaching by the Committee transformative of the relationship between lawyers and their clients. The volume of lobbying activity now directed at the rulemaking process is eloquent testimony that something is amiss. Lobbyists belong in the Capitol, not in the committees of the Judicial Conference or the chambers of the Supreme Court.

It must be granted that the line between "general rules of practice and procedure" and substantive law is a shady one. It is not possible to write procedure rules altogether lacking in substantive consequences. Thus, we know, for example, that Rules 4 and 15(c) have some necessary bearing on the applicability of statutes of limitations; and that Rule 13(b) has some necessary bearing on the law of judgments. But those effects are incidental to rules governing events that occur in the course of adversary proceedings in court between parties who have invoked the court's jurisdiction or who have been summoned to defend claims brought against them; claims that the courts have a moral and legal duty to decide on the law and the facts. The means of service of a summons, the duty to file a counterclaim, or the right to amend a pleading are predominantly technical matters that are special concerns of the judiciary and do not bear directly on the rights and duties of citizens in the affairs they conduct outside the federal courthouse. They are therefore proper subjects for judicial rulemaking. Yet, no one has suggested, or would suggest, that the Court is empowered to promulgate the Restatement of Judgments or a comprehensive federal statute of limitations, meritorious though both of those proposals might be in substance. The law of limitations and the law of judgments have broad social, political, and economic consequences; they are not "general rules of practice and procedure," and are not proper subjects for undemocratic rulemaking.

This is even more clear with respect to the law governing the making of settlement agreements and the law of contracts between lawyers and clients. A rule commanding citizens having possible but unasserted claims to explicitly dismiss as their attorney a person whom they did not affirmatively choose to employ is not a rule of "practice and procedure" within the meaning of Section 2072, nor is it within the constitutional limits of the lawmaking power that can be conferred on the Court. The same can be said for a law that forces a citizen having a possible but unasserted claim either to object promptly to a supposed settlement of that claim or else accept its terms. Such laws materially alter the status of citizens as individuals responsible for managing their own affairs. The "settlement class action" is a device for achieving precisely these effects, and is, on that account, not a rule of procedure, but a form of contract and a device of legal substance.

In addition to creating substantive contractual relations and diminishing the autonomy of citizens, the settlement class action effects significant wealth transfers. First, it relieves the defendant and the court of the transaction costs associated with resolutions of individual claims, but it does not eliminate those costs. Individual claims must yet be evaluated, so the transaction costs are merely shifted to the claimants to be absorbed from any funds made available to satisfy their claims. Second, because the settlement class action necessarily envisions cruder methods of determining the merits of individual claims, there is a transfer of wealth from class members having strong claims that would have succeeded if fully litigated to class members having weak claims that would have failed. Third, there is a material transfer of wealth within the bar, as leading class action lawyers amass large fortunes in short periods at the bar, in part of the expense of those lawyers who would otherwise present claims of individual clients. These are significant substantive consequences, and they are not mere incidents of arrangements the Court

may have made by rule of court to assure "the just, speedy, and inexpensive determination of every action." They are central consequences of the settlement class action and further confirm the substantive nature of that device.

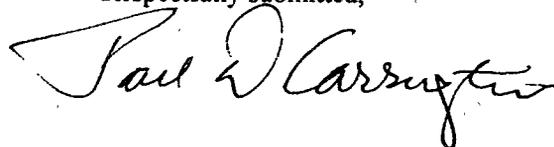
It is true that Rule 23(b)(3) has some of these same characteristics. That is why it evoked mistrust of the Court's rulemaking power in the early 1970s. And (b)(4) goes well beyond (b)(3) in the degree to which it modifies the substantive rights identified, and in the distance between the aims of the new provision and those of more conventional rules of practice and procedure. Rule 23(b)(3) was at least directed to the conduct of proceedings for the purpose of deciding them on the merits, and it was thought by those who proposed it to have quite narrow application. Rule 23(e) was an afterthought to (b)(3) envisioned to have narrow application.

The Civil Rules Committee recommending (b)(4) has addressed some of the substantive considerations raised by their proposal, but in the Committee Notes rather than in the text of the proposed rule. The Notes seem designed to counsel district judges in the exercise of the otherwise unbounded power conferred upon them by the proposed rule (b)(4). Committee Notes to procedure rules are, however, as especially unsatisfactory format for making substantive law. The likely effect of the Notes ought to be appraised in light of the 1966 Committee's experience in proclaiming in its Committee Notes that its Rule 23(b)(3) was not intended for use in mass tort litigation and should not be used in such cases.

The settlement class action ought to be seen as a substantive device comparable to bankruptcy. It is reasonable to propose an alternative to bankruptcy for solvent mass tort defendants. Indeed, I believe that I favor the creation of such an alternative. It should, however, contain many safeguards to protect claimants, safeguards comparable to those that abound in bankruptcy. The bankruptcy laws of the United States are not made by rule of court, nor could they be. A moment's consideration of the problems of drafting a law to provide the desired alternative to bankruptcy reveals that many substantive entitlements are put at risk, while others are necessarily enlarged. This is not a task for judicial rulemakers. Those whose rights are affected are entitled under the Constitution as well as the Rules Enabling Act to have such laws considered by duly elected representatives who are accountable to their constituencies.

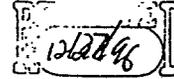
The lack of Rule 23(b)(4) has not prevented courts from starting to fashion a law of settlement class actions in the conventional way in which courts make law, i.e., by deciding cases. That form of lawmaking has its acknowledged demerits and limits; if an alternative to bankruptcy for solvent mass tort defendant is required, Congressional action should be much preferred. Congress is organized to perform such tasks as no court or committee of the judiciary is. Rules of court, however, are not a legitimate substitute; Congress has not commissioned the Court to enact such a law; it would be quite possibly unconstitutional for it to do so; and if the Court were to undertake such a task, it would improvidently place itself in a crossfire of factional politics without means to weigh the competing interests and mediate amongst them; it would be an invitation to all manner of lobbyists to begin working the corridors of the Court.

Respectfully submitted,



cc: Hon. Patrick E. Higginbotham
Prof. Edward H. Cooper

96-CV-138



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December 18, 1996

Advisory Committee on Civil Rules
Judicial Conference of the United States
Thurgood Marshall Building
Washington DC

Dear friends:

Enclosed please find the text of an article to be published this spring in the Arizona Law Review. It is an elaboration of the argument that proposed paragraph (b)(4) of Rule 23 is not within the rulemaking power of the Court. Its conclusion, but not its reasoning, was presented by Professor Cramton at the Philadelphia hearing. If there are members of the Committee who were not fully persuaded by him, I hope they might take time to entertain the fully developed argument. In my opinion, the possible benefits of the proposal under consideration cannot possibly justify the injury to the rulemaking process if the proposal were to be promulgated by the Court.

Given the political energy released by the Committee's efforts to revise Rule 23, it might do well to take the advice given the Committee a dozen years ago by Professor Burbank with respect to Rule 68 and "abandon ship." On the other hand, the Committee's efforts have brought forth some ideas that, in my judgment, would clearly improve the rule. I especially commend Judge Schwarzer's suggestions for improving the process for approving settlements and the Committee's proposal with respect to interlocutory review of class certifications.

Of course we all sympathize with the ambition of the committee to solve the problem of mass torts. I do not believe that the Committee has yet produced a tolerable solution to that problem, but when it does, I hope the Committee will wisely address its recommendation to Congress, and not to the Supreme Court.

Best wishes.

Sincerely yours,

Encl.

THE CONSTITUTIONAL LIMITS OF JUDICIAL RULEMAKING:

THE INVALIDITY OF PROPOSED RULE 23(b)(4)

Paul D. Carrington*

&

Derek Apanovitch**

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* Chadwick Professor of Law, Duke University; Reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States, 1985-92; Chairman of the Board, Private Adjudication Center, Inc. The Center is a non-profit subsidiary of Duke University providing dispute resolution services. The Center has participated in the efforts of state and federal courts in mass tort matters, and hopes to continue to assist federal courts in such matters in the future.

** Duke University School of Law, JD Class of 1998. The authors are grateful for helpful comments on an earlier draft by Roger Cramton, John Frank, Susan Koniak, and Alan Morrison.

The Supreme Court of the United States has not been empowered, and cannot constitutionally be empowered, to promulgate a rule of court authorizing United States District Courts to certify a class action for the single purpose of approving a settlement of a "mass tort."

The Rules Enabling Act

The limit to the Court's authority to make rules of court is implicit in the Constitution and explicit in the provision of the Rules Enabling Act forbidding the Court to promulgate rules modifying or abridging substantive rights.¹ The Act authorizes the Court only to make rules "of practice and procedure" for lower federal courts.² Of course, the line between substance and procedure is shaded.³ Of course, many legitimate rules of court have substantive consequences,⁴ just as much substantive law has procedural implications. And of course there are legal nihilists who will deny that the line exists at all,⁵ so free are the Justices to declare their enactments to be mere procedure. Yet, there is a difference between substance and procedure that is easily discerned in most of its applications.

There is no settled meaning of the terms "substance" and "procedure" as used in the Act.⁶ The difference can be stated in the language of Article III. The function of judge-made procedure rules is to facilitate the only mission of federal courts, that is to decide cases or controversies. In the alternative, it might be said that valid rules of practice and procedure facilitate the enforcement of law by guiding courts in the application of legal texts to facts.⁷ Or, the difference can also be stated in the language of Rule 1 of the Federal Rules of Civil Procedure, i.e., "to secure the just, speedy, and inexpensive determination of every action."⁸ In this locution, justice is not broad social justice among classes, but is just recognition of the merits of individual claims and defenses. Procedure rules, in short, aim to cause dispositions on the merits, not to redefine those merits.

Rule 23(b)(4): Procedure or Substance

The Advisory Committee on Civil Rules is presently considering an addition of paragraph (b)(4) to Rule 23 that would authorize the certification of class actions for the limited purpose of settlement; such certifications would be excused from the present requirements of paragraph (b)(3) that common questions predominate. The proposal is intended to legitimate the practice of certifying as class actions matters that have already been settled by contracts made between an alleged tortfeasor and counsel purporting to represent the class of alleged tort victims. Such matters cannot be tried as class actions because the rights of individual class members are too diverse to permit their resolution en masse.

By definition, therefore, the proposed rule applies only to matters that will never be the subject of litigation in a federal court. It has nothing to do with the Article III mission of deciding cases or controversies, but is instead a means of promoting and endorsing apparent private dispositions by lending them the imprimatur of the court. It is indeed questionable whether a settlement-only class action is a case or controversy at all; certainly some such settlements look very much like collusive suits traditionally condemned as frauds on the court⁹ that federal courts have long been enjoined from entertaining.¹⁰

Nor does the proposed rule facilitate civil law enforcement. Indeed the whole purpose of the proceeding is to avoid the noisome burden of applying law to fact. Settlements achieved by the means proposed are not bargaining in the shadow of the law because by definition the law will never be applied by the court, nor will any disputed facts be determined. Stephen Burbank's question about the 1984 proposal to amend Rule 68 seems even more applicable to paragraph (b)(4): does it "really regulate . . . the judicial process for enforcing rights and duties" or "is it not, rather, designed, precisely to abort that process?"¹¹

The proposal can in a sense be said to facilitate speedy and inexpensive terminations, but only in the same sense in which it can be said that the repeal of substantive rights and defenses can reduce cost and delay in litigation. The proposed rule does nothing to secure "just" determinations within the meaning of Rule 1, and is therefore not congruent with the aims expressed in that rule. It is thus barren of significance as rule of "practice and procedure" within the meaning of the Rules Enabling Act.

The present practice of some lower federal courts in certifying mass tort claims for settlement under Rule 23 cannot be legitimated by a rule of court. The present Rule 23 does not authorize federal courts to lend their imprimatur to the settlement of mass disputes not meeting its requirements for certification of a class action to be decided on the merits. The 1966 Rules Committee appended to the present rule a Note explicitly disavowing its applicability to mass torts.¹² The Supreme Court promulgated the rule with that understanding. Congress allowed it to become the national law with that understanding. On the basis of that understanding, Rule 23 was regarded as a valid exercise of the Court's rulemaking authority.

While lacking significance as a rule of practice and procedure, proposed paragraph (b)(4) is replete with substantive consequences. These are not fully visible because it is the nature of settlement to sublimate questions of right and duty and to silence further consideration of the merits or the policies advanced by the agreed result. It is possible that the settlement-only class action has progressed as far as it has for this reason, that judges employing it do not see clearly the rights and duties affected when all they examine is a proposed settlement. It is what Judge Jack Weinstein has identified as a substantive law revision hiding behind "procedural camouflage."¹³

The attainment of global peace in mass torts is a legislative purpose of formidable complexity. The Civil Rules Committee is aware of many of the difficulties but addresses them only in the proposed Committee Notes. Many critics of the proposal have advanced ideas for its improvement, but these are so substantive in character that they call attention to the impropriety of asking the Supreme Court to enact them as a rule of court. We count at least ten substantive consequences confronted by the architects of global peace in mass torts.

First, there are the substantive rights of state governments to enact and enforce their own laws governing such matters as standards of care, measures of damages, statutes of limitations, and the law of judgments.¹⁴ There is no federal law measuring the standard of care in tort; with rare exception,¹⁵ there is no applicable national statute of limitations;¹⁶ there is no national law of judgments other than the full faith and credit clause;¹⁷ and there is no federal law of damages by which diverse injuries can be measured. Unless the tort victims are all asserting rights governed by the laws of the same state, an omnibus settlement necessarily overrides differences in state law. A

federal statutory scheme could be devised¹⁸ by which appropriate deference to the sovereignties of the states can be accommodated, but it would surely require an exercise of the commerce power, and entail a massive trespass on the *Erie* principle. Such a law authorizing the use of settlement-only classes in cases arising in interstate commerce would satisfy Article I of the Constitution, but might be denoted as a randomized preemption of state law vulnerable under the Due Process Clause of the Fifth Amendment.¹⁹ The relationship of the federal government to the states is a matter of substance, not mere procedure to be controlled by rule of court. It is Congress, not the Court, that wields the Commerce Power.

The state law displaced is much more than the law of torts, but bears on diverse social and economic relations extrinsic to litigation. Thus, second, there is the substantive impact of the proposed rule in displacing the states' laws of conflict of laws.²⁰ That corpus of law regulates relations between states, rather than between the states and federal law, but it is not less substantive on that account. As the Supreme Court affirmed in *Phillips Petroleum Co. v. Shutts*,²¹ if the rights of class members are defined by the laws of different states, those differences may not be disregarded merely because of the existence of a class action, even one that is sustained by the predominance of common questions of fact. An order approving a mass tort class action settlement disregards conflicts of law governing the substantive rights and duties being terminated. Indeed, one of the alleged advantages of the settlement-only class action is that it enables a court to dispose of thousands, even millions of potential cases without noticing the substantive differences amongst them.²²

To elaborate briefly, an individual class member asserting a substantial individual claim cannot intelligibly evaluate an offer to settle that claim without making some assumptions about the controlling law. When a judge undertakes to evaluate a settlement in the performance of the duty imposed by subdivision (e) of the rule,²³ he or she necessarily makes similar assumptions, but in gross, rounding off the differences amongst the rights and duties of the parties. A statute creating a device to settle many claims at once would prescribe, or is authorizing the court to prescribe, answers to the following substantive questions, perhaps among others: what is the applicable standard of care? what harms are to be compensated? how is compensation to be measured? under what circumstances are punitive damages to be taken into account? who pays the costs of resolution on the merits of issues that must be tried? if there are multiple causes of the harms to be compensated, how is liability to be apportioned among multiple alleged tortfeasors? what effect with any apportionment have on the rights and duties of other alleged tortfeasors not joined in the action? All these questions are given one Procrustean answer without regard for the differences in the laws governing individual members of the class.²⁴

Third, a settlement-only class action necessarily requires establishment of a fictional contract of employment between members of the class and class counsel who will be paid from the proceeds of the settlement of members' claims. Judge Easterbrook was perhaps understating when he observed that "a settlement followed by a fairness hearing remains more like a contract than like litigation."²⁵ Perhaps such a contract is created through the notice and opt-out procedure, but this requires an extraordinary extension of the concept of mutual assent. Indeed, the usual class action notice is so uninformative to the average citizen receiving the notice as to make most other contracts of adhesion look like carefully negotiated bargains.²⁶ Contracts between attorneys and

their clients are substantive legal relationships and the validity of adhesion contracts with regard to such relations is a matter of utmost substantive-political sensitivity.²⁷

The problem of creating a fictional contract of fiduciary relations exists in some measure with respect to all class actions. It is, however, much less a problem if it is supposed that the class action is to be tried, for the duties of trial counsel are well-formed, there is far less risk of a conflict of interest between the class attorney and the members of the class fictionally designated to be his or her clients, and it is therefore more reasonable to infer the clients' assent to the class representation. Indeed, when there is a trial, the fictional nature of the attorney-client contract is generally inconsequential. The conflict of interest problem is muted even in settlement if the requirements of (b)(1), (2), or (3) are met, but if the class is not identified by the predominance of common questions, as (b)(4) contemplates, the class lawyer is laden with conflicts of interest. It is not possible in the absence of predominating common questions for class counsel to negotiate a settlement equally faithful to all his or her fictional clients. It is therefore unrealistic to infer assent.

The difference between (b)(3) and (b)(4) in this respect is illuminated by comparison to *Phillips Petroleum Co. v. Shutts*.²⁸ The Court there noted that most of the members of the class had something to gain and very little to lose by being included in the class. It was therefore reasonable to suppose that they assented to the jurisdiction of the court in Kansas. Also, because of the predominance of common questions, it was also reasonable to suppose that class members were willing to have the class attorneys represent them. No such supposition can be justified in the mass tort situation in which the claims are large and diverse.

We are now accustomed to contracts of adhesion. They are an acceptable, even a benign device, so long as their provisions are reasonable, i.e., consistent with the reasonable expectations of the party whose assent is fictionalized. But they are not enforceable when they go beyond those reasonable expectations.²⁹ The claimants in the *Shutts* class were royalty owners presumably possessed of some sophistication; they likely understood the notice they received, and it was plausible to believe that they would regard the suit as advantageous to themselves. They are in contrast to the average personal injury victim, who is very unlikely to comprehend a class action notice. 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.³⁰ There is no reason to believe that a serious personal injury claimant desires to be represented by class counsel.³¹ This becomes especially obvious when we consider the nature of the representation that will be provided by this self-selected attorney.

Thus, fourth, the fictional contract created between class members and their lawyer also radically modifies the powers of the attorney as agent of class member clients. The attorney to whom the class member is said to be a client, is no ordinary attorney, because he or she lacks the normal duties of fidelity and obedience to the client. It is elementary agency law that a client as principal is not bound by the promises of an attorney as agent to settle except on authorized terms.³² Thus, under conventional law, a litigant is entitled to reject a settlement negotiated without explicit advanced approval.³³ Insofar as subdivision (e) of Rule 23 confers authority implied by law, it modifies the substantive right of a client to reject settlement. In the (b)(3) situation, the

predominance of common questions may possibly justify such an implication of authority to settle subject to the approval of the court. But in the absence of predominating common questions, no such implication is remotely warranted. It is not a reasonable inference that a class member intends to confer such extraordinary authority on class counsel in the mass tort situation; such an unrealistic inference effects a substantial change in the law of agency.

Moreover, an ordinary lawyer has a duty to reject a compromise providing generous fees but modest relief for the client.³⁴ Such a duty seems to be unknown to mass tort class action settlements.

Fifth, such fiduciary duties as may be imposed on class counsel are enforced by another body of tort law; lawyers who betray their clients' interests expose themselves to liability.³⁵ The risk of betrayal is particularly marked in the (b)(4) class because of the dissimilarity of the claims being settled. It seems to be widely assumed, however, that court approval of a settlement under subdivision (e) insulates class counsel from collateral attack by "clients" aggrieved by an apparent sell-out of their claims by lawyers laden with conflicts of interest.³⁶ This assumption may not be correct if the usual principles of tort law apply.³⁷ If an analogy can be made to the law of provisional remedies, the action of the court granting an attachment or a temporary restraining order without proper notice and security against abuse of process does not insulate from liability the party and counsel who persuaded the court so to violate the law.³⁸ Perhaps a mass tort client aggrieved by a class settlement can likewise maintain a claim against the class lawyer notwithstanding court approval of the settlement.³⁹ Indeed, the fact of judicial approval might be said to make the settlement "state action," and hence actionable under federal civil rights laws.⁴⁰ In an appropriate case, it would seem that the tort law of many states would allow for the recovery of punitive damages against faithless class counsel. Whatever the answers to the questions thus posed, they are answers rooted in tort law. If the interface of subdivision (e) and paragraph (b)(4) is to have any effect on the tort claims of class members against class counsel, the rule is substance, not procedure.

Sixth, resolution of monetary claims en masse entails the assignment of monetary values to the choses in action being compromised. Choses in action are property rights. Subdivision (e) as applied even in (b)(3) cases assumes that there is a fair value of a mass of claims that can be detected by the court and counsel. If, however, there is no standard by which fairness can be judged,⁴¹ then the promised protection of subdivision (e) is a snare and a delusion.

Generally, counsel determining whether a settlement of an personal injury claim is fair analyzes its merits, i.e., the likelihood of its success and the damages likely to be assessed if the claim is tried. But even after making that calculation, experienced personal injury lawyers will differ enormously in the value they assign to their cases, sometimes by a factor of several multiples.⁴² There is no value of an individual claim that can be designated as its fair value in settlement. What is fair is what informed and uncoerced disputants will accept, and fairness has little meaning other than that.⁴³

In (b)(3) cases, because the common questions of law and fact predominate, it may be plausible that class counsel can prudently appraise the value of each of the claim being settled en masse and that class members might willingly authorize acceptance of a payment so measured.

When common questions do not predominate, as in proceedings under proposed paragraph (b)(4), there is no method by which an intelligent judgment can comprehend the settlement value of diverse claims, however "mature." Not only class counsel, but the court acting under subdivision (e) can do no more than take a stab in the dark⁴⁴ unless it is to inform itself on the merits of each case, a process that would defeat the purpose of the exercise.

Moreover, the prospect that claims will be valued with little or no regard for the expected outcome of trial disturbs the ability of individual claimants to settle their disputes with alleged tortfeasors because settlements are generally the result of predictability associated with the prospect of a trial on the merits. Difficult though it often is to foretell the likely results of a trial, it is always more difficult to foretell the outcome of an informal settlement negotiation conducted without the prospect that rights will be enforced if no settlement is reached.

In these respects, the guesswork associated with mass tort class action settlement effects a substantial modification of the property rights of class members. The modification of rights from those that can be enforced at trial to those that will be measured by weakly founded guesswork effects a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious. Intangible property rights are thus modified by any law conferring authority on a court to approve en masse a settlement of personal injury claims.

Seventh, there is the closely related problem of dividing the proceeds of a global settlement among members of the class. Typically, the defendant will have no desire to participate in that division. The result is that the cost of defending against false or excessive claims falls on the class. This transfer of the role of defendant from the putative tortfeasor to the victims as a class has economic consequences in further devaluing the intangible property rights of the victims. It also has social and political consequences by turning the claimants away from the alleged wrongdoer and against one another.

Eighth, the right to individual control and management of one's own personal injury claim is itself a substantive right, indeed perhaps a constitutional right.⁴⁵ As the Court not long ago said, there is a "deep-rooted historic tradition that everyone should have his own day in court."⁴⁶ In this respect, the substantive entitlement may be denoted jurisprudential. The civility of our law has long been thought to rest on its recognition of individual entitlements and responsibilities, and a central entitlement has been the right to assert one's own rights. As Justice Harlan wrote in 1971:

American society ... [bases] its machinery for dispute resolution not on custom or the will of strategically placed individuals, but on the common law model. ... [T]hose who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of our concept of due process ... [W]ithout due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable, for binding conflict resolution could hardly be said to be acceptable under our scheme of things.⁴⁷

A legal system that no longer has time for individuals has seriously modified the quality of justice,⁴⁸ as Frank Michelman puts it, we depend in some measure on "litigation values"⁴⁹ as the distinctive mark of our citizenship. Perhaps we cannot afford that luxury in mass tort cases, but

surely a law abrogating the right of individuals to be treated as individuals in regard to their distinctive personal injuries is a substantive enactment.

Ninth, the ability of the defendant to pay is a significant factor in judging the fairness of the terms of many settlements, including many mass torts, asbestos being the obvious example. That ability to pay is connected to other substantive rights and duties of the debtor. What is involved in many settlement-only class actions is therefore the creation of a voluntary bankruptcy process for use by solvent debtors. Indeed, it may be that the primary aim of some mass tort defendants seeking settlements is to protect the security of corporate management from the hazards associated with seeking the protection of the bankruptcy court. And one bargaining chip employed by some mass tort defendants to induce class settlement may be the threat to seek the protection of a bankruptcy court. Almost the whole range of issues and concerns arising in bankruptcy are therefore raised by the concept of the settlement-only class action when applied to a defendant of questionable solvency. The contract and property interests protected by bankruptcy law are not less exposed to modification and diminution when those protections are circumnavigated by a Rule 23 settlement. Proposed paragraph (b)(4) simply fails to address the vast number of substantive issues addressed by Congress in the Bankruptcy Act,⁵⁰ with which bankruptcy lawyers are conversant. Silence does not deprive the such legislation of substantial impact on the rights and duties it fails to observe.

Finally, there is the problem of future plaintiffs, including those yet unborn.⁵¹ The present proposal disowns that issue, leaving it to case law. But the case law to which the issue is left has been made to rest in large measure on Rule 23 and the Committee Note attached to the present proposal expresses the purpose of facilitating the resolution of the issue regarding future claims. Courts imposing global peace on future plaintiffs can therefore be expected to rely on paragraph (b)(4) with even greater ease and justification than have those who fashioned the settlement-only class action out of the present text of the rule. That the substantive consequences of the rule are acknowledged and specified only in the Committee Note does not change the substantive character of the law it would purport to create. To the contrary, the Notes in this instance serve to call attention to the nature of (b)(4) as a disguise.

Paragraph (b)(4), and the lower court practice it would purport to legitimate, are not principles of practice and procedure. They are radical tort reform. Doubtless, a strong case can be made for radical law reform to deal with the social, economic, and political problem of mass torts. We do not here question the need for reform, but challenge the propriety of effecting such reform by rule of court.

The Theoretical and Practical Bases of the Rules Enabling Act

We then return to examine the proposition with which we began, that the Court cannot constitutionally employ its rulemaking power to achieve such substantive aims. As we noted above, the Court has never enforced the principle limiting its power. As we will shortly report, responsible officers have sometimes disregarded it. For these reasons, it seems timely to review the elementary principles of constitutional law and the practical political considerations underlying the statutory language of the Rules Enabling Act.

The theoretical limits of the Court's rulemaking power are derived from first principles of constitutional law so familiar that they are easily overlooked. Those principles are that Article III judges are to decide cases or controversies, i.e., to enforce the rights and duties of citizens by applying law to facts. Life tenure is conferred upon them to assure fearless judicial decisions, but it also limits the roles they can legitimately perform in a democratic society. Because of their independence from democratic politics, Article III courts may perform political functions only if incidental to the Article III mission. That a function is socially useful or economically beneficial is not alone a sufficient reason to employ Article III institutions to perform it.

It is implicit in these principles that, as Judge Posner has affirmed, there is no power in the federal judiciary to compel individuals to settle their grievances.⁵² Social peace is not the Article III mission. Dispute resolution is a by-product, not the objective, of their decisions. It is, we may hope, a large by-product because for every carefully wrought judicial decision, there may be hundreds or thousands of matters that are privately resolved "in the shadow of the law." Private dispute resolution depends to an important degree on the effectiveness of courts in the performance of the Article III mission of rendering accurate judgments in contested cases and controversies.⁵³

Making law is also an activity incidental to the mission of Article III courts. Law is made when courts decide cases, but life-tenure judges hold no commission to enact laws creating, modifying, or abrogating the rights and duties defining relationships between citizens in a democratic society. There is an important constitutional and practical political difference between the making of law bound to and limited by decisions in cases that a court is called to decide and the voluntary articulation of legal texts uttered as commands to control future conduct and relations. We accept the former because it is necessary, but not the latter because we have little need of what Geoffrey Hazard denotes as "undemocratic legislation."⁵⁴

Procedural legislation by federal judges is therefore constitutionally exceptional. It has been contended by no less an authority than John Henry Wigmore that courts have inherent authority to utter procedural rules to command future conduct of lawyers and parties in judicial proceedings.⁵⁵ Such constitutional authority may be appropriate in the schemes of state governments, especially those in which high judicial office is filled by vote of the people. But no such power has ever been claimed by or for the designedly elitist federal courts and where such power has been conferred by state constitutions, it has always been narrowly confined to the management by the courts of their own internal operations.⁵⁶

Although there are now perhaps two hundred constitutions in operation around the world,⁵⁷ it is doubtful that even one could be found to confer authority on a judicial institution to enact prospective laws creating new contractual relationships between citizens, abrogating or diminishing liabilities owed by some citizens to others in regard to events and relations external to judicial proceedings, transforming the jurisprudential premises of the legal order, or altering the relationships between branches or levels of the governmental structure. As we have seen, proposed paragraph (b)(4) would be an enactment doing all those things, and would therefore be in violation quite possibly of every constitution in the world.

There is a practical reason that this is universally so: wherever law is important, it is important to preserve the independence of the judiciary from direct involvement in the factional

politics that is an endemic threat to that independence. John Marshall was guilty of hyperbole in identifying a "dependent judiciary" as "the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people,"⁵⁸ but his point has been taken wherever constitutions intended to be enforced have been written.

All constitutions including our own depend on the self-discipline as much as the moral courage of the judiciary. In no sphere of judicial work is that discipline more timely than in regard to judicial rulemaking. The Supreme Court promulgating rules of court is necessarily the judge of its own work. If it exceeds its authority, there is no effective authority available to correct it. While in our federal scheme, Congress has an opportunity to set rules of court aside, and the Supreme Court may sometimes have relaxed its guard against its own transgressions in the belief that Congress would prevent it from abusing its power, it is obvious, and recent experience with Rule 26 strongly confirms,⁵⁹ that even Congress does not sit to judge the judges' rules. As Judge Sloviter has cautioned, because checks on the judiciary are few, they "must be particularly sensitive to the need to check" themselves.⁶⁰ With respect to rules made pursuant to the Rules Enabling Act, that duty falls in the first instance on the committees who advise the Judicial Conference and the Court. Stephen Burbank has rightly said that "[b]oth the Supreme Court and Congress have a right to expect those to whom the primary responsibility for rulemaking has been entrusted" to take seriously the constitutional limits of their role.⁶¹

They should keep always in mind that the absence of effective correction for indiscipline does not mean that those who make rules of court are beyond any accounting. The price of indiscipline in rulemaking will not be paid immediately in the form of invalidation by another body, but will be paid over time in other coin. It will be paid primarily in the erosion of trust and respect, in the willingness of citizens, the bar, and the political branches of government to accept the authority of a Court seen to trespass on the right of the people to govern themselves. Especially if the Court makes questionable or bad law, it will as an institution pay a high political price.

It is partly because the Court sits in judgment on its own power that there is so little precedent defining the limits of the rulemaking power.⁶² There are some who might advise the Court to disregard mere exhortations, even those of constitutional origin, and make whatever law seems most convenient or gratifying at the moment, leaving the nation and others who come later the burden of paying the price. In the long run, as they say, we'll all be dead. Doubtless there are occasions of grave political crisis when any public officers having any power to relieve the crisis must act despite adverse long-term consequences for constitutional arrangements. However, paragraph (b)(4) addresses no such urgent national crisis. Enacting it in violation of the Court's solemn, self-enforced duty to use its rulemaking power only for the limited purposes for which it was created cannot be warranted.

Moreover, the Court and those who advise it need to keep in mind that its rulemaking process has been embattled in recent years.⁶³ In considering the politics of federal judicial rulemaking, it is necessary to ask the awful question, "how many divisions has the Pope?" The answer is very few. In 1983, the National Association of Process Servers proved to have more influence with Congress in shaping the text of Rule 4 than did the Judicial Conference and its committees,⁶⁴ a clear signal that the judicial rulemaking institutions were not held in the highest esteem on Capitol Hill. In 1988, Congress amended the Rules Enabling Act in expression of its

dissatisfaction with the Court's rulemaking;⁶⁵ the House of Representatives voted to abolish the supersession clause,⁶⁶ a significant feature of the rulemaking process.⁶⁷ And in 1990, even with the support of the American Bar Association, the Judicial Conference was unable to dissuade Congress from enacting the ill-conceived Civil Justice Reform Act⁶⁸ which grievously disrupted the scheme put in place by the Court's rules.⁶⁹ The Congress enacting that legislation was not far removed from repealing the Rules Enabling Act. Judicial rulemakers may well already be, as Linda Mullenix has said, "going the way of the French aristocracy."⁷⁰ That destiny seems likely, and even warranted, if the Court ill-advisedly oversteps its role. Ronan Degan in 1962 cautioned those drafting the Federal Rules of Evidence: "common prudence should tell the rulemakers that reaching for too much may cost them everything."⁷¹

Yet another consideration of both theoretical and practical significance is that Article III institutions are not well-suited to the task of enacting substantive laws. The political branches of government have procedures for lawmaking to which those of the committees of the Judicial Conference of the United States are a poor imitation. Those procedures are designed not only to inform legislators about the merits of pending legislation, but also to accommodate the desires and demands of affected groups or interests to participate in and influence the process by which substantive rights and duties are created, modified, and abrogated.

Article III institutions are not adept at such procedures. Indeed, for the first half century of its existence, the federal rulemaking process was doggedly non-participatory; rulemakers sought to minimize public exposure of their deliberations to underscore and preserve their independence from factional politics. For about a decade, and especially since the 1988 revisions of the Rules Enabling Act,⁷² the rulemakers have striven to fit themselves for participation in policymaking by adopting procedures resembling those employed by Congressional committees and federal administrative agencies when rulemaking. Their public meetings and hearings on proposed rules and the comments they produced have helped rulemaking committees make better rules. But there is less there than meets the eye. No one should mistake a committee of the Judicial Conference of the United States for a genuine instrument of democratic politics. Not yet have rulemaking committees become responsive to the influences to which Congress and the Executive are subject, for the reason that those committees are largely staffed by Article III judges who are, thanks be, almost impervious to the coercions of popular will. Although often accused of having a secret agenda to serve special interests of one kind or another, there is compelling evidence that the rulemaking committees have generally over the years maintained a steady eye on the simple aims stated in Rule 1.⁷³ Nevertheless, it cannot be denied that if judges are to choose among policies extrinsic to the process of litigation, "they will choose to advance those policies that are their special province and to subordinate those that are not."⁷⁴

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.⁷⁵ The federal civil jury, as the reader knows, was displaced a quarter century ago by the half-jury after the Court upheld a local rule of court effecting that change.⁷⁶ The Court's argument for sustaining the local rule was, again to quote Hazard, "monumentally unconvincing,"⁷⁷ its decision allowed local district courts to make juries less representative, more erratic and harder to predict (and thus an impediment to settlement), and also doubled the impact of the peremptory challenges limited by Act of Congress.⁷⁸ Had the electorate

or even the bar had any influence, it seems unlikely that the halving of the jury would have been seriously considered. No notice was taken by the Court.⁷⁹ or the district judges engaged in halving the jury that the institution was embedded in the Seventh Amendment because the people of the United States insisted on moderating the power of the life-tenure judges created in Article III.⁸⁰ In 1991, the Court promulgated rules amendments acknowledging what had been done.⁸¹ At no time did the Court or its advisors seriously consider any views of the jury other than that of the judiciary. When at last a rulemaking committee responded to the popular view⁸² and voted to restore the jury to full size,⁸³ its recommendation was rejected with no reasons given. A lesson taught is that if the federal judiciary prefers halved juries, juries will continue to be halved, whatever the bar and the people may think. Such indifference to the will of the governed is entirely appropriate when judges are deciding cases or controversies, and is also appropriate when making rules of a technical nature serving to promote just, speedy, and inexpensive enforcement of rights and duties, but is inappropriate in an institution abridging or modifying those rights and duties.

The independence of the judiciary is an advantage in making narrowly procedural rules governing the conduct of parties and their lawyers in court because it advances the formation of general principles of procedure expressing the values of due process of law.⁸⁴ In 1994, the American Bar Association in its dismay over Rule 26 disclosure requirements urged that the composition of rulemaking committees be revised to include more lawyers.⁸⁵ What their proposal overlooked was that the recommendations of a committee of lawyers would carry meager influence with the Judicial Conference, or the Court, or Congress, all of whom would have cause for concern that the lawyers on such a committee were actively advancing their own interests or those of their clients.

The strength of the rulemaking idea is that Article III institutions are less vulnerable to factional political interests of the sort customarily advanced by lobbyists to gain specific advantages for the particular classes of lawyers or the litigants whom they represent. Although it is no longer uncommon for people to try, one cannot lobby Article III judges in the ways that one might lobby a committee of Congress to gain an advantage for a "special interest." Experience with civil procedure fashioned by factional democratic politics, such as the ABA proposal would enhance, was generally adverse; the extreme example was the so-called Throop Code that displaced the simpler Field Code in New York with a procedural system of daunting complexity.⁸⁶ Such complexity tends to result when influential factions are given tactical advantages over their usual adversaries in litigation.

Yet another consideration of constitutional character is that if the Court or the Judicial Conference were ill-advisedly to place themselves in the role of making laws evoking a high level of political partisanship and lobbying activity, they would be transformed by the activity. The Court would follow the Civil Rules Committee in become more like Congress. Notwithstanding the existence of *amici curiae*, the Court is ill-designed to receive and absorb the information and the influences that are the stuff of democratic policy-making. The more substantive its enactments, the less the Court can rely on the presumed technical expertise of the Civil Rules Committee and the more the Court will need to employ its own political judgment. No Court legislating substantive law is likely to rely for long on subordinate committees to keep it informed about the social, economic, and political consequences for which it is asked to take responsibility, and it is unlikely to accept the recommendations of subordinate committees without considering afresh the merits not

only of rules proposals, but of other alternatives coming from other sources, and the more it will need to afford participatory opportunities to ever more diverse groups seeking to help shape that judgment. On several occasions in recent years, the Court has received argument in opposition to the promulgation of proposed rules. That practice is likely to increase in frequency as a result of the 1988 amendments to the Rules Enabling Act because the enhanced openness of the process has brought increased demands for participation. And the Judicial Conference and its committees must inevitably become increasingly redundant.⁸⁷ The Court will come to conduct its own legislative hearings and do its own drafting.

In addition, as the Court's rules modify substantive rights and duties, the more aggressive will be the efforts of factional interests to establish relationships with Justices, and the more concerned the Justices will become with marshalling public acceptance and support for their enactments.⁸⁸ Would the Court enacting new principles of contracts or torts accept ex parte communications as Senators and committee members do? Would lobbyists be issued badges of access to the corridors of the Court? Would they be received in the chambers of individual Justices? Would Justices allow themselves to go junketing with lobbyists favoring or opposing a particular rule of court? Would Justices need at least one law clerk performing the role of legislative assistant who is adept at spin-doctoring? And is it not likely that Justices would seek and perhaps find new means of bringing pressures to bear on one another to secure legislative enactments and on Congress to protect their enactments from unwelcome revision on Capitol Hill? Would they go on speaking tours? Divide into parties? Send their staffs to work the corridors of Congress?

Finally, at the end of the process making substantive legislation comes a Faustian moment when the judge-legislator must express a substantive preference for the interests of one faction over another, choosing between labor and capital, or between investors and brokers, or consumers and manufacturers, or environmentalists and those who use and consume natural resources, and so forth. Granted that the Supreme Court reflects in a general way the politics of the presidents who appoint its members, it presently remains an institution independent of any enduring ties to any of the various factions just mentioned. Trust in the Court is a precious national treasure. That trust rests in large measure on our shared belief that Article III judges decide cases or controversies on the merits, without regard for who the parties might be in part because they have no continuing ties to factions of the sort that democratic legislators nurture. That trust is at risk when the Court elects to enact laws favoring one special interest over another.

We of course cannot say that all these imaginary horrors would occur if paragraph (b)(4) were added to Rule 23. But they are all foreseeable secondary consequences of the Court's departure from its assigned role. None are likely to occur if the Court sticks in rulemaking to the narrowly technical task of expressing general principles derived from the values embodied in the constitutional principle of due process of law, technical matters on which its advisory committees have some plausible claim to competence.

Observing (and Not Observing) the Limits of the Court's Authority

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. When large political

forces are marshaled in support of or in opposition to a proposed amendment to a rule, it is time to ask why. The answer will generally be because the proposal has important effects extrinsic to the process by which the courts decide cases or controversies in accordance with law. When that appears to be the case, it is time for the Civil Rules Committee and the Judicial Conference to redirect those factional interests to Capitol Hill, where they belong.

Although never articulated, this practical wisdom has in the past guided the behavior of the Civil Rules Committee. It has never recommended a rule to which there was stout, principled opposition by persons aggrieved by the prospective substantive consequences of the pending proposal. The one counterexample was the opposition of court reporters to the revision of Rule 30 to permit the use of videotape in recording depositions,⁸⁹ a reform that was incontestably procedural in character because it affected no rights or duties bearing on relations and events outside federal judicial proceedings.

On the other hand, some who should have been sensitive to the pragmatic constitutional politics of judicial rulemaking have not been. Like all jurisdictional restraints, the injunction against substantive legislation by the Court is easily forgotten by those seeking to make what they believe to be good law. For example, Judge Charles Clark, the first Reporter to the Civil Rules Committee, forgot. The Advisory Committee had to restrain him from including in Civil Rule 3 a doctrine of limitations law.⁹⁰ Limitations law, while it is often characterized as procedural for some purposes,⁹¹ has little to do with the operations of the courts in performing their constitutional mission, and it was quite clear that Congress did not intend to confer on the Court authority to enact limitations law.

The 1937 Advisory Committee served by Judge Clark itself forgot the limits of its commission when it recommended the promulgation of Rule 68 on offers of judgment⁹² apparently without considering that it might violate the statutory injunction against substantive rules of court. It is understandable that the committee overlooked the issue in regard to the original Rule 68 because that rule was so trivial in its effect. Possibly it could have been justified as a procedural rule implementing Congressional legislation on the taxation of fees;⁹³ on the other hand, Rule 68 is merely an inducement to litigants to withdraw from court and has nothing to do with the internal operation of the institutions in deciding cases or controversies. It appears to modify rather than elaborate the controlling Congressional legislation on fee-shifting.⁹⁴ Hence, it would seem that Rule 68 was from its beginning an invalid rule of court, albeit an almost completely harmless one.

The American Bar Association was the progenitor of the Federal Rules Enabling Act,⁹⁵ yet it also sometimes forgets that the Act limits the rulemaking power of the Court. During the decade of the 1980s, the Association recommended three reforms. The first led to the promulgation of revised Rule 11 in 1983, a rule proving to have significant unintended substantive consequences.⁹⁶ The second was a revision of Rule 45 to include, among other features, a provision imposing liability on lawyers who abuse the subpoena power.⁹⁷ That request was fulfilled in the 1991 revision,⁹⁸ but not without some soul-searching on whether tort law regarding abuse of process could be included in the Rules. It was concluded that the proposal was sufficiently narrow and sufficiently pertinent to in-court misconduct of lawyers that it met the test as a procedure rule within the authority conferred by the Rules Enabling Act. The third was that Rule 64 be modified

to enact a federal law of provisional remedies.⁹⁹ That proposal was promptly tabled by the Civil Rules Committee as beyond the reach of the Supreme Court's legislative powers, as it clearly was.

Even the Court itself has not always been attentive to the limits of its powers. It has on several occasions comforted itself that Congress has an opportunity to review the rules it promulgates, and has brushed away challenges to particular rules with the casual observation that Congress would not allow it to promulgate an invalid rule.¹⁰⁰ It is true, as we previously noted, that on occasion Congress has interceded to derail a promulgated rule it disapproved.¹⁰¹ But the Court's idea that Congress has somehow approved rule changes that it does not derail should be reappraised by the Court in the light of the events of 1993 regarding the changes made in Rule 26. Readers will likely recall the brouhaha raised by members of the bar who felt that fundamental values were threatened by the disclosure requirements authorized by that amendment.¹⁰² The United States House of Representatives voted unanimously to derail the Committee's proposal and substitute one of its own.¹⁰³ The House bill was brought before the Senate Judiciary Committee on the day before adjournment when that committee was acting under a rule requiring unanimity. When Senator Metzenbaum objected to the House bill, that killed it. And so Rule 26 became law as the result of its support by a single Senator voting against a unanimous House, a House that would have been joined by an almost unanimous Senate if the matter had ever reached the Senate floor. The final vote was thus one Senator against the world, with the one Senator prevailing. It would therefore be preposterous to argue that Congress in any degree approved Rule 26. By the same token, Congress in no useful sense approved the 1983 version of Rule 11, although the Court over strong dissent treated Congressional inaction on that rule as an endorsement of its authority to promulgate a Rule authorizing an imposition of costs on a party represented by counsel.¹⁰⁴

The Court has also sometimes been less than fully attentive to the limits of its authority in interpreting the rules it has promulgated. *Marek v. Chesny*,¹⁰⁵ in which the Court re-wrote Rule 68, is an example. The court of appeals there held (rightly in our view) that an interpretation of Rule 68 to include attorneys' fees would make the rule pro tanto invalid as an abridgment of substantive rights.¹⁰⁶ The Court reversed, relying in part on the rule, but also on the Civil Rights Act¹⁰⁷ adopted after Rule 68 as the legislative source of the doctrine it applied to sustain a taxation of fees against a civil rights claimant who had declined a favorable offer of judgment.¹⁰⁸ The result was a zany principle that shifts fees or not according to subtle differences in the language of diverse federal enactments.¹⁰⁹ The issues raised in *Marek* would better have been left entirely for Congress, where in fact they presently reside.¹¹⁰ A prudent Civil Rules Committee might consider the repeal of Rule 68.

For another example, in *Omni Capital International v. Rudolf Wolff & Co.*,¹¹¹ the Court referred to the rulemakers the issue of whether federal long-arm jurisdiction should be extended over foreign defendants having minimum contacts with the United States, but not with any individual state. The Court did not consider whether such a rule would be within the rulemaking power. This appeared to the rulemakers to be a close question; the Civil Rules Committee would have preferred for Congress to respond to the legislative need, and diffidently called the attention of Congress to the uncertain authority with which it proposed Rule 4(k)(2), a provision that became law in 1993. This was the suggestion of Congressional staff to whom the issue was presented.

On the other hand, while the Court was on those occasions heedless of the limits of its rulemaking authority, it has on at least one recent occasion been hypersensitive to an issue of rulemaking power. In 1991, the Judicial Conference recommended a change in Rule 4 authorizing service of a requested waiver of formal service of process backed by a provision for shifting the costs of formal service in cases in which the defendant refused the waiver of service without justification, thereby incurring needless cost.¹¹² One contemplated use of that provision was to eliminate the sometimes substantial and unnecessary cost of translating a complaint in order formally to serve it in a foreign country on a multi-national corporation doing substantial business in the United States. That purpose was clearly within the pale of the rulemaking authority of the Court. Moreover, the rulemakers were right that if Toyota, for example, wants a complaint translated into Japanese,¹¹³ it should be no more able to impose that cost on an American plaintiff injured in America than are General Motors or Ford.

However, at the last moment, the British Embassy, of all people, objected to this revision of Rule 4, contending to the Court that it violated the spirit of the Hague Convention providing that a summons served in a signatory nation must be translated and transmitted through the Central Authority of the nation in which service is to be effected.¹¹⁴ That treaty is silent on the question of the costs of the translation.¹¹⁵ It was surely no purpose of the Senate in ratifying that Convention to give foreign defendants the right to impose a needless cost on American plaintiffs, a cost not incurred by plaintiffs suing the business competitors of those foreign defendants.¹¹⁶ Nevertheless, the Court declined to promulgate the rule as proposed by the Conference, in effect yielding to, without accepting, the formalistic British contention that the request for a waiver backed by a fee-shifting provision was tantamount to service by mail in a country forbidding that form of service. Revised Rule 4 was at last promulgated in 1993,¹¹⁷ but foreign defendants are exempt from the cost-shifting provision.¹¹⁸ It is thus one of the xenophilial provisions of our law that may explain the extraordinary success of foreign litigants in American courts.¹¹⁹ Perhaps the Court was wise to remove the rulemaking process from the line of political fire mounted by the British government at so minor a provision, but the result is an unjust asymmetry in our law that the Court was surely empowered to correct.

Thus, neither the American Bar, nor the Court, nor the Civil Rules Committee nor its Reporters have been consistently faithful to the limits of judicial rulemaking. But there have been occasions when attention was given to those limits, and Rule 23 has provided more than its share of such occasions. The committee recommending the 1938 version of the rule was uncertain of its validity. After the decision in *Erie R. R. v. Tompkins*,¹²⁰ the committee reconsidered whether its proposal might be too substantive as a displacement of the state law of judgments.¹²¹ It was concerned that the provision in its rule disallowing a derivative action by a shareholder who was not a shareholder at the time of the transaction of which he complained. Noting that the proposed rule was based on longstanding federal equity practice, the Committee concluded that the question of its validity as a displacement of state law in diversity litigation should be left to the courts. Implicit is the assumption that the text of the rule would have no bearing on the *res judicata* effect of the judgment.

The 1966 revision of Rule 23 created no factional political stir and was not viewed by those who studied and recommended it as having large social and political consequences. The reform was part of a general revision of the rules bearing on parties and was animated by concern

for the management of civil rights litigation involving injunctions applicable to large numbers of citizens. Its heart was clause (b)(2) bearing on class actions seeking injunctive or declaratory relief.¹²² Clause (b)(3) was a re-writing of the former clause (a)(3) covering what was then known as the spurious class action. The spurious class action was a device useful in cases in which numerous claims rested on a common contention, the parties making the claims elected to join in a single action, and it was infeasible to conduct the litigation with each of the claimants asserting the autonomy customary in conventional adversary litigation.¹²³ It was not a means of adjudicating the rights of any person not joined as a party.

The need in 1966 to revise the spurious class action was occasioned in part by the erosion of the requirement of mutuality as a precondition to what was then known as collateral estoppel and now known as issue preclusion.¹²⁴ The development's relation to Rule 23 was called to public attention when a district court in Colorado, after finding for a plaintiff miner who had alleged that the price paid for his minerals by Union Carbide was fixed in violation of the antitrust laws, sent out a notice to all other miners working the slopes of the Rocky Mountains that they might join in the litigation and thus get the benefit of a previous determination that Union Carbide was guilty of price-fixing. The late comers would be required to prove only that they had, like the original plaintiff, sold minerals at an artificially low price. And of course all would receive triple damages. While the court of appeals affirmed,¹²⁵ and the Supreme Court denied certiorari,¹²⁶ there were those who regarded this outcome as unjust to the defendant, who would clearly have been unable to use a finding in its favor to preclude reassertion of identical claims by the unjoined miners.

The new clause (b)(3) was recognized by the Committee as a novel invention. The novel feature was the provision for notice and opt-out in lieu of formal joinder of each member of the class.¹²⁷ Under the amended (b)(3), Union Carbide could have requested the unjoined miners all be asked to take a position either in or out of the action. It was supposed that those who opted out would not only be excluded from any judgment rendered in favor of other members of the class, but that they would also have no access to issue preclusion as an indirect means of securing that benefit.¹²⁸ A review of the Committee's deliberations indicates that the Committee would not have recommended (b)(3) had it not hit upon the idea of notice and opt-out¹²⁹ embodied in clause (c)(2) of the rule. Although (c)(2) requires only that the notice be "the best practicable under the circumstances" and sent only to those members "who can be identified through reasonable effort,"¹³⁰ it was clearly understood in 1966 that no class member could possibly be bound to a judgment who was not given actual notice of the proceeding and in a position to exercise intelligently the choice to opt out.¹³¹

It appears likely that some members of the Committee were moved in part to support the new provision as a means of enabling a large class of persons, having each experienced modest harms resulting from a single misdeed of the defendant, to gain the economies of aggregation. Over two decades before, Harry Kalven and Maurice Rosenfield had made a powerful argument that such an aggregation should be permitted as a means of deterring many forms of predatory conduct.¹³² Knowing that no single person harmed by their illicit practice could have a claim large enough to be viable, firms could engage in predation with impunity; aggregative litigation could dispel that knowledge and impunity and thus deter predation. While there appears to have been relatively little discussion of the Kalven and Rosenfield thesis in the Committee, (b)(3) was a response,¹³³ and class actions to recover money to compensate consumers, investors, or victims of

environmental torts have become common in circumstances in which a single claim would be financially non-viable.¹³⁴

There was opposition within the Civil Rules Committee to the recommendation of clause (b)(3). The concern expressed was that defendants might prefer to litigate class actions for the purpose of securing *res judicata* defenses assertable against individual members of the class too slow to recognize that their interests were inadequately represented by class counsel.¹³⁵ The response to this concern was set forth not in the text of the new clause, but in the Advisory Committee Notes.¹³⁶ Those notes emphasized that the rule requires that questions common to the class predominate over the questions affecting individual members. This was thought to exclude the possible use of the rule in mass tort cases because "significant questions, not only of damages, but of liability and defenses of liability, would be present, affecting the individuals in different ways."¹³⁷ Moreover, the committee asserted that mass tort cases can better proceed through the use of test cases¹³⁸ or multi-district consolidations of individual actions,¹³⁹ hence the class action is not superior to such other methods and is therefore precluded by the text of (b)(3).

No one in 1966 suggested that the proposed clause (b)(3) would be invalid as exceeding the power of the Court under the Rules Enabling Act.¹⁴⁰ In fact, little if any consideration was given to that possibility. One reason for this was that the rulemaking power of the Court was still in its honeymoon stage. There was at that time great enthusiasm for the 1938 Rules and no one was disposed to question their source.¹⁴¹ Indeed, the Rules had been replicated in many states, sometimes *in haec verba*.¹⁴² The Supreme Court in 1965 dicta loosely equated its rulemaking power with the power of Congress over the federal courts and suggested that a rule would be valid so long as it could be "rationally classified" as procedural.¹⁴³ Not yet under consideration were the Federal Rules of Evidence that would be proposed at the end of the decade and would go far to unravel the political invulnerability previously enjoyed by the rulemaking process.¹⁴⁴ So 1966 was still a happy time for federal rulemakers.

But the important reason for the absence of concern regarding the validity of the 1966 reform was that no one favoring the addition of paragraph (b)(3) envisioned the uses to which that text would be put. Benjamin Kaplan, the Reporter, affirmed that the new provision was "well confined."¹⁴⁵ Charles Alan Wright predicted that few cases would be brought under that provision.¹⁴⁶ The Committee was not indifferent to the issue of its authority, but spoke to the question in explaining its modification of Rule 19.¹⁴⁷ But as long as Rule 23 had no application to mass torts, there was little cause to be concerned about its legitimacy.

The Committee apparently gave little attention to the settlement of (b)(3) actions. Subdivision (e) requiring court approval of dismissals remained in its 1938 form as a vestige of traditional equity practice applicable to all class actions and derivative suits and was intended to protect members from an improvident or corrupt dismissal of their claims by class counsel. 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.

To the extent that the effect of paragraph (b)(3) of the 1966 rule was to accommodate the problem posed by the belated joinder of those miners working the slopes of the Rockies, there seems to be little question that it, with the notice and opt-out feature of paragraph (c)(2), was a rule of procedure within the meaning of the Rules Enabling Act. Moreover, facilitating the aggregation of claims for smaller harms, as advocated by Kalven and Rosenfield in order to make trials economic in cases involving numerous and identical small claims, fit comfortably with the aims of procedural law reform as advanced by the Rules Enabling Act and expressed in Rule 1, even though it was known that "the rule would stick in the throats of establishment defendants."¹⁴⁸

More questionable, however, were some of the uses to which the text of the 1966 version of Rule 23 was soon put by lower federal courts.¹⁴⁹ As Charles Alan Wright has said, the rule has been put "in jeopardy" by "those who embrace it too enthusiastically."¹⁵⁰ Illustratively, some courts found authority in the new rule for the creation of something called a "fluid recovery," i.e., one that disconnect the class remedy in a (b)(3) action from any individual entitlements of class members. Others found authority for shifting the cost of notice to members of the class from the class representative to the defendant. In due course, the Court hemmed in some of the more extravagant interpretations of the new rule.¹⁵¹ Lower courts became more cautious.¹⁵²

Numerous proposals were, however, advanced for the further revision of the 1966 rule.¹⁵³ Prudently recognizing the vulnerability of the rulemaking process, the Civil Rules committee tabled those proposals, effectively referring them to Congress. Yet, the question of revision of Rule 23 recurred. In the 1980s, two sections of the American Bar Association simultaneously advanced suggested reforms of the rule; the two proposals were so at odds that the ABA House of Delegates took no position on them, but referred the issue to the Civil Rules committee where they were tabled along with all earlier suggestions. The Committee was at that time unanimous in the view that Rule 23 was too politically freighted to bear treatment by the apolitical process associated with Article III institutions. And the issues then posed were, at least for the most part, less subject to factional political dispute than is the present proposed Rule 23(b)(4).

Nevertheless, lower federal courts have continued to extend Rule 23, particularly in regard to the approval of settlements in class actions not meeting the requirements of paragraph (b)(3) and certified for settlement only.¹⁵⁴ Peter Schuck has labeled the time "a period of desperate improvisation" to solve the problem of repetitive mass tort litigation.¹⁵⁵ It appears, however, that only a few members of the federal judiciary were the innovators.¹⁵⁶ Possibly, some have been animated by the ambition to decide cases of elevated importance; Judith Resnik reports that "some federal judges are 'offended' when asked to think about as 'small' a problem as that of a single individual."¹⁵⁷ Whatever the driving force, federal judges have been approving settlements justified by questionable interpretations of the text of Rule 23 and relying heavily on the fact that the present text does not explicitly forbid the practice.¹⁵⁸ The United States Court of Appeals for the Third Circuit has recently set aside two such approvals.¹⁵⁹

The Third Circuit, in setting aside the approval of the settlement in *Georgine* suggested the possibility that the absence of legislative authority to impose global peace on mass tort litigation might be supplied by an amendment to Rule 23.¹⁶⁰ In making that suggestion, the court was inattentive to the statutory and constitutional limitations on the rulemaking power.

It seems likely that chronic inattention to the constitutional limits of rulemaking continues in some measure to reflect the casual words of the Court in *Hanna v. Plumer* decided in the halcyon days of 1965. It will be recalled that the Court was there confronted with a challenge to Rule 4 based on its apparent conflict with an otherwise applicable state law. The issue was one of federalism: did *Erie* require federal courts to apply a state rule of procedure in a diversity case? Justice Harlan, concurring, caricatured the opinion of the Court as one holding that a rule is valid if "arguably procedural."¹⁶¹ The dictum was later invoked by the chair and the reporter of the Civil Rules Committee in defending the validity of the proposed reform of Rule 68. Stephen Burbank rightly declared this application of *Hanna* to be "wrong and wrong-headed." It is wrong," he said, "because the Court in *Hanna* did not intend its constitutional test to do double duty, so that if it satisfied, one need not even inquire about the validity under the Rules Enabling Act. It is wrong-headed because central to the Court's presumption of validity was the premise that the rulemakers take questions of power seriously. Whatever one may think of that presumption in the context of adjudication, it has no proper place in rule formulation."¹⁶²

Conclusion

It is not our purpose here to argue the social, political, and economic merits of the settlement-only class action device. We do not doubt the burgeoning problem of mass tort litigation.¹⁶³ We incline to the belief that a law bearing some resemblance to Rule 23(b)(4) would be desirable if it could foreclose or diminish the need for individual consideration of large numbers of possible tort cases. Global peace is a good idea. But when and if such a law is made, it should be enacted by officers who have been elected by the people, or who are at least more accountable to the people than Justices holding office for life. We say this not because we perceive that Congressmen and the people they represent are wiser than Justices, but because those whose substantive rights must be modified and re-arranged to resolve mass tort problems expeditiously ought share in the responsibility for what their legislators do and ought have the means of correction at hand if they disapprove of the re-arrangement. That is the essence of democratic government, and it is what is inevitably lacking in any federal judicial rulemaking process.

Imaginably, some source of authority other than a rule of court might be identified for judicial innovation of the settlement-only class action. In fashioning remedies case by case, federal courts may fashion principles of equity entitled to prospective effect through the familiar process of *stare decisis*.¹⁶⁴ But as the Court emphasized in *Alyeska Pipeline Co. v. Wilderness Society*,¹⁶⁵ that power, too, is limited. There is no federal common law of remedies standing independently of Congressional legislation and applicable to the enforcement of state-created rights.¹⁶⁶ Whether a settlement-only class action could be justified as a new principle of federal equity seems at best doubtful, and we note the possibility only to distinguish that issue from the one we address. We limit our contention to the unsuitability of the rulemaking power of the Court.

As we have observed, the proposed provision would create contracts, restrict tort remedies, redefine agency relationships, diminish the value of some intangible property rights while enlarging others, alter the jurisprudential premises of our legal system, pit claimants against one another, creates an alternative to voluntary bankruptcy proceedings, and alter the relationships between state and federal law, and between Congress and the Court. Meanwhile, it does nothing to advance the Article III mission of deciding cases or controversies on the law and the facts. Whatever the

need for better means to resolve mass torts, the conduct of the federal courts in approving settlements in cases not certifiable under paragraph (b)(3) derives no legitimacy from Rule 23 or from any other rule that might be promulgated by the Supreme Court.

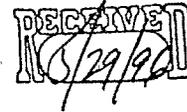
The present Rule 23 was the product of its time; if it overreached the jurisdiction of the Court under the Rules Enabling Act, it was not known at the time, there was no one to object, and the adverse political consequences to the Court and its rulemaking process were not present. In the environment of 1996, the constitutional considerations we have identified stand out. It is now quite clear what is at stake and it is substance, not procedure. The present Civil Rules Committee ought now recall the advice of the draftsman of 1966, Benjamin Kaplan, to keep the rulemaking process clear of public political contests.¹⁶⁷ If legislation is needed to legitimate and regulate the settlement-only class action, there is an institution available to respond to the need. That institution is not the Supreme Court, but Congress. Congress, too, will be bound by such noisome constitutional considerations as those we have identified, and it will be time enough to involve the Supreme Court when it must decide whether Congress overreached its powers.

While the Civil Rules Committee, like the rest of us, is free to make proposals to Congress regarding the mass tort problem, it should not ask the Court to enact its proposals. If it is tempted to disregard this advice, the analogy to the French aristocracy's doom is worthy of the Committee's attention.¹⁶⁸



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96-CV-005

#917

May 23, 1996

The Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules
c/o John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Judge Stotler:

As law professors who have taught and written about Civil Procedure for many years, we are writing to express our concern over the draft revision of F.R.C.P. 23 that has been submitted to your Committee for consideration. The proposal, we believe, suffers from a number of troublesome defects, most notably the open-ended nature of proposed subsection (b) (4) and the striking retreat from one of the major benefits of the class action that is suggested (or perhaps mandated) by proposed subsection (b) (3) (F). Our reasons for these concerns are summarized below.

1. The proposal to add a new subsection (b) (4), giving the court open-ended discretion to certify a settlement class whenever the general requirements of subsection (a) and, perhaps, some unspecified portion of subsection (b) (3) are met, is troublesome on several grounds.

A. The proposal posits the availability of a settlement class in minimalist terms, with no effort either to spell out the relevant factors or to set forth (here or elsewhere in the rule) the limitations and conditions that should apply in the handling of such cases. The effort to remedy this deficiency in the Advisory Committee Note raises questions on several levels. First, there is a general problem inherent in the drafting of vague or ill-defined rules or statutes that are accompanied by a legislative history that attempts to give them a content they would not otherwise have -- a content that at times seems difficult to square with the wording of the rule itself. (For example, in the present instance, what aspects of (b) (3), if any, must a (b) (4) class meet? Does the proposed rule guarantee notice and the right to opt out in a (b) (4) case? What are the "increased protections" (referred to in the Note) that are afforded to class members in a (b) (4) class?). Second, the commentary itself does not deal fully with the many problems presented by settlement classes, problems that courts are just beginning to explore. And third, neither the proposal nor the commentary addresses the question of settlement classes relating not to subsection (b) (3) but rather to (b) (2) or (b) (1).

B. That the notion of the settlement class is one that has only begun to make itself felt suggests that more time is needed to explore and understand the problems presented by such litigation before undertaking a major change in the existing rules. Settlement classes may prove to have significant benefits when properly administered, but rulemaking at this relatively early stage seems, at best, premature.

C. The whole field of class actions is one that has always fallen on the edge of the rulemaking power delegated to the Supreme Court under the Enabling Act. As Professor Carrington explains in his letter to the Standing Committee, any effort to modify Rule 23 in the respects proposed can only exacerbate the concerns of many that the rulemaking process has spilled over its bounds to the point where substantive rights are being profoundly affected, and even shaped.

2. One important benefit derived from the 1966 revision of Rule 23, we believe, was to facilitate group litigation in "small claims" class actions -- cases that could not be brought individually, as a practical matter, because the cost would be prohibitive. Not every such action warrants certification, of course, and the rulemakers may well wish to provide some guidance to district judges. But the proposed addition of subsection (b) (3) (F) does not offer any guidance; rather, it seems driven by the view that these actions are inherently undesirable. That view is not one that, in our opinion, is appropriate for a judicial system that takes justifiable pride in providing equal access to all who seek vindication of their legal rights -- particularly those arising under acts of Congress.

Moreover, in many instances, the deterrent effect achieved by the bringing (or potentiality) of a "small claims" class action for damages more than outweighs the costs. There is no inherent reason why a wrongdoer who causes \$50 worth of damage to each of 10,000 people should be immune from liability while one who causes \$500,000 in damages to one individual is not. Indeed, the social cost of the harm done may well be greater in the former case, and dependence on public authorities to remedy or prevent such a wrong may well be impracticable under present (and probably long-lasting) fiscal constraints.

Yet proposed subsection (b) (3) (F) (like the Advisory Committee Note relating to it) appears to ignore the deterrent and other social values of such litigation and to focus on the value of relief to each individual as a critical factor. In our view, this drastic change in the law governing class actions would constitute a major step in the wrong direction. We urge that it not be taken.

Here too, the history of Rule 23 is one that raises a serious question of authority under the Enabling Act. But to reverse direction in an area that has seen significant development under subsection (b) (3) during the last three decades is not to resolve that question, but rather to raise it again in a new and more insistent context.

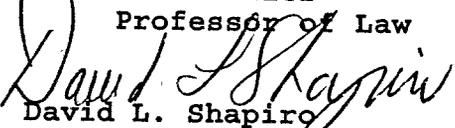
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If some or all of the concerns expressed here and in other letters to the Committee are shared by the Committee itself, one possibility is to attempt to deal with these concerns through drafting changes at the Standing Committee level. But the problems addressed by the proposed changes to Rule 23 do not require such hasty action; rather they deserve further study and discussion by the Advisory Committee specially established for that purpose. We therefore urge that the proposal be returned to the Advisory Committee for further study.

Thank you for your consideration of this letter.

Sincerely,


Arthur R. Miller
Professor of Law


David L. Shapiro
Professor of Law

#2080

David L. Shapiro
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96-CV-153

January 9, 1997

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Pursuant to the notice issued by the Committee in August 1996, I am writing to offer my comments on the changes in Federal Rule of Civil Procedure 23 that have been submitted for consideration by the Advisory Committee on Civil Rules. Because I believe these proposals deal with matters of great importance, and because the specific proposals raise a number of serious questions (of both commission and omission), I urge that the present draft be returned to the Advisory Committee for further study in light of the many comments and suggestions that have been received.

My own qualifications in this area include several decades of teaching Civil Procedure, as well as (less frequently) a course in advanced procedure and complex litigation; service on the Advisory Committee of the ALI Study of Complex Litigation; and participation at the appellate level in a number of cases raising issues of class certification under Rule 23. In addition, over the past few years, I have taken part in several national conferences on the present problems and future prospects of class action litigation in state and federal courts.

I

Before turning to the specific proposals of the Advisory Committee, I would like to make several general observations about the problems I believe they raise. First, the timing of these proposals is somewhat awkward because one of the most critical -- the addition of Rule 23(b)(4) -- relates to a matter currently pending before the Supreme Court.¹ For that reason alone, it may be desirable to postpone any action until the Court has interpreted the present rule.

Second, I believe that, from the very outset, Rule 23 has raised difficult questions of the relationship between the rulemaking power and the limits on that power imposed by the

¹ Amchem Products, Inc. v. Windsor (Supreme Court Docket No. 96-270) (the Georgine case).

Enabling Act. Those questions were to some extent intensified by the 1966 amendments to the rule, especially the addition of Rule 23(b)(3), which opened up dramatic new possibilities for aggregate litigation. And in my view, the highly controversial proposals now pending -- which would substantially affect the availability of "small claims" class actions and place the Rulemakers' imprimatur on the use of the class action device to approve and implement pre-litigation settlements -- may well constitute the last push needed to plunge the rule over the Enabling Act precipice.

This problem has been explored in detail by both Professor Cramton and Professor Carrington, among others, in their submissions to the Committee, and I will not rehearse their arguments here. I will add only that the consequences these proposed changes are likely to have on the practical and legal scope of substantive rights and remedies 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.

Finally, if the Committee believes that rulemaking is appropriate despite the difficulties raised by the Enabling Act, I have a number of specific concerns, focusing primarily on (1) the threat to the "small claims" class action posed by proposed Rule 23(b)(3)(F); (2) the inadequate treatment of "settlement class actions" under proposed Rule 23(b)(4); and (3) the failure to address several significant shortcomings in the present rule. The remainder of this letter addresses each of these concerns separately.

II

The major concern raised by the proposed changes in Rule 23(b)(3) lies in the addition of new subdivision (F), dealing with "small claims" class actions -- actions in which few if any members have a sufficiently substantial claim to be viable as an individual cause of action. But related to that change, in a somewhat puzzling way, is the addition of new subdivision (A), which calls on courts to consider "the practical ability of individual class members to pursue their claims without certification". As disclosed by the minutes of the Advisory Committee, one member noted that while subdivision (F) appeared to place a substantial roadblock in the path of small claims class actions, subdivision (A) looks squarely in the opposite direction -- in emphasizing their value because of the lack of feasible alternatives. Thus a court faced with both new provisions in a small claims case may have difficulty accommodating them.

Moreover, there is a problem raised by subdivision (A) that may have been overlooked because of the greater concerns relating to subdivision (F). In those cases involving viable individual claims (e.g., claims of substantial size), subdivision (A) appears

to establish a separate factor cutting against certification even when the provisions of (revised) subdivision (B) do not support such a decision. Take a case, for example, in which a group of people with large individual claims do not have a substantial interest in maintaining separate actions within the meaning of subdivision (B). Why should their practical ability to pursue separate actions stand in the way of the more efficient class action procedure under the independent provisions of subdivision (A)? I find nothing in the minutes or Committee Note to answer this question. Indeed, even in the case of a "small claims" action, revised subdivision (B) seems fully adequate to focus the court's attention on the relevant practical questions, and thus new subdivision (A) seems at best superfluous, and at worst, counter-productive.

With respect to new subdivision (F), the Advisory Committee minutes and Note suggest that it is designed to encourage courts to deny certification to a plaintiff class if the claim of individual members is small and the problems of litigation are large. But the effect of the provision, I submit, would be to achieve massive overkill because it is phrased entirely without regard to the considerations favoring the use of the class action device in such cases. Virtually by definition, the potential relief to any individual class member in a "small claims" case -- whether it is less than one dollar or more than one hundred dollars -- does not justify the burden of either individual or class litigation.

The value of such litigation, when it has value, is that it may be the only means, or the best available means, of internalizing to a wrongdoer the true costs of the wrong -- of effecting the goal of deterrence of harmful illegal conduct. Whether a class action is warranted in such a case depends not on the magnitude of the wrong to any individual, or even on the complexity of the issues presented, 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 case for a class action may be far weaker in the case of the defendant who causes a \$100 injury to each of 50 people by conduct that can readily be determined to be wrongful than in the case of one who causes a \$5 injury to a million people by wrongful conduct that is more difficult to prove.

Yet none of this is reflected in proposed subdivision (F). On the contrary, the minutes of the Advisory Committee discussion suggest a concern that any reference to the "public interest" in connection with small claims class actions -- most notably, of course, to the value of internalizing to the defendant the cost of its wrongful conduct -- would trespass on substantive ground in possible violation of the Enabling Act. 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; surely that is no less substantive in effect than a decision to recognize its significance.

Few would argue that every aggregation of small claims should be certified for class action treatment, but the problem is far more complex than the simplistic language of subdivision (F) would suggest, and is freighted with major considerations of substantive policy. If any change in Rule 23 is to go forward, I strongly urge that this aspect of the proposal be deleted.

III

The problem of the "settlement class" has become perhaps the most controversial aspect of the class action device in recent years, and (as noted above) is currently the subject of a split in the circuits and of a case pending in the Supreme Court. Though the certification of settlement classes is not new, the area has assumed greater importance, as Professor Koniak pointed out in her testimony, because of the willingness of some courts -- endorsed by the proposed addition of subdivision (b) (4) -- to certify a class action for purposes of considering the approval of a settlement reached before litigation has begun, even though under the present rule, the same class could not be certified for litigation.

A

Unlike a number of people who have written to the Committee, or testified before it, I do not believe that the use of the class action device in such cases is inherently undesirable or beyond the scope of the Article III powers of a federal court. I should therefore begin by outlining my reasons for this view.

First, even if a "settlement class" would not be certified as a "litigating" class under the present Rule, it does not follow that certification necessarily raises a question under Article III. In some cases -- for example those involving future claimants (including even the unborn) who have not yet even been exposed to an injurious product -- such questions of justiciability as ripeness and standing may well exist. But the present Rule 23(b) (3) vests broader discretion in the court to deny certification -- to determine, for example, that a class action may be too difficult to administer for litigation purposes, even though certification in such a case would be wholly consistent with Article III, and the difficulties of administration may well diminish when the sole question is whether to approve a settlement.

Moreover, if there is an actual controversy between adversaries, and a settlement is reached before suit is filed that requires judicial approval in order to become effective, I do not

think it is beyond the power of a federal court to play a role that only a court can fulfill in such a case. In the case of a negotiated guilty plea in a criminal case or a consent decree in a civil case that is agreed to before filing, the court's role includes implementation of the agreement through sentencing or supervision; in the case of a settlement class action, the role consists primarily of evaluating and, if appropriate, approving the settlement after full opportunity for hearing. This role is essential if absent members of the class are to be bound.

Second, although the certification of such classes is filled with hazards, especially with respect to the absent members of the class -- and some of those hazards exceed the dangers implicit in almost any other kind of class action -- the benefits of class action treatment in many such cases may still outweigh the costs. Indeed, I believe a recent example of such a case is the class action brought against certain blood concentrate manufacturers by victims of hemophilia who claimed to have been infected with the AIDS virus as a result of blood transfusion.² The Seventh Circuit in that case held that, for a variety of reasons including the difficulties of administration, a litigating class should not be certified, but after remand to the district court and dismissal of the original class action, a very substantial settlement was reached, and at this writing, a settlement class has been certified for purposes of proceeding under Rule 23(e).

It has been suggested that the hazards of certification in such cases are enhanced by such factors as (a) the likelihood of a "reverse auction" in which the prospective defendant shops around for the most amenable group of plaintiffs and their lawyers, (b) the danger that lawyers will sacrifice the interests of the class to the interests of their own clients who are prosecuting separate actions, and (c) the strong bargaining position of a defendant who knows that, if the settlement falls through, the class action cannot go forward for purposes of litigation.

But these fears may well be overstated. To my knowledge, there is little empirical evidence that the "reverse auction" problem has been a real one (and indeed, the monitoring of such cases by other interested lawyers may prevent it from becoming one). As suggested below, safeguards can be instituted against serious conflicts of interest that prejudice class members. And the defendant's bargaining position is not all that strong in light of the risk of such alternatives to one nationwide class action as dozens of smaller (e.g., statewide) class actions, as well as the defendant's nightmare of one-way nonmutual offensive issue preclusion. Moreover, if the terms of settlement are arrived at

² The case, involving a number of manufacturers including Rhone-Poulenc Rorer, was one in which I participated in seeking a writ of certiorari from the Supreme Court.

before filing, the likelihood of significant judicial participation in arranging those terms is reduced, and the objectivity of the judge in assessing the fairness of the deal is necessarily increased. (And the judge's objectivity may be further enhanced if judicial rejection of a proposed settlement does not mean that the class action will continue to remain on the docket as an albatross around the court's neck.)

B

For me, then, the problem is not with the very concept of a settlement class, or even some of the modern extensions of this concept, but rather with the way in which the issues are addressed in the proposed rule change. And these difficulties are not just cosmetic. Even apart from the problems of timing and legitimacy to which I referred in Part I, the Advisory Committee's approach raises a range of difficulties so serious as to call, in my view, for an intensive second look at the Advisory Committee level. I will attempt to deal briefly with my major concerns, though there are others that have been discussed and dealt with in earlier testimony and correspondence.

First, the text of the proposed rule is brief to the point of being almost entirely uncommunicative. Some effort to make up for this gap appears in the accompanying Note, but it too is cryptic and at points disturbingly vague or confusing. Moreover, even were they clear, these notes are not promulgated by the Supreme Court and do not have the force of the law.

New subdivision (b)(4) is far from clear about whether it contemplates a separate "(b)(4)" certification (which comes into play only when a "(b)(3)" certification is sought), or whether certification is contemplated under (b)(3) in such a case, and in either event, whether any or all of the (b)(3) limitations apply -- including those incorporated in later subdivisions of the rule. The Committee Note purports to fill some of this gap by advising that certification under (b)(3) is contemplated (though not application of all of its factors) with the attendant limitations. But surely, if this is so, the point could have been far more clearly made by incorporating language in (b)(3) along the lines of that suggested in the Advisory Committee minutes and rejected for no evident reason.³

³ The language, appearing in the second full paragraph of the report at 167 F.R.D. 555, would have added to subdivision (b)(3) the phrase "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."

Note that this language does not rule out the possibility

Even more fundamentally, the new rule makes no effort to confront the special difficulties that arise when a settlement class is certified at the outset of litigation. The Committee Note mentions one of these difficulties and recites (without any supporting evidence) that in the event a settlement class is certified, "increase[d] . . . protections [are] afforded to class members." The Note then goes on, in a brief concluding paragraph, to refer to such issues as the dangers of conflicts within the class, and the need for clearer notice to class members.

Even if this commentary were to have the force of law -- and it does not -- it barely scratches the surface, as many of the critics of the proposed rule have shown. The difficulties that courts must face in dealing with settlement classes include (but are not limited to):

- The danger that the court will be asked to certify in the total absence of adversary proceedings and indeed of relevant information developed through discovery and submission of relevant material from objectors;
- The danger that the lawyers for the class, even if attempting to act in good faith, may be torn between the interests of the class as a whole and those of individual clients (who may have individual suits pending or may choose to opt out of the class);
- The danger that, in cases where there are dramatic differences in the applicable law governing different class members, those differences will be overlooked or ignored in the settlement, with a resulting transfer of wealth from those with strong claims to those with weak or nonexistent claims; and
- The danger that lawyers for the class will be awarded disproportionately large fees, to the detriment of some or all class members.

Some of these hazards exist in every class action that reaches the settlement stage, but all seem especially great in the context of a class action that is settled before it begins. If the Rule is to address these hazards, it should do so explicitly, perhaps in revisions of Rule 23(e), dealing with court consideration of any dismissal or compromise. Various proposals have been made for the

that, if the settlement falls through, the class may be certified for litigation purposes (as proposed (b)(4) seems to do). One difficulty with the language, however, is the casual use of the word "parties" when the reference -- in the case of a plaintiff class -- is presumably to the representatives of that class on the one hand and the defendant(s) on the other.

expansion of Rule 23(e) (including recommendations by Judge Schwarzer and Professor Leubsdorf), and these deserve careful consideration. Proposals that may be of special relevance to settlement classes include: (a) authorization or requirement of the appointment of an "advocate" for the absent members of the class who, like a devil's advocate, is obligated to present to the court the arguments against settlement (in particular cases, advocates for subclasses may be required); (b) limitation or even prohibition of representation by class attorneys of clients who are maintaining individual actions on the same or a closely related claim; and (c) limits on the ability of a judge who has taken any part in the settlement negotiations to play any role in determining the acceptability of the settlement under Rule 23(e).

These ideas are not advanced in the thought that this Committee should discuss and perhaps adopt them. Rather, they are suggested as possible starting points for further consideration by the Advisory Committee if the rulemaking process is to continue on this issue.

IV

Several issues raised by the present rule that were discussed at the Advisory Committee level did not find their way into the proposal now under consideration. Three of these are mentioned here.

First, there is a need (as indicated in Part III) to expand the specification of matters to be considered in a "fairness" hearing under Rule 23(e), and this need is not solely dependent on the decision whether or not to go forward with the authorization of settlement classes.

Second, and of great importance, there is a need to revisit the straitjacket imposed on certain "small claims" actions by the language of present Rule 23(c)(2) and its interpretation in the Supreme Court's decision in the Eisen case.⁴ In a case with, say, 1,000,000 class members, none of whom has suffered substantial damages, but all of whose whereabouts are known or can be readily ascertained, it is at least ironic (and at most perverse) that the action should fail, even if all the prerequisites of Rule 23 are met, solely because the Rule imposes such a high cost of notice on the plaintiffs. The irony is that, even in a case in which there is little reason to believe that any significant number of class members will wish to opt out or even to participate, and in which a class action is the only means of charging a defendant with the cost of wrongdoing, the members of the plaintiff class are receiving so much due process that it becomes too expensive for

⁴ Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

them to pursue their claims at all.⁵

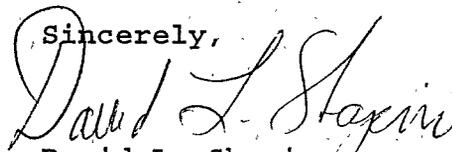
Nothing in the Constitution, as interpreted in the Mullane decision⁶ and in the more recent decision in the Shutts case,⁷ requires such an outcome. The flexibility that is needed in such cases, and that is wholly consistent with the requirements of due process, could be achieved simply by revising the first sentence of Rule 23(c)(2) to end with the word "circumstances." Such a change would, for example, permit sampling notice, and publication, in appropriate cases.

Finally, if the Supreme Court clarifies the nature of the opt-out requirement in the pending Adams case,⁸ attention needs to be given to the opt-out question with respect to every type of class action under Rule 23. Thus, if the Constitution permits a degree of flexibility on this issue, it may be appropriate to require the recognition of opt-out rights in some cases certified under 23(b)(1), and even 23(b)(2), but not necessarily in every case arising under 23(b)(3).

* * *

I hope this letter is helpful to the Committee in the difficult task of deciding on the future course of class action litigation in the federal courts. While I have been critical of some aspects of the Advisory Committee proposal, I believe the bench and bar owe the Committee a debt of thanks not only for their intensive and comprehensive study of these daunting questions, but also for precipitating this important debate.

Sincerely,



David L. Shapiro
Professor of Law

cc: Professor Edward Cooper
Professor Daniel Coquillette

⁵ As Professor Gilmore said in his concluding sentence in "The Ages of American Law" 111 (1977), "In Hell, there will nothing but law, and due process will be meticulously observed."

⁶ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

⁷ Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

⁸ Adams v. Robertson (Supreme Court Docket No. 95-1873).

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96-CV-006

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June 3, 1996

#918
Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposals Regarding Federal Rule of Civil Procedure 23

Dear Judge Stotler:

These comments are presented on behalf of Public Citizen Litigation Group, a division of Public Citizen, a non-profit consumer advocacy organization with approximately 100,000 members nationwide. We urge the Standing Committee to reject the proposal for amendment of Rule 23 recently set forth by the Advisory Committee on Civil Rules and return it to the Advisory Committee for further study.

Public Citizen Litigation Group has considerable day-to-day experience with Rule 23. We sometimes represent plaintiffs in class actions, but more often we represent absent class members who object to proposed class action settlements. In the past several years alone, we have represented objectors in approximately a dozen nationwide class actions.¹

¹ See, e.g., Georgine v. Amchem ("Georgine"), ___ F.3d ___, 1996 WL 242442 (3d Cir. May 10, 1996); 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 re Ford Motor Co. Bronco II Products Liab. Litig., 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995); Bowling v. Pfizer, 143 F.R.D. 141 (S.D. Ohio 1992).

Honorable Alicemarie H. Stotler
June 3, 1996
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We have regularly submitted comments to this Committee and its Advisory Committees on proposed changes to the Civil and Appellate Rules. Ordinarily, we would withhold comment on proposals of an Advisory Committee and await a request by the Standing Committee for public comment. However, we find the proposals adding new Rules 23(b)(3)(F) and 23(b)(4) to be so vague and subject to potential abuse that the Standing Committee should decline to publish the Rule for comment and send the proposal back to the Advisory Committee for further study. We address each proposal in turn.

(1) Proposed Rule 23(b)(3)(F).

This proposal directs the court, in deciding whether to certify a class under Rule 23(b)(3), to evaluate whether "the probable relief to individual class members justifies the costs and burdens of class litigation." This appears to demand some sort of cost-benefit evaluation as a pertinent factor in Rule 23(b)(3)'s superiority analysis. Indeed, the Advisory Committee Note suggests that, where costs exceed benefits, a class action is not, by definition, superior to individual litigation. The Rule, however, tells the court virtually nothing about how to gauge "probable relief," whether the value of the relief should be discounted by the likelihood of obtaining the relief, and, perhaps most important, what constitutes the "costs and burdens" of the litigation.

Most troubling from Public Citizen's perspective is that there

is no explicit recognition--on the "benefit" side of the equation--of the effect that the litigation might have on the defendant's future conduct (or on the conduct of similarly-situated defendants not before the court). We believe it very problematic for the courts to be dragged into some sort of ill-defined economic/social analysis in determining class certification. However, if that is to be done, something as significant as whether the court may consider the effect that the suit might have in furthering the goals of the substantive law must be addressed explicitly in the Rule.

As the Committee Note recognizes, subdivision (b)(3) historically has permitted certification of small-claims consumer class actions. In the area of securities law, for instance, Congress is aware that the only feasible way to maintain many such cases is through the class action device, since the size of the claims will not support individual litigation. Requiring a cost-benefit analysis might well change the substantive law, by, in effect, creating a different cost-benefit calculus than that struck by Congress. At the very least, the Advisory Committee should be required to set out guidelines or criteria for the performance of the cost-benefit analysis before debate on the Rule goes forward.

(2) Proposed Rule 23(b)(4).

Under this Rule, a class can be certified if "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision

Honorable Alicemarie H. Stotler
June 3, 1996
Page 4

(b) might not be met for purposes of trial." As with proposed Rule 23(b)(3)(F), this Rule offers no guidance, standards, or criteria for certifying a settlement class. Taken literally, a court could hold that the mere existence of a settlement warrants certification as long as the Rule 23(a) criteria are met. Surely, the standardless certification of settlement classes would be an odd and unwelcome development in an era where commentators have decried the complete absence of criteria for settlement approval under Rule 23(e). See, e.g., Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Corn. L. Rev. 837, 843-44 (1995). Nor does the Advisory Committee Note provide significant guidance. On the one hand, the Note says that the predominance and superiority criteria of Rule 23(b) would still have to be met (although the Rule itself appears to provide otherwise), but then suggests that "the many differences between settlement and litigation of class claims or defenses" may serve to meet the predominance and superiority criteria. Given the lack of any standards in the new Rule (and the apparently contradictory position taken in the Note), there simply is not enough clarity to warrant sending this Rule out for further comment at this time.

Two other aspects of the proposed Rule underscore our concern. First, the Rule indicates that settlement classes may be certified only under subdivision (b)(4) and only for settlements that are reached prior to the request for certification. The Advisory Note supports this interpretation of subdivision (b)(4). Therefore, as

a practical matter, subsection (b)(4) will only be available to parties who have negotiated a settlement prior to the filing of the complaint and, thus, creates a breeding ground for settlement classes in which the defendants have chosen the class counsel (already apparent in cases such as Georgine). The Rule should be structured, we believe, to encourage the participation of class counsel who are champions of the class; the proposed Rule, we fear, will have the opposite effect: it will encourage defendants to seek out counsel most likely to accept a settlement favorable to them.

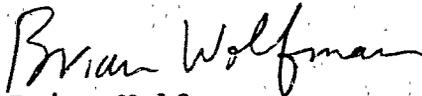
Second, the Rule not only fails to provide any standards for the certification of settlement classes, but it sidesteps entirely the issue of whether a settlement class can settle the claims of 'futures,' i.e., class members whose injuries have not yet become manifest. Although we have grave concerns about the use of class actions to settle future claims under any circumstance, it seems odd for the Rule to ignore this issue at the same time that it endorses settlement classes. This problem is exacerbated by the Committee Note which appears to reject "some very recent decisions" that "have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes." The Note for some reason does not cite these "very recent decisions;" presumably, however, the Committee is referring to General Motors and the Georgine "futures" settlement class action recently rejected by the Third Circuit. The Note is so vague on this point that it could be taken to endorse the

Honorable Alicemarie H. Stotler
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possibility of a "futures" settlement class, since it disapproves at least a portion of the reasoning of the Third Circuit opinion in Georgine. We do not suggest that the Rule should be amended to consider the question of settlement classes. However, it would be a mistake to approve the Rule and Note in their current forms if for no other reason that, while purporting to deal with settlement classes, they fail to provide any guidance on the critical "futures" question.

For these additional reasons as well, the Committee should reject the current Rule 23 proposals and send the Rule back to the Advisory Committee for further study and consideration.²

Sincerely,


Brian Wolfman

² While we have concerns regarding the other proposed changes to Rule 23, none of them is of such significance that it would require rejection by the Standing Committee at this juncture.

#2005

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12/30/96

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December 2, 1996

96-CV-139

The Honorable David F. Levi
United States District Judge
2504 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

Dear Judge Levi:

I enjoyed our brief interchange during the Civil Rules Advisory Committee hearing on the proposed amendments to Rule 23. During our discussion, you questioned why the choice of law problems that often crop up in nationwide class action cases could not be resolved through some kind of constructive or implied consent theory. As I understood your point, where class members are notified that a specific state law rule (say California's) will be employed to resolve class members' claims, unless class members from other jurisdictions opt out, they should be deemed to have consented to the application of California law in the settlement.

I have at least two serious reservations about this theory. First, I have never seen a class action notice that addresses the choice of law issues, let alone provides class members with adequate information on which to make an informed choice about waiving his or her right to insist on the application of whatever state law would otherwise properly govern the claim. Moreover, given the complexity of choice of law rules, I find it very difficult to imagine that a sufficiently detailed notice could be drafted, especially in light of the substantial due process rights that surround the choice of law question. Indeed, Phillips Petroleum v. Shutts would require, in my view, that any waiver be both knowing and explicit.

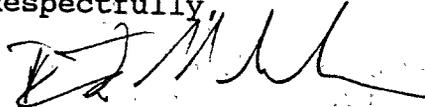
Beyond the difficulties in drafting an adequate notice, your proposal brings to the forefront the conflicts faced by class counsel in settling a nationwide action where there are significant variations in state law. Implicit in your suggestion is that, as a result of the settlement, some class members would sacrifice strong state law claims (that might well warrant a more substantial settlement) in part to benefit class members from those states that have weaker or even non-existent claims (which might yield lower or no recoveries at all). This is the problem Judge Posner alluded to

in the Rhone-Polenc decision, in which he expressed grave concerns about creating an "Esperanto" of common law that simply homogenizes very different common law standards. In my view, class counsel can avoid this conflict only by categorizing class members on the basis of the relative strength of the state law claims, perhaps by creating sub-classes as the Third Circuit suggested would be appropriate in the Asbestos School District litigation.

I appreciate the forces that motivated your proposal. It certainly would facilitate settlement and perhaps provide class claimants some form of justice to disregard substantial variations in state law that might make a global settlement difficult or impossible to achieve. But as we read Shutts, fundamental Erie principles cannot be disregarded even when it would be expedient to do so, and we simply do not have enough faith in the notice and opt out process to say that they cure all ills. For these reasons, we would not support the proposal that you have suggested.

Nonetheless, I want to thank you and your colleagues on the Committee for allowing me and the other commentators to put forth our concerns about the proposed revisions to Rule 23. I thought that the dialogue was highly constructive, and I hope that you and your colleagues had the same reaction.

Respectfully,



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June 3, 1996



96-CV-007

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Rule 23

Dear Judge Stotler:

I write in support of the proposed Amendment to Rule 23 adding section (b)(4) and in opposition to the objections to the proposed amendment raised by several of my academic colleagues in their joint letter from the "Steering Committee to Oppose Proposed Rule 23."

My comments are based on nearly twenty years of teaching and work at Boston University School of Law and Harvard in the subjects of Constitutional Law, Evidence, Alternative Dispute Resolution and Mass Torts, and on my direct experience and involvement in settlement of mass tort lawsuits. I have served or currently serve as the Special Master for several United States District Courts (Northern District of Ohio, District of Connecticut, and District of Massachusetts) and the Superior Court of the Commonwealth of Massachusetts in asbestos litigation, and as the Guardian Ad Litem in the pending class action settlement currently sub judice in the United States Court of Appeals for the Fifth Circuit, Ahearn v. Fibreboard.

In my opinion, the proposed amendment to Rule 23(b)(4) specifically providing for the possibility of settlement classes is both a necessary and desirable improvement to Rule 23. The ultimate effect of the proposed amendment will be to 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 in appropriate cases for federal courts to reduce the enormous drain on resources caused by mass product liability litigation.

The necessity for this amendment is made clear by the recent decision of the United States Court of Appeals for the Third Circuit in Georgine, et al. v. Amchem Products, et al., reversing and decertifying a conditional class certification by the District Court in the so-called asbestos personal injury futures litigation against the Center for

Claims Resolution, a group of former asbestos manufacturers and distributors. In Georgine, the Third Circuit reaffirmed its earlier decisions that Rule 23 class actions certified for settlement purposes (but not for trial) must satisfy not only Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements. In Georgine the Court also extended this holding to require that if the class is certified under Rule 23(b)(3), the settlement class must also satisfy Rule 23(b)(3)'s requirements of predominance and superiority "as if the case were to be litigated," slip opinion, p. 13, and that in making this inquiry the Court may not take the fact of settlement into account. *Id.* In its opinion, the Court noted, "While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception." *Id.* Perhaps in deference to this "better policy," the Third Circuit panel expressly invited the Judicial Conference Advisory Committee on Civil Rules and Congress to reform rules and procedures to enable courts to innovate in the management of mass torts, while taking due process concerns into account. *Id.* at 55-56. The proposed amendment would go a long way achieving the reform discussed by the Third Circuit in Georgine and recognized by so many other members of the judiciary as urgently needed to deal with the modern phenomenon of mass tort litigation.. (However, for various other reasons unrelated to the proposed amendment to Rule 23(b)(4) and not discussed here, the specific result in Georgine might not be any different even if the proposed amendment were in effect. Similarly, the result in Ahearn would be unaffected by the proposed amendment because it does not purport to affect classes certified under (b)(1)(b).)

The objections of my academic colleagues on the ad hoc Steering Committee to the proposed amendment are serious and well-intentioned, but, in my opinion, unfortunately reflect a cloistered, unduly conservative, and unrealistic view of mass torts and the federal courts. It is a view that, in my experience, is inconsistent with the modern demands placed on courts by mass torts, the ability of federal courts to respond to those demands with innovative procedures that ensure fairness and efficiency consistent with fundamental institutional values, and with the societal benefits of settlement as opposed to the take-no-prisoners, scorched earth litigation warfare fought out in numerous foxholes that the opponents of the amendment seem to prefer.

The law teachers opposing the amendment criticize it on three grounds. The first is that the amendment "contains no limiting principles, standards or other guidelines, except for the basic requirements of 23(a), to help trial judges decide when a settlement class is desirable" But the proposed amendment merely makes settlement classes possible in appropriate cases subject to satisfaction of the section (a) requirements, the section (c)(2) notice and opt out requirements, and the Court's ultimate determination under Rule 23(e) that the settlement is fair, reasonable, and adequate. Moreover, as the Advisory Committee Notes accompanying the proposed amendment make crystal clear, the amendment does not relieve the Court from applying the requirements of section (b) to the issue of class certification, as the law professors who oppose the amendment state;

rather the amendment merely states that these requirements need not be met for purposes of trial, but only for settlement. (The Steering Committee of law professors opposed to the proposed amendment appear to jump to another faulty conclusion -- that opt out rights may not exist if (b)(4) is applied. The Rule does not in any way abolish or affect opt out rights, and the suggestion that it might is a scare tactic specifically contradicted by the Advisory Committee Notes.)

The requirements that remain unchanged by this amendment, including the right to opt out, are more than adequate to protect the interests of absent class members. Moreover, no cogent argument has been presented, other than "potential problems with settlement class actions . . . [that] have been much debated recently," as to why judges are unable to evaluate the fairness and efficiency of a proposed class settlement under all the requirements of sections (a), (b), (c), and (e) while taking into account the unquestionable reality that the class action, subject to approval by the court, is settled rather than in litigation. There is no evidence that district court judges, as ultimately reviewed by the courts of appeal, are unable to make these determinations or "are not likely to exercise that power vigorously." To the contrary, requiring these courts to close their eyes to the reality of settlement and instead appraise the suitability of class certification in the unrealistic context of a litigation that is not going to take place severely distorts judicial decision-making and lends an "Alice in Wonderland" aura to the issue. It also frustrates the achievement of beneficial results in those cases that should be settled through a class action mechanism even though they might not be best tried as a class-action. It is not difficult to think of many such cases. The proposed amendment merely grants courts the power to recognize these possibilities. Rule 23 already contains many requirements and factors which courts must take into account when deciding whether certification is appropriate. The proposed amendments to (b)(3) make further improvements in identifying relevant factors that should go into this decision. Imposing further limitations, standards, or guidelines on courts in making these determinations is unwise at this time given the myriad of factors that must go into any such determination, and will only stimulate further litigation. Appellate review is an adequate check on trial court certification discretion, as can be seen by a casual perusal of recent decisions in this area. Moreover the proposed amendment to (f) permitting an interlocutory appeal of certification decisions provides a mechanism for earlier review of district court certification decisions, which tightens the safeguards still further.

Finally, I disagree that "it is an abdication of rulemaking responsibility to leave these questions to trial judge discretion and case by case resolution." Indeed, given the many factors that must be considered in assessing the superiority of a class action settlement compared to other available methods for the fair and efficient adjudication of the controversy, a requirement that still exists under the proposed amendment, and the relative novelty of this device in mass tort cases, I believe that it would be premature to attempt to set out detailed limitations and criteria. A sounder approach to this issue at

this time, as the Advisory Committee noted, is to remove the artificial constraints on settlement classes imposed by requiring a trial court to pretend the action is being litigated, gather more evidence with the use of settlement classes under the watchful eyes of trial and appellate judges, and then, if necessary, add further guidelines derived from experience, not speculation.

The second objection by the law teachers opposing the proposed amendment is based on Article III "case or controversy" concerns when a class action is simultaneously certified and settled. This is, of course, a potentially serious issue in the abstract (and, in some cases, perhaps, in reality). However, in all the cases in which I have been involved, there is no way in which any moderately objective observer could doubt the existence of a concrete dispute with all the requisite adverseness. Settlement does not eliminate the existence of a dispute between the parties. All it means is that they have tentatively worked out a way to resolve the dispute short of a fully adjudicated judgment, appeal and post-judgment skirmishes. To argue that the existence of a class action settlement destroys Article III jurisdiction overproves the contention to a point of dangerous absurdity that would have profound negative consequences far beyond the class action context.

The related point that actions that cannot (or, more accurately, might better not) be tried as class actions are not "cases" or "controversies" that can be settled as class actions confuses the constitutional requirement of a case or controversy with the superiority requirement of Rule 23, which addresses merely some of many methods and forms of resolution. Article III does not require that a case or controversy be triable in any particular format. Further, there is no reason to expect that cases, including class actions, should be triable and settleable in the same format. To require this kind of false symmetry between trials and settlements obscures important differences between them.

The Steering Committee's opposition also questions the constitutionality of "class settlements that involve such untriable matters as claims for 'future injury'." With all respect, this objection appears misplaced. Whether "exposure only" claims (which is a more accurate label for such claims) are justiciable is primarily a question of whether the applicable law (state law, in most instances) recognizes a cause of action simply for exposure to and ingestion of or impact with a toxic substance. Some jurisdictions do recognize a cause of action for increased risk of disease or medical monitoring. In those jurisdictions that do not, the amount of injury required to be established to make out a claim for present injury varies tremendously from minimally noticeable cell or tissue changes to a rather complete medical diagnosis of a recognized disease or injury, or observable impairment. Thus, justiciability in these cases (as well as satisfaction of the amount in controversy requirement) turns on substantive state law issues, not the rules governing class actions. Moreover, contrary to the Steering Committee's opposition statement, the proposed amendment to Rule 23(b)(4) says nothing about how such so-called "future injury" claims should be resolved. To the extent such class settlements are

nonjusticiable or for other reasons should not be certified under Rule 23, the proposed amendment certainly would not require certification.

The Steering Committee's opposition based on the due process guarantee of adequate representation is a red herring. The court maintains, as always, the responsibility of assuring adequacy of representation. The proposed amendment does not affect this requirement. Adequate representation by class counsel is a concern with class actions that will be tried just as much as with class actions that are settled. In a potential class action, lawyers may qualify as class counsel and refuse to settle the case; in some of these cases the case may not be maintainable as a class action because the requirements of Rule 23 cannot be met in the context of a class action to be tried. So what? That is a risk counsel run. It may be true that defendants may try to shop for class counsel who are willing to "sell out" the class in settlement, but defendants may also try to shop for class counsel who will be less threatening as trial counsel. In either event, the court has the responsibility of assessing adequacy of representation, which is an exceedingly fact-based inquiry necessitating a critical, detailed examination of the case and all aspects of the proposed settlement. It is by no means clear that the proposed amendment is "likely to increase the number of collateral attacks on settlement based on claims of inadequate representation," as suggested by the Steering Committee's opposition, other than merely by increasing the number of class actions that are certified and settled -- a natural and unavoidable result that says nothing about the merits of such attacks.

Resolution of these constitutional concerns is very case-dependent. The proposed amendment has no effect on how these concerns are resolved in a particular case. While the Rules Committee should of course consider constitutional problems that might be implicated by the rules, raising such a fact-bound issue such as the due process guarantee of adequate representation for absent class members in the general context of the rule-making process is itself inconsistent with the notion of concreteness which the case or controversy requirement addresses.

The Steering Committee's opposition to the proposed amendment appears to be strongly motivated by a fear of collusion between plaintiffs' lawyers and defendants in which there is a "race to the bottom" to "sell out" the claims of absent class members -- the third challenge to the proposed amendment. Possible collusion is a threat in all class actions, including traditional class actions that are triable. But the fact that the class action may not be triable as a class action does not necessarily increase this threat. The Steering Committee misses an important dynamic of the settlement of mass tort class actions by focusing on the fact that "the plaintiffs' lawyers cannot leverage the defendant into settling by threatening trial." Settlements of these cases are not dependent on their being triable as class actions. Indeed, the threat of multiple repetitive actions over many years, sometimes with multiple punitive damage recoveries, or the threat of consolidated

trials under Rule 42, may be more of a threat to defendants that enables class counsel to obtain a favorable settlement. Sometimes extrinsic factors, such as the defendant's risk of loss of favorable judgments on insurance coverage (as in the Ahearn case), are the motivating forces driving a good settlement for class members.

There is no basis whatsoever for the statement in the Steering Committee's opposition to the proposed amendment that "plaintiffs' lawyers least committed to the class' interest are most likely to serve as (b)(4) counsel." This statement is contradicted by all my experience in mass torts class actions. Indeed, the class lawyers are much more likely to be the most experienced, knowledgeable and passionate advocates for the class. They tend to be the lawyers who, in effect, "made" the class by taking the individual cases on early when they were immature, investing their time and effort in risky matters, and developing the evidence and law that enables the class to be mature enough to be in position to settle the action.

Further, in my experience, a properly conducted fairness hearing is adequate protection of absent class members' interests. Even with a nontriable settlement class, courts have the ability to scrutinize the fairness of the hearing and reject the settlement if it is inadequate or unfair. In fact, objectors are not rare, as is seen by the recent notable class action settlements that have attracted attention -- GM Trucks, Georgine, Ahearn, Silicone Breast Implant, In re American Medical Systems, Inc. (penile implants case). The presence of objectors helps assure a "true adversary proceeding," as anyone who participated in these cases can attest, and in collusive cases provide an effective safeguard. As a matter of fact, several members of the Steering Committee opposing the proposed amendment have themselves recently represented objectors or served as experts or consultants to objectors' counsel at fairness hearings into class settlements, which is a clear indication of the extraordinary quality of representation objectors are able to obtain to challenge certification of settlement classes.

Moreover, the court has other tools it can use to assess the fairness and reasonableness of the class settlement whether or not there are objecting parties. The appointment of a Guardian Ad Litem, whose only duty is to review the proposed settlement on behalf of the class and advise the court on its fairness, reasonableness, and adequacy is an effective mechanism to protect absent class members' interests. Indeed, I believe it is a superior method compared to the often uninformed criticisms of uninvolved outsiders who may base their objections on unwarranted speculations about the motivations of class counsel, professional biases against settlements in general, or greed. The Guardian Ad Litem has a fiduciary duty to the class members; his remuneration does not depend on the settlement being approved. A Guardian Ad Litem may take discovery concerning the substance of the settlement, the negotiations that led up to it, the economics of the settlement, including counsel fees, and the alternatives. The Guardian Ad Litem may interview the class representatives and others in the class and establish

channels of communication for member of the class to express their views on the proposed settlement directly to the Guardian. In the Ahearn case, I did all of these things, and had communications with hundreds of class members. This kind of involvement by a court-appointed Guardian in a settlement class arguably is a better way of ascertaining and protecting absent class members' interests than insisting that Rule 23(b)(3) be satisfied for trial purposes.

A Guardian Ad Litem could be an even more effective tool if he or she were appointed earlier in the case -- if possible, prior to the settlement being finally negotiated. However, the realities of negotiation dynamics may not make this practical in most cases. Nonetheless, the prospective appointment of a Guardian and a rigorous fairness hearing by the court, coupled with the obvious interest of class counsel in increasing their fees by increasing the value of the settlement, are sufficient safeguards against "underselling the class" in cases which may not be triable as a class action. Fairness need not depend on the saintliness of counsel.

A final point. It is not enough to criticize proposals in the abstract. Policies and procedures must be judged relative to the alternatives, including the alternative of no policy or procedures. The alternatives to prohibiting settlements of appropriate class actions, after close scrutiny and fairness hearings, are case-by-case adjudication or settlements, consolidations of some cases or issues under Rule 42, or, possibly, several (many?) smaller class actions. How do the costs and benefits of these alternatives compare to the costs and benefits that might be obtained under Rule 23(b)(4)? In many cases, the alternative will mean no effective recovery at all to the absent class members because of unaffordable transaction cost barriers or the insolvency of the defendants by the time the class member reaches them, and huge drains on the courts, with resulting impacts on other litigants standing in line waiting for their due process. Rule 23 might not be perfect; as more experience is gained with it, further guidelines may be appropriate. But the Committee should not let the perfect be the enemy of the good.

For the foregoing reasons, I urge the Standing Committee to adopt the proposed amendment to Rule 23(b)(4) and to consider extending (b)(4) to classes certified under (b)(1) and (b)(2) as well.

Sincerely,

Eric D. Green/cak

Eric D. Green
Professor of Law

EDG/cak

RECEIVED
6/10/96

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96-CV-008

JUDITH RESNIK
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June 4, 1996

The Honorable Alicemarie Stotler, Chair
Standing Committee on the Rules of Practice and Procedure
United States District Court
United States Court House
751 W. Santa Ana Blvd.
Santa Ana, CA 92701

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

Dear Judge Stotler and members of the Standing Committee on
Rules of Practice and Procedure:

We have read a draft, circulated informally, of the
proposed changes that the Advisory Committee on Civil Rules
is sending to the Standing Committee with the hopes that it
will then be noticed for comments and publication. We know
that the draft is already the subject of controversy, and
that some argue that the Standing Committee reject aspects of
it.

We have a different suggestion: that the Standing
Committee circulate the version, as proposed by the Advisory
Committee, but explain in its prefatory remarks that this
draft is circulated as the basis for meetings and discussion
and not necessarily as the predicate step toward forwarding
it to the Supreme Court for promulgation. Further, as
detailed below, we hope that your publication would be
accompanied by a series of questions about which you would

welcome commentary and research.

Our rationales for this suggestion are several. First, the revision of the class action rules is of great import. Those revisions affect not only practice directly under Rule 23 but also under other aggregate processes, including multidistrict litigation, bankruptcy, and class actions in state courts. One only need watch the many current proceedings in the breast implant litigation (with recent decisions from several different courts¹) to appreciate the interconnections among the differing venues and aggregate rule regimes.

Second, there is more to learn, much of which is a necessary predicate to determining whether and how to change Rule 23. We believe that the Advisory Committee has developed some interesting suggestions, and moreover that the basis from which it was built -- a series of meetings and conferences -- was wise and should be used as the model for going further.² Simply put, the information gathering process should not yet have been concluded. The law of mass tort aggregate litigation is expanding, as trial and appellate courts have an extensive dialogue about the propriety and elasticity of class actions. The Federal Judicial Center has done an admirable job of providing what

¹ See, e.g., *In re Silicone Gel Breast Implants Prod. Liab. Litig.* (MDL 926), Order 29B (N.D.Ala., April 16, 1996); *In re Dow Corning*, ___ F.3d ___ (1996 WL 163029, 6th Cir. Apr. 9, 1996) (appeal on issues of bankruptcy court jurisdiction); *In re Dow Corning Corp.*, Order Granting Appellants' Emergency Motions for Stay of Orders Regarding Various Motions to Appoint Additional Committees or to Modify the Composition of Existing Committees, (E.D. Mich. Apr. 4, 1996); *In re Silicone Gel Breast Implant Prod. Liab. Litig.*, New York Silicone Gel Breast Implant Cases, "Joint Order 1, Rule 706 Panel, Special Masters/Referees" (E.D.N.Y., S.D.N.Y., S.Ct.N.Y., April 3, 1996).

² Both of us have participated at meetings and conferences convened by the Advisory Committee to explore alternatives. We have appreciated the Advisory Committee's efforts to expand its own group of advisors and to obtain information from an array of commentators.

has been termed a series of four "separate snapshots"³ of class action litigation but has warned against aggregating even the information therein gathered. Different kinds of empirical projects -- such as one now contemplated by the Institute for Civil Justice of RAND -- would provide additional sources of important knowledge about how, in practice, class actions operate. As the RAND proposal recognizes, some research directed specifically at class actions in state courts is critical to revision of the federal rule. Given the ability of one genre of litigation to migrate from federal to state court and the Judicial Conferences' expressed concerns about "judicial federalism,"⁴ understanding more about the volume and kind of class actions in state courts is essential.

Further, since "settlement classes" are a key element of the proposal and are an important part of current litigation, research on the range of problems and opportunities that such litigation presents -- rather than reliance on the most vivid cases that dominate discussion -- is all the more important. About a dozen class action settlements have made the news in the last year alone: the questions abound. What are the variables that affect those agreements? How do they differ? How many lawyers are involved or competing to represent the class? Are any of these settlements to be applauded and if so, why? And what about the ones not so well known? A series of case studies might well alter our understanding of what kind of statement should be made by federal rules about settlement classes and what kind of guidance should be provided to judges charged with certifying or appraising them.

³ Thomas E. Willging, Laural L. Hooper, & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges* (forthcoming, NYU Law Review, 1996; manuscript at 11).

⁴ Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (Dec. 1995) (chapter 4, entitled "Judicial Federalism" and discussing the interrelationships among the state and federal systems).

There are many differences of opinion regarding settlement classes. Some believe that they raise serious due process and professional responsibility issues and pose significant dangers of inadequate settlements, while others believe the settlement classes are indispensable to the effective resolution of many types of contemporary class actions. Hence, it would be premature to adopt a provision that takes sides on such a central, controversial, and unresolved issue. If such a provision were adopted, it should reflect a substantial degree of consensus, which is absent at this time.

Third, Congress has been engaged in procedural rulemaking specifically in this area. Its 1995 securities legislation has only begun to be used in practice; at least one version of proposed immigration legislation would alter class actions for that kind of case. We urge that a new federal rule on class actions needs to be viewed in conjunction with enacted and proposed alterations by Congress of class action and other aggregate proceedings.

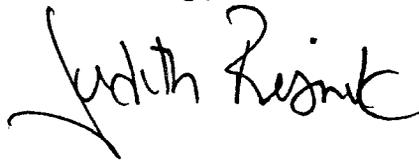
In short, we believe that promulgation by the Standing Committee of a particular set of revisions to Rule 23 is premature.⁵ Work, however, by rulemakers on this problem is not. The Standing Committee has the unique ability to structure a series of meetings and to create incentives for particular kinds of research. We urge that rather than either "approving" or "rejecting" in any preliminary fashion the draft that has been forwarded to you, the Standing Committee circulate the draft as just that -- one option to be considered along with many others. Thereafter, the Standing Committee could either hold hearings -- as it normally does -- in several cities or first convene a series of working meetings/ conferences. After this

⁵ We might imagine that were we on the Advisory Committee, we would feel somewhat "spent" in efforts directed toward the class action rule. Under the leadership of both Judge Sam Pointer and Judge Patrick Higginbotham, several thoughtful drafts have emerged and been through revisions. We are all grateful for these careful and serious efforts and believe they provide the basis for the next stage.

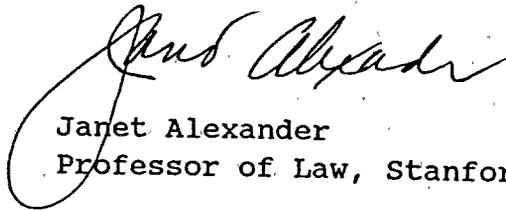
process (which would probably take about a year) has concluded, the Standing Committee could then remit the information developed to the Advisory Committee to resubmit a package, revised as appropriate in light of the information developed, or could determine that it had sufficient information to judge the current proposals.

We appreciate your consideration of our suggestions. Should we be able to be of any help or to provide additional information, please let us know.

Sincerely,



Judith Resnik
Orrin B. Evans Professor of Law
University of Southern California



Janet Alexander
Professor of Law, Stanford Law School

[* Affiliations listed for identification purposes only]

cc: The Honorable Patrick Higginbotham, Chair, the Advisory
Committee
Professor Ed Cooper, Reporter to the Advisory Committee
Members of the Standing Committee
The Honorable Sam Pointer, former chair, the Advisory
Committee

#921



Consumer Federation of America

Howard M. Metzenbaum
U.S. Senator (Ret.)
Chairman

June 7, 1996

96-CV-009

The Honorable Alice Marie H. Stetler, Chair
Standing Committee on Rules of Practice
and Procedure
c/o John K. Rabies, Chief
Full Committee Support Office
Administrative Office of the U.S. Courts
Washington, DC 20544

Dear Ms. Stetler,

We have reviewed the proposed changes to Rule 23 of the Federal Rules of Civil Procedure which are currently being considered by the Judicial Conference. These proposed changes are of enormous concern in that they are clearly designed to limit access of the ordinary citizen and consumer to the courts, have been proposed without any consideration to judicial expediency, and offer unjustifiable protection to defendants who have committed legal wrongs which have resulted in widespread and far-reaching injury. In particular, we find the following provisions extremely disturbing.

The Preliminary "Merits Test". It has been proposed that the Courts be required to preliminarily evaluate the merits of class claims to determine whether or not the merits are "not insubstantial". From a practical standpoint, this provision is burdensome and essentially meaningless due to its vagueness. This provision would require a court to determine the issue of class certification far in advance of the conclusion of discovery permitted on the merits under the Federal Rules of Civil Procedure. Thus, this requirement places upon the Court the need to make a totally speculative decision prior to accumulation of substantive evidence. If this "merits test" is interpreted to mean that plaintiffs must prove their case to the court's satisfaction prior to certification, then an arbitrary and very expensive new burden of proof has been placed upon class action plaintiffs. The expense, in and of itself, would prove a chilling factor for it would be doubtful that this cost is one for which a class representative would willingly assume responsibility.

The Consideration of Public Values. This new proposal suggests that as a screening device, the court be required to review whether public values are served by class certification. In other words, irrespective of whether the class plaintiffs have a valid cause of action and irrespective of whether their claims qualify for class certification under the current Rule 23, if

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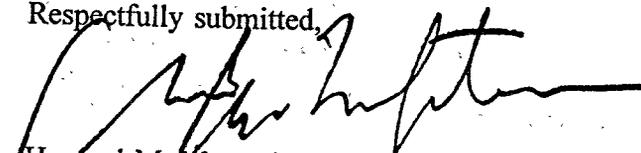
Ms. Stetler
June 7, 1996
Page Two

the court decides the "public interest" might not be well served by the lawsuit, certification can be denied. This provision constitutes an unconstitutional and arbitrary restriction on the rights of citizens to bring civil suit. In the United States, the right of access to the courts to redress a legal wrong is not dependent upon public opinion in any particular community.

The Requirement That The Class Action Be "Necessary". Quite frankly, a class action is never "necessary". Class actions are pursued because they are a most efficient, expeditious and superior manner by which to litigate and resolve multiple common claims. The class action is a procedural tool which has been developed to relieve the judiciary of the burdens imposed by multiple individual suits and to reduce the possibility of inconsistent decisions. Furthermore, the class action vehicle is economically desirable for both the plaintiffs and the defendant(s) for the cost of individual litigations far exceeds those incurred in a class action.

In conclusion, it is highly apparent that the practical effects of the proposed changes have not been properly addressed. If the amendments are adopted one or both of the following will occur. The plaintiff's bar will abandon the class action as a means to resolve complex claims and the courts will be flooded with individual suits, or the amendments will be the subject of long and protracted litigation in the appeals courts, while the plaintiff-litigants suffer interminable delays without having their day in court.

Respectfully submitted,



Howard M. Metzenbaum, Chairman
Consumer Federation of America

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2/18/97

96-CV-167



Consumer Federation of America

February 14, 1997

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. McCabe:

We have reviewed the proposed changes to Rule 23 of the Federal Rules of Civil Procedure which are currently being considered by the Judicial Conference. While we recognize that some improvements have been made over earlier drafts, we continue to be concerned that these proposed rules, if adopted in their current form, could limit access to justice for ordinary consumers. In particular, we strongly oppose the following two provisions of the proposed rules.

The new cost-benefit test for class certification. Proposed Rule 23(b)(3)(F) would add a new requirement that courts weigh the "probable relief to individual class members" against the "costs and burdens of class litigation" in determining whether to certify the class. This would undermine one of the primary purposes of class litigation -- to allow access to courts for victims, particularly low and moderate income victims, whose claims are too small to support individual actions. By depriving individuals with small claims of any means of obtaining relief, the proposed rule would also remove an important deterrent against misconduct where the aggregate damages are large but the harm to individuals is relatively small.

We strongly urge the the Committee not to go forward with this proposal. If it is determined to do so, however, it should, at a minimum, measure the costs against the probable relief to the class as a whole, plus the value of any deterrent effect the litigation may have. Even with these improvements, the proposed rule could result in highly subjective, inequitable determinations about whether a particular class should be certified. How, for example, are courts to measure the "probable relief" to class members at an early point in the case when little if any evidence has been submitted and the original determination about class certification is the major point before the court? And how is the court to put a value on a particular case's deterrent effect? Because of these serious problems, we recommend that the Committee withdraw this proposed rule and give the matter further consideration.

Certification for settlements that do not meet the standards for certification for litigation. Proposed Rule 23(b)(4) would permit parties to a proposed settlement to be certified

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as a class without having to meet the standards for class certification in Rule 23(b)(3). This proposal invites collusion against the interests of the class between defendants seeking to avoid further litigation and class counsel seeking to recover attorneys' fees. Even under the present rules, there have been too many settlements made where the attorneys took far too much of the proceeds, and the aggrieved consumers received but a pittance. This problem would be exacerbated by the proposed rule.

In addition, under the proposed rule, absentee class members are unlikely to have their needs adequately represented in the negotiations and thus may find themselves bound by a settlement that fails to make them whole. Since few class members will have the resources to hire an attorney to protect their interests, the ability to opt out of the settlement provides insufficient protection. Even worse, those victims who are unaware of the settlement or whose injuries are not yet manifest, may find themselves barred from bringing a claim. We urge the Committee, therefore, to withdraw this proposal for further study on how collusive settlements can be avoided and how the interests of absentee class members can be adequately represented.

Both of these proposals threaten to limit access to justice for victims of unlawful conduct. We urge the Committee, therefore, to withdraw proposed Rules 23(b)(3)(F) and 23(b)(4).

Respectfully submitted,

 / M.G.

Sen. Howard M. Metzenbaum (Ret.)
Chairman, Consumer Federation of America

#922

THE INSTITUTE OF JUDICIAL ADMINISTRATION, INC.
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96-CV-010

June 10, 1996

Via Facsimile: (202) 273-1826

Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Judge Stotler:

I am prompted to write by the petition of the "Steering Committee to Oppose Proposed Rule 23," which has garnered the signatures of a considerable number of teachers in the civil procedure field.

There is reason to believe that some of the signatories did not have the benefit of the Advisory Committee's Note when they agreed to lend their names to the petition. The petition was disseminated at NYU without the Note and at least one other school in the New York City area without the text of the proposed rule. These omissions, which undoubtedly were unintentional, indicate why the letter of the signatories fails to indicate that the Note addresses their concern over notice and opt out rights in the new (b)(4) category. The Note in this regard clearly states that "[a]lthough 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 subdivision (c)(2) rights to notice and to request exclusion from the class." The signatories, in short, may well have subscribed to a position on the basis of incomplete information.

Hon. Aliccmarie II. Stoller, Chair
June 10, 1996
page 2

On the other matter raised by the letter -- the addition of factor (F) ("whether the probable relief to individual class members justifies the costs and burdens of class litigation") -- I am supportive of this modest authorization for district courts to consider, as one factor among several, the overall utility of the class action device in cases where the relief to be obtained will have no practical value to the individual class members, and deterrence objectives might be better pursued in litigation brought by publicly accountable administrative agencies or state attorneys general suing in a parens patriae capacity. This is certainly an issue over which reasonable people can differ and whose resolution would benefit from public comment. I urge the Standing Committee to release the proposed rule and thus provide an opportunity for the interested public to comment and join issue on this question.

With regards.

Sincerely,

A handwritten signature in cursive script that reads "Sam Estreicher". The signature is written in dark ink and is positioned below the word "Sincerely,".

cc: Hon. Patrick E. Higginbotham



NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

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99 Hudson Street.
New York, N.Y. 10013-2897 (212) 219-1900 Fax: (212) 226-7592



#813

96-CV-011

June 11, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Amendments to Rule 23

Dear Judge Stotler:

The NAACP Legal Defense and Educational Fund, Inc., writes to urge the Standing Committee on Rules of Practice and Procedure to reject the changes to Rule 23 proposed by the Advisory Committee on Civil Rules. The comments in this letter will deal specifically with the proposals that would affect class actions in civil rights actions under Rule 23(b)(2). We do not limit our opposition to the changes to these proposals, however, and are in agreement with the views expressed by the Steering Committee to Oppose Proposed Rule 23 and other commentators with regard to other proposed changes.

The Legal Defense Fund wishes to address the proposals that would change 23(b)(2) class actions in particular because of its long history of bringing such actions and its role in developing the law governing such actions. The 1966 amendments that created Rule 23(b)(2) were designed with civil rights cases in mind and, indeed, all of the cases cited in the 1966 Advisory Committee Note on (b)(2) were brought by the Legal Defense Fund and were, in effect, codified by the 1966 amendment. Rule 23(b)(2) class actions have been one of the primary vehicles for the private enforcement of the rights created by both the fourteenth amendment to the Constitution and by the various federal civil statutes. It has facilitated not only broad injunctive relief but significant awards of back pay to compensate the victims of discrimination that, along with other monetary relief and equitable remedies, have done much to end discriminatory and illegal practices throughout the country. Therefore, changes to the Rule should not be made without a full explanation of the necessity of and reasons for such changes. Both are lacking in the proposals of the Advisory Committee.

Contributions are
deductible for U.S.
income tax purposes.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had, since 1957, a separate Board, program, staff, office and budget.

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Rule 23(a)(3)

The proposal would amend Rule 23(a)(3) from requiring that the "claims or defenses of the representative parties are typical of the claims or defenses of the class," to require that "the representative parties' positions typify those of the class." There is no explanation of what this change means or whether it would have any effect on the present ability to maintain class actions. The requirement that the claims of the representative parties be typical of those of the class is central to civil rights class actions. See, *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) and *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395 (1977). The Supreme Court's decisions are based on the proposition that a plaintiff who has a legal claim that is not typical of the claims of the class cannot reliably protect the interests of unnamed class members. The meaning of the proposed requirement, that the positions of the representative party is to be representative of the class, is obscure in the extreme, and could refer to the legal arguments or positions taken at the inception of the lawsuit.

Any change made in the typicality requirement should be in the direction of liberalizing the *Falcon* rule, without so eviscerating the typicality requirement so as to permit a class action to be brought by persons with no real interest in protecting the rights of all absent class members.

Rule 23(b)(2)

Similarly, the current language of (b)(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" is to be changed to "final injunctive or declaratory relief may be appropriate with respect to the class as a whole" with no explanation of what the change is intended to accomplish. The current language was put into the Rule specifically with civil rights cases in mind, since the nature of such cases is to challenge actions that are taken against a group of persons who share a trait such as race or gender. As was noted early on in the history of Rule 23(b)(2), "A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin." *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). See also, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968) ("racial discrimination is by definition class discrimination"). For a more recent recognition of the importance of the current language of Rule 23(b)(2), see *Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994) ("pattern of racial discrimination cases for injunctions against state or local officials are the 'paradigm' of Fed.R.Civ.P. 23(b)(2) class action cases").

The proposed amendment would jettison the substantive language of (b)(2), with its clear purpose and supporting decisional law, and substitute no standard at all by which a court is to determine whether injunctive or declaratory relief "may be appropriate." Rather

than be guided by a long-standing, coherent, and effective body of law, district court judges would evidently have unlimited discretion subject to no ascertainable standard of review. No reason is given for changing the language of Rule 23(b)(2) and, therefore, it should not be changed. Moreover, a statement in an Advisory Committee Note that "no change in substance is intended" will not be adequate except for the most minor of language changes, which the proposal is clearly not.

Rule 23(b)(3), (4) and (5)

Rule 23(b)(5) implicates Rule 23(b)(2) in that it permits the certification of a dual class action that joins (b)(2) claims with (b)(3) and (b)(4) claims. Once again, there is an absence of any explanation of the need for this change, and no explication of any standards by which a decision is to be made under this provision. Once more, district court judges will be left adrift without standards by which their rulings may be subject to meaningful appellate review.

Rule 23(c)(2)

This amendment would require, for the first time, notice to the class in a (b)(2) action immediately after certification. The Legal Defense Fund is not opposed to notice being given to class members in a (b)(2) action where that is appropriate; indeed, under the current rule, district courts may and do decide to order notice early in the litigation where they believe it is necessary. However, it must be clear that district courts retain the discretion to fashion or require notice that is adequate and feasible, and specifically that unreasonable notice is not required, particularly in civil rights cases where the class is large and not easily identifiable. Thus, for example, in school desegregation and voting rights cases, the class is, literally, the entire minority population of the political subdivision involved, and courts have utilized press releases and other media coverage to avoid notice requirements that would be so burdensome financially as to make it unfeasible to maintain a class action in such a case. Employment discrimination cases where the issue is promotions in an existing work force, on the other hand, would lend themselves to posting notices or even leaflets in pay envelopes that would reach every employee that might be affected. In short, district court judges should have discretion both as to whether and as to what type of notice should be provided early in (b)(2) class actions.

Rule 23(e)

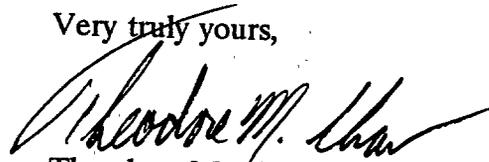
The proposed amendment would make a substantial change in current law and practice in Rule 23(b)(2) actions, to the potential detriment of absent class members. Current law requires that notice be given to the entire class in an action brought as a class action at any stage in the proceeding when the case is to be dismissed or compromised. The amendment would permit the dismissal, compromise or amendment of an action before certification of a case brought as a class action without any notice to the class. The

Legal Defense Fund strongly opposes this amendment. The initiation of a class action in and of itself suspends the running of the statute of limitations with regard to the claims of all putative class members. *Crown, Cork & Seal Corp. v. Parker*, 462 U.S. 345 (1983). The statutes of limitations for many civil rights statutes are extremely short. For example, Title VII requires that a charge be filed with the EEOC within 180 days of the alleged discriminatory act and that a lawsuit be filed within 90 days of the completion of the administrative process. Moreover, unnamed putative class members have the right to intervene to challenge or appeal from approval of the settlement of such actions before certification. *United Air Lines v. McDonald*, 432 U.S. 385 (1977). These important protections will become meaningless if putative class actions can be settled, dismissed, or the class claims abandoned without notification of class members, who may be relying on the pendency of the class action. See, e.g., the order in *Barrett v. United States Civil Service Commission*, 439 F.Supp. 216 (D.D.C. 1977), requiring notice to class members whose claims were no longer covered by an amended class definition, of the time by which they must pursue individual claims. The proposed amendment may have the unintended and undesirable consequence of encouraging class claims for the sole purpose of forcing favorable settlements in exchange for abandoning such claims. The current rule discourages both plaintiffs from using the practice and defendants from demanding it by requiring notice to class members.

Conclusion

The Legal Defense Fund urges strongly that the Standing Committee on Rules of Practice and Procedure reject the proposed changes to Rule 23. To the extent that there are specific, identifiable problems with the misuse of class actions in certain types of cases those problems should be identified and dealt with through narrow, specific, and well-explained changes in the Rules. The proposals of the Advisory Committee would make changes without demonstrating the need for them or explaining their purpose or intended effect.

Very truly yours,



Theodore M. Shaw
Associate Director-Counsel

cc: Hon. Patrick E. Higginbotham
Professor Edward H. Cooper
Mr. John K. Rabiej

#923

TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.

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96-CV-012

June 14, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Changes to Rule 23

Dear Judge Stotler:

I am submitting these comments on the proposed changes to Rule 23 on behalf of Trial Lawyers for Public Justice ("TLPJ") and The TLPJ Foundation. TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant tort and trial litigation. The TLPJ Foundation is a non-profit charitable and educational membership organization that supports TLPJ's activities. The TLPJ Foundation has over 1,500 members, primarily plaintiffs' trial lawyers, who participate in formulating the organization's policies and work as cooperating counsel on TLPJ's cases. TLPJ has both prosecuted numerous class actions and regularly challenged egregious class action settlements. Thus, we have substantial experience with Rule 23.

We are writing at this early stage of the proceedings because we are concerned that the proposed amendments to Rule 23 are so misguided that their mere publication would send the wrong message about the appropriate use of the class action device. We urge the Standing Committee to decline to publish the proposed changes and to return the proposal to the Advisory Committee for further study. We believe this action is warranted because of the inclusion in the proposal of two fundamentally flawed new provisions – proposed Rule 23(b)(3)(F) and proposed Rule 23(b)(4).¹

¹ The comments below focus only on the most problematic of the proposed changes. If the proposal is approved for publication, we anticipate that we will comment on other aspects of the proposed changes, as well.

I. Proposed Rule 23(b)(3)(F) Would Inappropriately Restrict The Use Of Class Actions To Enforce Small Claims and Set Impossible Standards for Class Certification.

Proposed Rule 23(b)(3)(F) would require courts to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation," before certifying a (b)(3) class. In our view, this ill-conceived proposal inappropriately seeks to restrict the use of class actions to enforce small claims and would set impossible standards for class certification.

According to the Advisory Committee Notes, the purpose of proposed Rule 23(b)(3)(F) is to cut down on the use of class actions to aggregate large numbers of relatively small claims. The Committee Notes further suggest that the proposed restriction is desirable because class actions are not a "superior" means of adjudicating large numbers of very small claims. See Advisory Committee Notes ("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 traditional wisdom, however, is that class actions are a highly efficient means of adjudicating large numbers of small claims. As Judge Posner recently commented, the "most compelling" rationale for the class action device involves those instances where "individual suits are infeasible because the claim of each class member is tiny relative to the expense of the litigation." See, e.g., Matter of Rhone-Poulenc Rorer Inc. 51 F.3d 1293, 1299 (7th Cir. 1995). Proposed Rule 23(b)(3)(F) ignores this truism.

Equally alarming is the Committee's apparent disregard of the fact that class actions have traditionally been seen as the *only* means of adjudicating very small claims. See, e.g., Deposit Guaranty National Bank v. Roper, 445 US. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.") Proposed Rule 23(b)(3)(F) and the accompanying Committee Notes utterly fail to acknowledge that, without the class action device, individuals with small claims may find it impossible to obtain relief.

The confusing standard that the rule seeks to impose only adds to the problems that are caused by these oversights. Under proposed Rule 23(b)(3)(F), courts must weigh the "probable" relief to individual members of the class against "the costs and burdens of class-action proceedings." This would be a difficult task under any circumstances. When considered in light of the realities of a class action, however, the standard is completely unworkable. Indeed, it is not at all clear how a court would, as a practical matter, go about assessing either the "probable" relief to class members or the unquantifiable "costs" of class action litigation. This is especially true in light of the fact that, in the usual case, the Court would be required to evaluate these factors shortly after the Complaint is filed. Indeed, even the Committee Notes acknowledge that "[o]ften it will be difficult to measure these matters" so early in the proceedings.

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Honorable Alicemarie H. Stotler, Chair

June 14, 1996

Page 4

To be clear, both parties to the negotiations would have good reasons to settle. The defendant would want to settle to avoid the results of other cases -- as long as it could pay significantly less than those cases were likely to cost. The plaintiffs' counsel would want to settle, even at unfavorable terms for the class, for an equally compelling reason -- to recover attorneys' fees. A settlement would take place if both sides got what they wanted. But the class members would get far less than they deserved.

Proposed Rule 23(b)(4) would, in other words, inevitably invite and prompt class action settlements that would not otherwise -- and should not -- take place. By so doing, it would also likely result in the courts being flooded with legally questionable class actions. Attorneys interested in negotiating Rule 23(b)(4) settlements would simply indicate their interest by filing a proposed Rule 23(b)(3) class action that had little chance of being certified for litigation purposes. That this would, in fact, be a permissible practice under (b)(4) is clear from the Advisory Committee's corresponding proposal to delay the class certification ruling. See Proposed Rule 23(c)(1)(changing the timing of the class certification ruling from "as soon as practicable" to "[w]hen practicable"). The Committee Notes accompanying that proposed change explain that it is necessary, in part, to ensure that parties who are interested in seeking certification under (b)(4) have sufficient time to reach a settlement.

Even more disturbing is the fact that, under Rule 23(b)(4), a settlement could be reached before a complaint was even filed. See Committee Notes (noting that the settlement agreement could be "worked out even before the action was filed). In other words, defendants could -- prior to the filing of any litigation -- choose their own friendly plaintiffs' counsel and reach a settlement. Under this scenario, the plaintiffs' lawyer would have even less leverage with which to negotiate a fair settlement. If the first plaintiffs' lawyers approached by the defendants refused an unfair offer of settlement, the defendants could simply offer the settlement to another lawyer, and so on, until the defendants found one unscrupulous lawyer willing to play along. Faced with these alternatives, even the most scrupulous lawyer might feel justified in accepting a poor settlement offer, because the next firm approached by the defendants might be willing to accept an even lower offer from the defendants.

All this would take place in a context in which it has already been demonstrated that the settlement class device significantly decreases the recovery for the class. A 1994 study by the Federal Judicial Center found that the average class member recovers nearly 50% more (\$848, compared to \$573) in settlements reached after a case was certified for litigation than in settlements obtained through a settlement class. See "Comparison of Outcomes in Certified, Settled Class Actions With and Without a Certified Settlement Class," attached hereto. Despite this fact, the study found that the average award of attorneys' fees in settlement class actions is basically the same as that which is awarded in "litigation" class actions. In other words, class members typically receive significantly less from "settlement class actions" but pay about the same amount in attorneys' fees. Proposed Rule 23(b)(4) would only exacerbate this inequity.

Rule 23(b)(4)'s alarming encouragement of unfair class action settlements is reason enough to return the proposal for further study. Several other troubling aspects further demonstrate that the Advisory Committee has not thought through the ramifications of its proposal.

The specific language of (b)(4), for example, fails to make clear that all of the usual Rule 23 requirements would also apply to (b)(4) settlement classes. Although this deficiency is remedied somewhat by comments in the Advisory Committee Notes, the Committee Notes are vague about precisely which requirements apply to (b)(4) settlement classes. See, e.g., Advisory Committee Notes noting that "the court also must take particular care in applying *some* of Rule 23's requirements" (emphasis added). Clearly, the requirements that apply to (b)(4) settlement classes should be explicitly set out in the rule.

The confusion about which of Rule 23's requirements would apply to (b)(4) settlement classes also suggests that the Committee has not adequately considered the constitutional ramifications of the proposed changes. Several aspects of current Rule 23 were "carefully drawn" to satisfy, among other things, the due process requirements of adequate representation and notice. See 7B Charles A. Wright, et al. Federal Practice and Procedure § 1789, at 251 (2d ed. 1986). Proposed Rule 23(b)(4) would disrupt this balance by permitting certification of settlement classes that could not be certified for purposes of trial. Since this practice was clearly not contemplated by the drafters of current Rule 23, it is necessary to both consider and explain how a class that could not be certified for litigation purposes could satisfy due process. The Committee's failure to address these issues is further evidence that it would be a mistake to publish proposed Rule 23(b)(4).

* * * * *

For all of these reasons, TLPJ and The TLPJ Foundation urge the Standing Committee to decline to publish the proposed changes and to return the proposal to the Advisory Committee for further study.

Sincerely,



Anne W. Bloom
Staff Attorney

Table 2
Comparison of Outcomes in Certified, Settled Class Actions With and Without a Certified Settlement Class*

Outcome	Settlement Class (N=59)	Not a Settlement Class (N=68)
Gross amount of settlement (mean)	\$3.6M (49 cases)	\$4.9M (57 cases)
Net amount of settlement (mean)	\$ 2.2M (50 cases)	\$3.2M (59 cases)
Average net settlement per class member (mean)	\$573 (34 cases)	\$848 (41 cases)
Attorneys' fees awarded (mean)	\$1.3M (45 cases)	\$1.5M (50 cases)
Attorneys' fees as percentage of gross settlement (median)	30% (49 cases)	33% (57 cases)
Attorneys' fees awarded as a percentage of fee request (median)	100% (49 cases)	100% (57 cases)
Attorneys' fees awarded as a percentage of fee request (mean)	96% (49 cases)	96% (57 cases)

* Data are derived from the FJC study of class action cases terminated between July 1, 1992 and June 30, 1994 in E.D Pa., S.D. Fla., N.D. Ill., and N.D. Cal.) (N=407). Publication of both an FJC report and an article in an NYU Law Review symposium on class actions are expected in May or June, 1996.

** "Cases" refer to the number of cases in which information applicable to the specific subject was available.

**COMMENTS OF
TRIAL LAWYERS FOR PUBLIC JUSTICE
AND
THE TLPJ FOUNDATION
ON PRELIMINARY DRAFT OF
PROPOSED AMENDMENTS TO FEDERAL RULE
OF CIVIL PROCEDURE 23
PUBLISHED AUGUST 1996**

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February 12, 1997

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INTRODUCTION

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant tort and trial litigation and is dedicated to pursuing justice for the victims of corporate and government abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

The TLPJ Foundation is a non-profit charitable and educational membership organization that supports TLPJ's activities and educates the public, lawyers, and judges about the critical social issues in which TLPJ is involved. It currently has over 1500 members, primarily plaintiffs' trial lawyers and law firms, who participate in formulating the organization's policies and work as cooperating counsel on TLPJ's cases. The TLPJ Foundation's members regularly represent plaintiffs in a broad range of personal injury, commercial, civil rights, tort, and other cases in the federal courts.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ is dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through its Class Action Abuse Prevention Project, TLPJ works to protect the rights of class members to opt out of damages class actions, prevent the inclusion of future personal injury victims in class action settlements for monetary damages, develop constitutional and procedural limitations on class action abuses, and otherwise preserve class

members' rights. For example, in 1984, TLPJ helped defeat a no-opt-out settlement class in the *Bendectin* litigation. See *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984). In 1986, TLPJ filed an *amicus* brief before the U.S. Court of Appeals for the Third Circuit in the school asbestos class action, successfully opposing the certification of a no-opt-out punitive damages class. See *In Re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986). In 1994, TLPJ filed an *amicus* brief in *Ticor Title Ins. Co. v. Brown*, cert. *dism'd as impro. granted*, 114 S. Ct. 1292 (1994), urging the U.S. Supreme Court to reaffirm the constitutional right of individuals to opt out of federal class actions for money damages.

More recently, TLPJ has filed *amicus* briefs opposing: a no-opt-out damages class including both present and future victims of arsenic poisoning in *Hayden v. Atochem North American Inc.*, Civil Action No. H-92-1054 (S.D. Tex.) (decision whether to approve settlement pending); a no-opt-out damages class including future asbestos victims in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *petition for cert. forthcoming*; a no-opt-out damages and injunctive relief class including victims of insurance fraud in *Adams v. Robertson*, 676 So.2d 1265 (Ala. 1995), *cert. pending*, No. 95-1873; and an opt-out damages class including present and future asbestos victims in *Georgine v. AmChem Products*, 83 F.3d 610 (3d Cir. 1996), *cert. pending sub nom. Amchem Products, Inc., v. George Windsor*, No. 96-270 (hereinafter, "*Georgine*").

We submit these comments because we believe that the proposed amendments to Rule 23 could significantly worsen the problem of class action abuse and improperly restrict small-claims consumer class actions. First, we strongly object to the proposed addition of subparagraph (b)(4), which would permit judges to certify a class whenever "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." In our view, this change is a prescription for class action abuse. By permitting settlement of class actions that could never be tried, the changes would inevitably foster collusive settlements that benefit defendants and harm victims.

Second, we object to the proposed addition of Rule 23(b)(3)(F), which would require a judge deciding whether to certify a class to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." Since traditional damage class actions (involving, for example, securities claims or consumer fraud) often provide a relatively small amount of relief to individual class members, this amendment could effectively eliminate such litigation. TLPJ opposes this change because class actions are often the only way to obtain justice for victims of mass consumer fraud and to deter wrongful conduct. Without the class action device, individuals with small claims may find it impossible to obtain relief -- and wrongdoers will get off scot-free. We sincerely hope and expect that, if these consequences are understood, the proposed changes will be improved or withdrawn.

I. The Committee Should Await *Georgine* Before Making Any Decisions On Its Proposal.

As a threshold matter, although we believe that ample reasons already exist for the Committee to reject its current proposal, at the very least the Committee should wait until the Supreme Court issues its decision in *Georgine, supra*, before taking any action. As the Committee knows, *Georgine* involves the propriety of a "future victims" class action settlement that all parties concede could never have been certified for trial purposes. In that

case, the question before the Court is whether the *current* version of Rule 23 permits a "settlement-only" class action that could not be certified as a litigation class. If the Supreme Court says the answer is "yes," then there will be no need to amend the Rule to permit settlements of this sort. On the other hand, if the Court says "no" -- *i.e.*, that Rule 23 *prohibits* "settlement-only" class actions -- then the decision may render the proposed amendments unlawful or, at the very least, may contain reasons why the Advisory Committee's proposal is poor public policy. We therefore urge the Committee to hold off its deliberations on Rule 23 at least until *Georgine* decided. Any action before then -- short of abandoning the proposed amendments entirely -- would be premature and, in our view, unwise.

II. Proposed Rule 23(b)(4) Is A Prescription For Class Action Abuse.

Whatever the Supreme Court ultimately decides in *Georgine*, it is our view that the proposed amendments -- particularly new Rule 23(b)(4) -- should be abandoned. This provision would permit the parties to a proposed class action settlement to "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." This Committee has stated that this proposal is good public policy and contains sufficient safeguards to protect class members against class action abuse. TLPJ respectfully disagrees on both counts.

A. The Committee's Proposal Is Bad Public Policy.

In TLPJ's view, Proposed Rule 23(b)(4) would vastly increase the potential for abusive class action settlements. Under this rule, a case could be certified as a class action *for settlement purposes only* even if it would not (or could not) be tried as a class action, as long

as the parties seeking certification had already reached a settlement. In other words, an attorney could file a case as a class action (involving, for example, a wide range of personal injuries), the defendant could settle it, and the court could approve the settlement -- imposing the terms of the settlement on the class members -- even though everyone involved knew the case could not be litigated (much less tried) as a class action.

Such an outcome might be tolerable if the settlement negotiations were likely to yield a fair result for the class. In fact, however, 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. Both parties would have an extraordinarily strong incentive to collude against the class.

To begin with, the mass tort defendant would want to settle to avoid the results of other cases (present and future) as long as it could pay significantly less than those cases were likely to cost on an individual basis. (The defendant would have no reason to fear class counsel, since there would be no realistic threat of a class action trial.) The "settlement-only" class counsel would want to settle, even on unfavorable terms for the class, for an equally compelling reason -- to recover attorneys' fees. (Since the defendant would not settle to avoid a non-existent threat of class litigation, class counsel could only obtain fees by agreeing to accept a bargain-basement settlement that would buy the defendant "global peace" from individual litigation.) A settlement would take place if both sides got what they wanted. But the class members would get far less than they deserved.

Proposed Rule 23(b)(4) would, in other words, inevitably invite and prompt class action settlements that would not otherwise -- and should not -- take place. By so doing, it

would also likely flood the courts with legally questionable class actions. Attorneys interested in negotiating Rule 23(b)(4) settlements would simply indicate their interest by filing a proposed Rule 23(b)(3) class action that had little chance of being certified for litigation purposes. (That this would, in fact, be the practice under (b)(4) is clear from the Advisory Committee's corresponding proposal to delay the class certification ruling. *See* Proposed Rule 23(c)(1) (changing the timing of the class certification ruling from "as soon as practicable" to "[w]hen practicable"). The Committee Notes accompanying that proposed change explain that it is necessary, in part, to ensure that parties who are interested in seeking certification under (b)(4) have sufficient time to reach a settlement.)

Even more disturbing is the fact that, under proposed Rule 23(b)(4), a settlement could be reached before a complaint was even filed. *See* Committee Notes at 12 (noting that the settlement agreement could be "worked out even before the action was filed"). In other words, defendants could -- prior to the filing of any litigation -- choose their own friendly plaintiffs' counsel and reach a settlement. Under this scenario, the plaintiffs' lawyer would have even less leverage with which to negotiate a fair settlement. If the first plaintiffs' lawyer approached by the defendants refused an unreasonably low offer of settlement, the defendants could simply offer the settlement to another lawyer, and so on, until the defendants found one lawyer willing to play along. Faced with these alternatives, even the most ethical attorney might feel justified in accepting a poor settlement offer, because the next firm approached by the defendants might be willing to accept an even lower offer from the defendants. This result, we submit, is simply unacceptable.

B. The Committee's Proposal Does Not Contain Sufficient Safeguards To Protect Class Members.

Contrary to the Committee's view, the proposed changes do not contain sufficient safeguards to protect class members against collusive settlements. The Advisory Committee recognizes that settlement classes "pose special risks," but states that its proposal "increas[es] the protections afforded to class members." Advisory Committee Notes at 52. We respectfully suggest that none of the "protections" relied on by the Committee affords any meaningful bulwark against abuse.

First, contrary to the Committee's view, the fact that "[c]ertification of a settlement class under (b)(4) is authorized only on request of the parties who reach a settlement" (Committee Notes at 52) does not in any way protect class members from collusive settlements. As explained above, Rule 23(b)(4) is an open invitation to collusion, and the fact that the parties must *agree* to collude before certification is sought is cold comfort to absent class members.

The Committee also suggests that class members will be protected from collusive settlements because they can always opt out -- a right that is enhanced, in the Committee's view, by the fact that the terms of settlement will be known at the time class members must decide whether to remain in the class. *See* Committee Notes at 13. The right to opt-out, however, is not an *increased* protection being provided against the "special risks" posed by settlement only classes; rather, it is *already* provided to all class members in damages cases certified under Rule 23(b)(3). Moreover, the right to opt out is hardly a bulwark against collusive settlements. Although the right is an essential due process protection, in reality few class members are in a position to exercise their opt-out rights in a meaningful fashion. Even

the "coupon" settlement rejected by the Third Circuit in *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), generated relatively few opt-outs, despite its notoriously meager terms. *See id.* at 781, 812-13. And, in many cases involving "future" victims, class members may not even realize that they are included in a class action settlement, let alone have the wherewithal to opt-out. *See, e.g., Georgine, supra.* Thus, in TLPJ's view, it is unrealistic to rely on the opt-out requirements of Rule 23 to protect class members against collusive settlements generated by Proposed Rule 23(b)(4).

Finally, the Committee suggests that, to protect against the risk of collusive settlements, "court[s] also must take particular care in applying some of Rule 23's requirements," including making sure that the notice is clear, that the class definition is not overly broad, and that "there are no disabling conflicts of interest among people who are urged to form a single class." Committee Notes at 13. We appreciate the Committee's effort to emphasize the importance of close judicial scrutiny of class action settlements, but these factors do not, in our view, cure the defects in Proposed Rule 23(b)(4). For example, while it may be an easy matter to determine whether a class definition is "overly broad" for purposes of litigation, the inquiry becomes far more subjective when a class action is viewed from the standpoint of settlement. What factors are to be applied when making this inquiry? Is a class definition that would be "overly broad" for litigation purposes permissible so long as the case is settled? Similarly, how is a court to determine that a class settlement is so riddled with "disabling conflicts of interest" as to render certification inappropriate? Is a court to apply the same standards here to litigation and settlement classes, or does a more lenient standard

apply to conflicts that are resolved in a settlement vehicle? The Committee's proposal raises more questions than it answers on these points, and provides district judges with no guidance on how to go about the crucial task of policing "settlement" classes. In light of the Committee's recognition that settlement classes pose special risks to absent class members, this fact alone is sufficient reason to withdraw the proposal.

III. Proposed Rule 23(b)(3)(F) Is Unworkably Vague And Would Inappropriately Restrict The Use Of Class Actions To Enforce Small Claims.

Proposed Rule 23(b)(3)(F) would require courts to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation" before certifying a (b)(3) class. In our view, this proposal is unworkably vague, rendering analysis of its effects difficult. It appears, however, that the standard inappropriately seeks to restrict the use of class actions to enforce small claims.

A. The Committee's Proposal Is Vague and Standardless.

As a threshold matter, we note that it is extremely difficult to predict how the standard would be applied in practice. The most serious confusion exists with respect to the measurement of "probable relief to individual class members" under the proposed rule. The Committee's Draft Minutes suggest that the relevant measurement is the amount an *individual* class member would obtain under a settlement or at trial. *See* Draft Minutes at 25 ("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 for individual class members.") (emphasis added). Yet Advisory Committee Chair Patrick Higginbotham's August 7, 1996, Memorandum to the Standing Committee on Civil Rules states that a court can *aggregate* claims when determining probable relief to class

members under Proposed Rule 23(b)(3)(F). See Higginbotham Memorandum at 4 ("This new factor is not 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.") Clarification on this point is obviously critical, since the impact of Subfactor (F) will depend, in large part, on whether "probable relief" is measured individually or on a group basis.

There also appears to be some confusion as to whether the "probable relief to class members" may include consideration of the "deterrent" effect of small claims class actions. Here, too, the Committee has sent mixed signals. See Draft Minutes at 26 ("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.") Since the text of the Proposed Rule is silent on this subject, the proposal could be interpreted to mean that a court has discretion to consider the public benefits of small claims class actions under Proposed Rule 23(b)(3)(F). This, too, requires clarification before the potential impact of the proposed amendments can be fully assessed.

Third, it is manifestly unclear whether subparagraph (f) would permit (or, indeed, require) consideration of likelihood of success on the merits when evaluating "probable relief to class members." At its April 1996 meeting, the Committee voted to reject language that would have explicitly incorporated likelihood of success on the merits in the determination of

probable relief. *See* Draft Minutes at 33. Then, a motion was made to "say nothing about consideration of the merits in conjunction with the factor (F) determination." *Id.* In response, one Committee member objected 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." *Id.* Despite this observation, the "motion to say nothing" passed, 7 to 6. *Id.* The upshot is that, if Proposed Rule 23(b)(3)(F) were to become law, a court would lack any guidance as to whether its determination of "probable relief to class members" should take into account the likelihood of success on the merits.

Finally, the overall balancing test embodied in subparagraph (f) is extremely vague and virtually standardless. To begin with, for all the reasons explained above, it is impossible to predict how courts will evaluate the "probable relief" to class members under the proposed standard. This indeterminate factor must then be weighed against another imponderable: "the costs and burdens of class-action proceedings." The Committee Notes suggest that this factor may depend on the need for "protracted discovery or trial proceedings, the costs of class notice . . . , and the costs of administering and distributing the award" Committee Notes at 50. Once again, however, this analysis is inherently vague and subject to virtually unlimited discretion. 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. (Indeed, even the Committee Notes acknowledge that "[o]ften 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." Committee Notes at 50.) The outcome of the balance in any given case would be virtually

impossible to predict.

B. The Committee's Proposal Would Inappropriately Restrict Small-Claims Class Actions.

The foregoing makes it difficult to fully evaluate the potential impact of Proposed Rule 23(b)(3)(F). The Committee has made clear, however, that the goal behind this proposed new factor is to restrict the availability of the class action device to litigate small claims. See Committee Notes at 10 ("Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims").

This result, in our view, 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. As Judge Posner recently commented, the "most compelling" rationale for the class action device involves those instances where "individual suits are infeasible because the claim of each class member is tiny relative to the expense of the litigation." *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). See also *Deposit Guaranty National Bank v. Roper*, 445 US. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.") Proposed Rule 23(b)(3)(F) could destroy this traditional use of the class action device, leaving many individuals with small claims with no means of obtaining relief.

Equally important, the Committee's proposal would also limit the deterrent effect of the class action device. It is well understood that class actions play an important role in deterring wrongdoing that harms a lot of individuals a little bit. Since small claims cannot

support individual litigation, class actions are the only litigation device that can help to prevent large-scale wrongdoing of this sort. If the Committee succeeds in "effecting a retrenchment in the use of class actions to aggregate trivial individual claims," Committee Notes at 10, then there will be less to deter defendants from engaging in large scale consumer fraud.

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. Instead, the Committee appears to have relied on anecdotal evidence of certain "trivial" class actions that, in its view, did not further any social goal. The problem with the Committee's approach is that it could conceivably eliminate *all* small-claims class actions, even those that the Committee itself would admit serve a useful social function. There is no evidence supporting a need for such a drastic result, and we urge the Committee to reconsider its proposal.

CONCLUSION

For all these reasons, we respectfully urge the Committee to withdraw Proposed Rule 23(b)(4) and Proposed Rule 23(b)(3)(F) or, at the very least, reserve any decision on the proposed amendments until the Supreme Court decides *Georgine*. We would like to thank the Committee for consideration of these views.

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Writer's Direct Dial Number:

June 2, 1996

Honorable Alicemaria H. Stotler, Chair
 Standing Committee on Rules of Practice and Procedure
 o/o John K. Rabiej, Chief, Rules Committee Support Office
 Administrative Office of the United States Courts
 Washington, D.C. 20544

Re: Proposed Federal Rule of Civil Procedure 23(b)(4)

Dear Judge Stotler:

Although I have already (as a co-author) burdened your committee with a letter concerning the proposed amendment creating Fed. R. Civ. P. 23(b)(4), I hope I may take the liberty of communicating my concern in this letter. In brief, the proposed rule reduces the safeguards for settlement class actions when it should be increasing them.

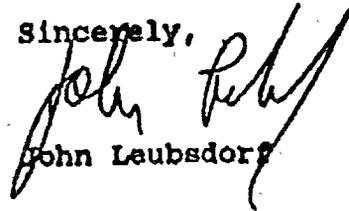
Settlement class actions raise special dangers of abuse beyond those of other class actions. They are often initiated by the party opposing the class, which can thus select the lawyers representing the class. Because there is no thought of trying the case, which may indeed be untriable, the settlement is less influenced by the merits of the claims in question, and lawyers and judges may well shrink from the thought of rejecting the settlement. Because the lawyers purporting to appear on opposite sides of the action have never appeared in the action as adversaries, and unite in supporting the settlement, there may be little or nothing in the record permitting an objective appraisal of the settlement's fairness.

The proposed amendment, if anything, reduces the existing safeguards against these dangers; it certainly does not increase them. It permits certification of a settlement class "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Although the settlement must be negotiated before certification is requested, that does not avoid the dangers I have described, and might even expand them.

Combining the proposed rule 23(b)(4) with the proposed amendments to rule 23(b)(3) would create undesirable incentives

that would funnel more cases into the settlement class action mold. The proposed rule 23(b)(3) amendments would, in various ways, restrict the certification of ordinary class actions. But the standards would be relaxed, to an uncertain extent, when the request for certification accompanies a settlement. The message to lawyers and parties is clear: settle before you present the possibility of a class action to the court. That is precisely the wrong message to be sending at this time.

Sincerely,



John Leubsdorf

By fax

File



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March 7, 1996

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Re: Proposed Changes to Rule 23

Dear Judge Higginbotham and Professor Cooper:

Thank you for giving me the opportunity to comment on the proposed changes to Rule 23 that will be discussed at the Advisory Committee's meeting this April. As you know, I have a number of clients who have been called upon to defend putative class actions, and I believe that their insights and experiences may be of assistance to you in considering the likely effects of the proposed changes contained in the current Draft Rule 23 and the Draft Note.

I realize that the Advisory Committee has been discussing these issues for over two years and that the Committee's approach has changed considerably over time. I believe the latest draft amendments in general would be a significant step forward in trying to curb the abuses of class actions. I also believe there is a growing recognition by many that Rule 23(b)(3) cannot be used as a mechanism for handling dispersed mass torts involving multiple claimants without distorting or violating basic adjudicatory norms. Dispersed mass tort claims, in most cases, should not be certified because it is rare that common issues truly predominate in these cases, and they present insurmountable conflicts of law problems, as well as Seventh Amendment problems. In addition, there is a growing number of purported "consumer" class actions that agglomerate claims which do not afford the class members significant individual relief while creating

enormous costs and burdens. In contrast, single accident torts -- such as airplane crashes -- may be quite appropriate for class action treatment.

Your present draft recognizes that there are significant problems with certifying mass tort cases, and it is attempting to provide some additional safeguards to limit the reach of class action procedures. I believe that it is possible to further refine some of the concepts you are proposing in order to accomplish the Committee's objectives.

As a general observation, there appears to be an emphasis in this draft on splitting cases into "issue" classes. There are many references to "claims or issues" in the Draft Rule and Draft Note, which may, in fact, be left over from previous drafts in which the Committee's overall approach to class action changes was different. I believe that separating a case into minute issues allows courts to disregard the factors required in Rule 23(b)(3) for class certification. It focuses the court's attention on very small segments of the case and does not necessarily save the court or litigants any time or expense. The "issues" approach is used as a technique to certify classes that would not meet the criteria for class certification if the case were considered as a whole. Thus, the "issues" class permits the plaintiffs to aggregate cases that could not otherwise be aggregated and by the sheer strength of numbers hopefully force a settlement regardless of the merits of the case.

The Advisory Committee has concentrated its discussion on four to five basic changes in Rule 23. Many of the other proposed changes in the current drafts were not discussed at the November meeting. Perhaps the Committee should leave for another day the "opt-in" proposal and the notice and timing issues that were not addressed in November. Accordingly, I have sought to organize this letter by first addressing the fundamental modifications discussed in November, and have left for the end the miscellaneous other changes that have not yet been discussed fully by the Committee. As I have indicated to you previously, I am pleased to be a part of the dialogue regarding the proposed revisions and would be very interested in discussing with you in greater depth the ideas outlined below.

INTERLOCUTORY APPEALS -- Proposed 23(f)

I believe that the Advisory Committee's approach to the issue of interlocutory appeal is a positive change. As Judge Posner so accurately explained in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995), an order certifying a class action in product liability or toxic tort litigation is effectively unreviewable. No defendant is able

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to withstand the risk involved in appealing a classwide final judgment, so defendants may be forced to settle cases after class certification -- regardless of the merits of the claim -- if they cannot obtain interlocutory review of the order. And interlocutory review in many circuits often is difficult, if not impossible, to obtain. As you know, some have criticized Judge Posner's use of *mandamus* as the method of effecting interlocutory review of the District Court's order in *In re Rhone-Poulenc Rorer*, and many Circuits refuse to grant review on similar *mandamus* petitions because of the strict standards associated with the use of the *mandamus* tool. In those Circuits, a party is effectively left without relief if the District Court refuses to certify the class certification issue for appeal under 28 U.S.C. § 1292(b).

The present system works a great injustice upon defendants in class action litigation. In fact, certification results in enormous discovery and defense costs for any defendant, regardless of whether the plaintiffs will prevail ultimately on the underlying causes of action. I believe there should be mandatory interlocutory review of class certification orders which are, after all, case dispositive if left unreviewed. At the very least, the Note should not characterize 23(f) as "[o]nly a modest expansion of the opportunity for permissive interlocutory appeal" and urge that review be granted "with great restraint." I believe the Note should declare what 23(f) really is: an important change in the rules made necessary by notions of fundamental fairness.

I have taken the liberty of drafting some language that you may want to consider using in the discussion of 23(f) in the Note:

Historically, courts have expressed considerable reluctance to permit appeals of decisions on class certification. The intent of the revision is to provide for more frequent appeals of such decisions, in recognition of the fact that the certification ruling is often the crucial ruling in a case filed as a class action. The decision to certify a class can pose such a serious economic threat to a defendant that resolution of the case on the merits is no longer a meaningful option. If class certification is erroneously granted, such a party 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. Conversely, 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 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." These consequences justify a special procedure liberalizing the availability of early appellate review of this critical ruling. During the pendency of appellate review, the district judge or the court of appeals may order a stay of proceedings in the district court. This power should be used to reduce discovery costs and other costs that could continue to accumulate during the review process.

As a practical matter, interlocutory appellate review is more likely to be granted for orders certifying a class action, as they most often are not effectively reviewable at the end of the case. This is simply a recognition of the fact that class certification is an extraordinary remedy which, when exercised, often results in intense economic pressure on the defendant to settle the case. If the case settles, the class certification -- the ruling that will have forced the settlement -- will never be reviewed.

You will note that the above language encourages the use of a stay once review has been granted to reduce discovery costs pending resolution of the class certification issue on appeal. This language would be an important alteration to the present Draft Note. The sheer expense of class action discovery is enormous; it is exponentially more costly than discovery in an individual case, and that expense -- particularly at the early stages of the litigation -- is disproportionately borne by the defendants. Accordingly, I believe it makes sense to refrain, as a general rule, from incurring discovery costs until the certification issue is decided by the appellate court.

THE "NECESSARY" REQUIREMENT OF 23(b)(3)(iii)

The current Draft Rule 23 requires that in order to certify a 23(b)(3) class, the court must find, *inter alia* that "a class action is superior to other available methods *and necessary* for the fair and efficient disposition of the

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controversy." I believe that the "necessary" requirement has been included by the Committee as an additional requirement to make it more difficult to certify a class action; the discussion in November clearly evinced an intent to favor individual lawsuits over class actions, generally speaking. The "necessary" requirement is especially effective in the product liability and toxic tort context, as it stresses that if the claims may be pursued individually, then certification is improper.

One area where the "necessary" requirement raises some concern, however, is in the context of class actions in which individual trivial or insignificant claims are agglomerated into a purported class. I am very concerned that the "necessary" requirement in this context -- particularly in light of the Draft Note -- may in practice actually *liberalize*, rather than *restrict*, class certifications. As I understood the discussion in Tuscaloosa, however, that would not be the result intended by the Committee in inserting the "necessary" requirement in Rule 23(b)(3)(iii).

I believe the Committee should use the Draft Note to explain that the "necessary" requirement is *not* intended to liberalize the rules for class certification, but rather to restrict them -- even in the case of what some have called "consumer" class actions. Again, I propose some language that you may consider substituting in the Note to achieve this purpose:

The new factual finding required under Rule 23(b)(3)(iii) is intended to further circumscribe the narrow category of cases appropriate for class resolution. The Committee recognizes that the preferred method of trying cases remains individual litigation. By requiring a finding that class adjudication is both superior to other available methods "and necessary" for the fair and efficient resolution of the case, the court can prevent the misuse of the class action mechanism for collective litigation of claims that could be litigated separately. The necessity requirement thus increases the class proponent's burden in seeking certification.

The Rule 23(b)(3) class proponent now must demonstrate that, in addition to meeting all of the other requirements for class certification, resolution of his or her claims through individual litigation is not feasible.

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The rule change thus is intended to emphasize that class certification is improper unless it appears that the class proponent will effectively be precluded from pursuing relief unless certification is granted. Certification also should be denied where the amount of individual damages are significant, but the claim is so weak that it has practical value only because certification creates pressure to settle. Finally, certification is inappropriate where the claims of the individual class members are insignificant. See [Rule 23(b)(3)(F) or my proposed Rule 23(b)(3)(iv)].

PUBLIC INTEREST vs. BURDENS OF CLASS LITIGATION

The current Draft Rule proposes to add a balancing test -- called Factor F -- to the list of factors a court should consider in deciding whether to certify a 23(b)(3) class action:

whether the public interest in -- and the private benefits of -- the probable relief to the individual members justify the burdens of the litigation.

As Judge Higginbotham described Factor F in Tuscaloosa, this is the "it just ain't worth it" factor, and it is designed to prevent the certification of class actions that involve claims which are not significant to the individual class members. As you know, this problem -- what some call "consumer" class actions -- is particularly vexing. They often result in insignificant recoveries for individual class members, and yet the large fees recovered by class counsel provide tremendous incentive for lawyers to file increasing numbers of these class actions. Furthermore, because of the size of the individual "damages," it often is more cost-effective for a defendant simply to settle such class actions rather than incur the tremendous costs associated with defending the cases.

By focusing on the "public interest" and "public value" of class actions, the Draft Rule -- as well as the Draft Note -- proposes a test that eclipses the very reason for the balancing test. I would suggest that the lengthy discussions of the "public value" of class actions in the Draft Note actually invite a court to certify *more*, not *fewer*, "consumer" class actions. The Draft Note is correct when it recognizes that "fluid" or "cy pres" recovery clearly would be

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beyond the scope of the Rules Enabling Act. However, it is no more within the scope of the Rules Enabling Act to confer upon class counsel the role of a private attorney general, which is exactly what the Draft Note appears to do.

Instead of emphasizing that class actions are merely a litigation management device -- albeit an extraordinary one -- the references in the Draft Rule and Draft Note to the notions of "public interest" and "public values" are likely to be interpreted improperly as *encouraging* the use of Rule 23 to enlarge the narrow class of cases in which private suits have been determined by Congress to be in the public interest. Congress has created mechanisms for private citizens to implement "public values" through civil litigation only in particular, well-defined subject areas. Where it makes such a determination, it may create special incentives to encourage suits, such as allowing attorneys' fees or treble damages. *See, e.g.*, the Clayton Act, 15 U.S.C. § 15; the Fair Labor Standards Act, 29 U.S.C. § 216(b); the RICO statute, 18 U.S.C. § 1964. The Draft Rule and Draft Note, in contrast, elevate the private litigant to a private attorney general in *all* class action litigation, regardless of the subject matter of the suit. I would suggest that the Advisory Committee defer to Congress to determine when private actions should be encouraged to implement public policy. *Cf., Alyeska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 270 (1975) (observing that Congress has, by statute, indicated where "the encouragement of private action to implement public policy has been viewed as desirable," and declining, in the absence of statutory authorization, "to invade the legislature's province by redistributing litigation costs" to encourage private litigation to protect the environment).

Not only has Congress narrowly construed the public's interest in encouraging private litigation, but on the one occasion that Congress directly considered the question of what sorts of "consumer" class actions should be allowed, it adopted a particularly restrictive approach in order to keep relatively minor actions out of the federal courts. In enacting the Magnuson-Moss Warranty Act -- which is the core "consumer" action statute -- Congress specifically provided that a putative class action under the statute is permissible in federal court *only* if the complaint includes 100 named plaintiffs. 15 U.S.C. § 2310(d)(3). Obviously, the purpose of this provision, as well as the other restrictive jurisdictional provisions in the statute, is to "avoid trivial or minor

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actions being brought as class actions in Federal district courts." *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541, 543 (N.D.N.Y. 1978). See also *Skelton v. General Motors Corp.*, 660 F.2d 311, 319 n.15 (7th Cir. 1981), cert. denied, 456 U.S. 974 (1982). Put differently, the "jurisdictional provisions of section 2310(d) were designed by Congress to assure that [only] substantial class actions could be brought in federal court." *Jacks v. The Firestone Tire & Rubber Co.*, Civ. A. No. C78-1261A, slip op. at 6 (N.D. Ohio June 4, 1974). To the extent the Draft Rule and Draft Note encourage the use of class actions where the litigants have claims involving trivial sums, they appear to contravene Congress' clear determination that the maintenance of such federal class actions is not in the public interest.

As an overall observation, the use of class actions in civil litigation should not be infused with notions of "public interest," and certainly the Draft Note should not conclude that "[o]nly public values can justify class certification." As Judge Posner explained in *In re Rhone-Poulenc Rorer*, issues of broad public policy are primarily the province of the legislative and executive branches of government. Class action litigation arises in the context of private disputes between individual litigants; the judicial system's only interest is in determining the dispute fairly and efficiently when those litigants have a sufficient interest in the outcome to proceed with the case. Part of that efficiency interest is a realization that some individual claims are so insignificant as to not be worth the costs associated with class action litigation in the federal courts.

The Uniform Law Commissioners recognized, as you do, the need to evaluate whether the individual claims are substantial enough to warrant the burdens of class certification. The factor that they proposed to effect such a cost-benefit analysis, however, did not contain such terms as "public values" and "public interest." I would suggest that the Committee borrow some of the language from § 3(a)(13) of the Uniform Law Commissioners' Model Class Actions Act to rewrite this balancing test.

Moreover, because this cost-benefit balancing lies at the very core of what the Committee is trying to do in revising Rule 23, I submit that this test should not be a mere "factor," but rather should become a full-fledged *requirement* under Rule 23(b)(3), just like the "superiority" and "necessary" require-

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ments. Clearly, the Committee is seeking to circumscribe the use of Rule 23 to curb abusive class action filings. There seems to be a consensus that class actions presently are being filed and certified on behalf of individuals who have little interest in the outcome of the litigation, and that such actions often "just ain't worth it." If this is true, as I believe that it is, then making the cost-benefit analysis a mere "factor" may not be enough to address the problem. Accordingly, I propose that the Committee delete Factor F and instead add the following new subsection to Rule 23(b)(3) as a prerequisite to certification:

the court finds . . . (iv) that the amount or relief sought in each individual class member's claim is sufficiently significant to justify the burdens, complexities and expense of affording class treatment

In place of the present commentary in the Note, you might also consider the following:

The new factual finding required under Rule 23(b)(3)(iv), like the new "necessary" requirement in Rule 23(b)(3)(iii), is intended to further circumscribe the category of cases appropriate for class resolution. Some cases, even if otherwise appropriate for class treatment, involve claims of such limited value to the individual class members that they simply do not justify the burden and expense that is inherent in federal class action litigation. This new balancing requirement has been added to recognize the impropriety of using class actions to aggregate insignificant individual claims, and it requires the court to weigh -- as a prerequisite to class certification -- the benefits that individual class members derive from class treatment against the burdens, complexities and expense of treating the litigation as a class action. This requirement is distinct from any evaluation of probable outcome on the merits because it will permit in some cases the denial of certification even if the class would certainly prevail on the merits.

Rule 23 is not intended as a vehicle to allow litigants to prosecute class actions on behalf of the public interest. Rather, a 23(b)(3) class requires actual representative parties with quantifiable damages. Indeed, "fluid" or "cy pres" class recovery would severely test the limits of the

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Rules Enabling Act. The requirement that the individual members of the proposed class have substantial claims thus is intended to ensure that the extraordinary procedure offered under Rule 23 is not employed in cases where the actual damages of individual class members are relatively inconsequential.

Class actions tax the judicial system and place enormous costs on the parties and the courts, often creating virtually irresistible pressure toward settlement, even where the defendant has only a small risk of loss on the merits. Where the action involves claims of relatively insignificant value to the individual claimants, certification should be denied even if the other requirements for certification have been met. If the potential individual relief is not significant, the core justification of the extraordinary procedure described in this Rule fails. This is the case even in actions where the class proponents are able to demonstrate a strong likelihood of success on the merits.

By expressly requiring the court to consider the costs involved in proceeding with class litigation, it is intended that the class action mechanism will be reserved only for those cases it originally was designed to address. This amendment is intended to eliminate the current trend toward the class treatment of individual claims so insignificant that the litigants' interest in pursuing them through class litigation is outweighed by the concomitant burdens imposed by the class action device itself.

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**RELATED BALANCINGS: THE PRACTICAL
ABILITY TO MANAGE THE LITIGATION
INDIVIDUALLY AND ON A CLASSWIDE BASIS**

The Committee has proposed two factors for courts to consider in deciding whether to certify a 23(b)(3) class that I believe relate closely to the above discussion of your proposed Factor F. In the first of these additional factors, Factor A, the Committee proposes that courts consider the individual class members' ability to pursue individual cases, and in the second, Factor D, the Committee proposes that courts evaluate the difficulties inherent in a class action that could be avoided by allowing the claims to proceed on an individual basis.

There is much that I believe is beneficial in Factor A. Plainly, it would discourage class certification in product liability and toxic tort cases in which the putative class members have large claims that may be pursued independently. What concerns me about Factor A, however, is the same thing that concerns me about Factor F: the Draft Note appears to promote the certification of "consumer" class actions without regard to whether this extraordinary procedure will actually be used to pursue claims that are *significant* to the individual litigants.

One reason that I find the Draft Note regarding Factor A troubling is that it presents an artificial dichotomy: "consumers" must resort either to individual suits or class action suits to vindicate their interests. That simply is not the case. There are numerous mechanisms other than federal civil suits by which consumers are protected and commercial wrongdoing is deterred. Attorneys General, regulatory agencies, and even non-governmental entities (*e.g.*, trade associations and the media) are often very effective tools by which consumers with small or relatively insignificant claims are protected and the "public interest" in deterring wrongdoing is served. In addition, the defendant may already have taken action to remedy the alleged wrongs, such as voluntarily recalling a product. The class action rule should reflect this fact, and courts should be required to consider the available extra-judicial avenues of "consumer protection" before they are allowed to certify such class actions. Accordingly, I propose the following modification to Factor A (my additions are underlined):

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- (A) *the practical ability of individual class members to pursue their claims without certification or the availability of alternative means for resolution of the controversy and their interest in maintaining or defending separate actions.*

I would also suggest the following addition to the Draft Note:

In considering the class members' ability to pursue relief individually, the court should be mindful of avenues of relief that may exist outside of the civil litigation context, especially where the class purportedly includes members with relatively small claims who may have a correspondingly small interest in pursuing relief. Where there are comprehensive regulatory schemes, attorneys general, or state or federal agencies that may pursue relief for members of such a class, a class action may not be superior to other available methods or necessary for the fair and efficient resolution of the controversy. This may be true particularly where there are state or federal officials who are in the process of addressing the matters raised by the litigation or who have determined that relief or other action concerning matters involved in the litigation are unwarranted. In addition, the court should consider whether a party already has taken voluntary action to remedy the alleged wrongs. Where protections exist outside the civil litigation context and the claims of individual class members are relatively small, the class generally should not be certified.

Factor D -- which addresses the burdens of class litigation -- also relates to the weighing that must be done under Factor A. I believe Factor D is an important addition to Rule 23(b)(3), and I am pleased that Professor Cooper has outlined in the Draft Note a number of the burdens inherent in class litigation. I am concerned, however, that some courts give little credence to the incredible settlement pressure exerted by a certification order. I can only believe that they do so because they simply do not understand the pressure. Perhaps they find it counterintuitive that 100 individual cases are not the same to a defendant as a 100-member class action. It would be helpful perhaps if the Draft Note described exactly how this pressure works. I have taken the liberty of drafting some language for you to consider, in which I have borrowed heavily from Judge Posner's description of this phenomenon in *In re Rhone-Poulenc Rorer*:

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The certification of a class action fundamentally alters the litigation calculus for the party opposing class certification, placing enormous pressure on it to settle prior to trial, even where the class proponents' likelihood of success on the merits is low. To the class certification opponent, one hundred individual cases are not equivalent to a class action involving one hundred members. Faced with a large number of individual cases, the party may seek to quantify its litigation risk by evaluating the cases individually, taking note of their strengths, weaknesses and venues, and thereby predicting a win-loss ratio and an average jury award. Once a trial class is certified, however, the party must evaluate its litigation risk in the aggregate, taking into account the fact that it may face at trial only the strongest representative class members selected by class counsel. On the basis of one trial, the party may be found liable to all identified class members, and perhaps even unidentified class members. Given the uncertainties of litigation, few class certification opponents can withstand the pressure to settle after the class is certified rather than risk an adverse jury verdict in a single class action trial.

THE PROBABILITY OF SUCCESS ON THE MERITS

I have struggled quite a bit with the various approaches proposed by the Committee for a merits review. The genesis of the proposal is a recognition that class certification presently is being used to up the ante in litigation, often aggregating weak claims in an effort to coerce a settlement out of defendants. I wholeheartedly agree that this is a serious problem that should be dealt with in any proposed revision to Rule 23.

Nevertheless, I remain concerned about the ancillary effects of introducing a merits inquiry into the class certification decision. In an effort to resolve this issue in my own mind, I have discussed the desirability of a merits inquiry with a number of Fortune 500 companies, who often are involved in class action litigation. They are unanimous in their belief that although a merits requirement is intended to dispose of meritless class actions -- a result that would be beneficial to responsible corporations -- the likely negative effects of such a requirement outweigh whatever benefits would accrue from it.

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Any determination by a court that the merits of the class claims are "not insubstantial" or "are sufficient to justify . . . certification" may have devastating effects for the defendant both inside and outside of the litigation. Inside the litigation, the pressure to settle would increase exponentially, as not only would the court have certified the class (and thereby fundamentally altered the defendant's litigation calculus), but it also would have declared that the plaintiffs stand a good chance of winning. The defendant obviously would be severely disadvantaged in any resulting settlement discussions. Moreover, if the court is required to evaluate the merits of the class claims, one can expect class counsel to argue quite compellingly that they are entitled to enough discovery to sufficiently address the merits. Class action discovery is extremely expensive and burdensome; any change in the rule that allows plaintiffs to delay the certification decision (and toll the statute of limitations) while subjecting the defendants to the burdens of discovery gives the plaintiffs tremendous additional leverage with which to extort a settlement. This may be particularly true in "consumer" class actions where the individual damages of putative class members may be insignificant and, when aggregated, may be outweighed by the expense of defending the litigation.

In addition, the abbreviated or truncated nature of such a "preliminary" merits inquiry threatens to prejudice litigants, as the U.S. Supreme Court has recognized:

[W]e might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

Outside of the litigation arena, although it is difficult to predict the reaction of the financial markets to news that a court has found the class claims "sufficient" on the merits, there can be no doubt that such a ruling has the

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potential to significantly affect a company financially. It also may cause a public relations nightmare.

Despite my serious reservations about a merits requirement of any sort, I remain convinced that something must be done to require courts and the parties to evaluate the basic allegations of the litigation at the earliest stages of the proceeding. I would suggest that a different approach be employed *instead of a merits requirement* that would, nevertheless, target the same problem. I would appreciate receiving your reaction to this proposal, as I believe it may achieve many of the benefits of a merits approach without its corresponding disadvantages.

The fundamental premise of this alternative approach is that requiring the class proponent to plead with particularity will focus the court and the parties on the question of whether the action may actually be maintained as a class action. One of the problems often identified by my clients is that they have no real idea when served with a putative class action exactly what that action is about. Increasingly, class action complaints from different litigations look alike, as if they all have come from the same word processor with few modifications. Hearings on the certification issue become exercises in generalities, with the court (and often the litigants) proceeding blindly in the absence of detailed factual allegations regarding the representative plaintiffs and their claims. It is easy to make claims sound alike in the abstract; one can begin to differentiate between claims only after knowing the basic facts underlying the claims.

The Sixth Circuit recently recognized this fact in *In re American Medical Sys., Inc.*, 1996 WL 63417 (6th Cir. Feb. 15, 1996), when it granted mandamus relief to the defendants in a class action that had been certified by the trial court before significant discovery of most of the representative class members had begun. In *American Medical*, the "complaint and class certification motion simply allege[d] in general terms that there are common issues without identifying any particular defect common to all plaintiffs." *Id.* at *7. Apparently the defendants were the only parties to introduce real proof regarding the elements of Rule 23, yet the trial court certified the class anyway. Pointing out the trial court's lack of analysis factor-by-factor, the Sixth Circuit observed that:

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it should have been obvious to the district judge that it needed to "probe behind the pleadings" before concluding that the typicality requirement was met. [citation] Instead, the district judge gave no serious consideration to this factor, but simply mimicked the language of the rule. This was error.

Id. at *9.

In short, I believe notice pleading is wholly inappropriate in class actions where the court and the litigants must explore such issues as commonality, typicality and predominance for a particular class of plaintiffs. As an alternative to a preliminary merits inquiry, the Committee might consider rewriting the Draft Rule to include: (i) a particularized pleading requirement similar to Fed. R. Civ. P. 9(b), and (ii) a requirement that the plaintiffs demonstrate that the evidence relating to the elements of the class claims is the same for all class members. Including these requirements would address the Committee's concerns by providing the court very early on with the means to screen out cases that do not merit class treatment without the dangers inherent in a premature effort to address the merits of the case.

The first part of this approach is that the Committee include within Rule 23 a particularized pleading requirement:

When persons sue or are sued as representatives of a class, all elements of all claims asserted on behalf of or against the class must be stated with particularity.

This requirement, based on Fed. R. Civ. P. 9(b), is designed to address the problem of "baseless" or prematurely filed class actions and slow down the "race to the courthouse" that in the past has been accelerated by notice pleading requirements and word processors. Under such a rule, lawyers would no longer be able to file a putative class action on the afternoon of a product recall. Rather, they would have to gather enough facts to demonstrate that, *prima facie*, there are classwide claims. As a result of this requirement, the proponent would be required to plead facts demonstrating that there is a class (*i.e.*, more than just the named representatives) interested in the controversy. Although a particular-

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ized pleading requirement would be contrary to the more liberal notice pleading approach contained in Rule 8, it certainly is not without precedent. As courts have recognized in connection with Rule 23.1, which addresses shareholder derivative actions, a stricter pleading requirement may be justified where the type of litigation imposes significant burdens. *See, e.g., In re Kaufman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973); *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1577-78 (D. Kan. 1986) (citing *Kaufman Mutual Fund* and addressing the purpose behind Rule 23.1's particularized pleading requirement).

One advantage the particularized pleading proposal has over the merits requirement is that it does not threaten to drag out the class certification process with requests for discovery or lengthy hearings on the merits. In dealing with requests for discovery in the Rule 9(b) context, courts have been quite clear that the particularized pleading requirement is intended to prevent "the filing of a complaint as a pretext for the discovery of unknown wrongs" and to protect "potential . . . defendants from the harm that comes from being charged with the commission of fraudulent acts." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (further noting that "[t]he requirements of Rule 9(b) are designed to prohibit a plaintiff from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis"); *see also Guidry v. Bank of LaPlace*, 740 F. Supp. 1208, 1216 (E.D. La. 1990) (Rule 9(b) is intended to "preclude litigants from filing baseless complaints and then attempting to discover unknown wrongs") (citation omitted), *aff'd in relevant part*, 954 F.2d 278 (5th Cir. 1992).

I offer for your consideration the following language which could be used in a Note accompanying a particularized pleading requirement:

The Advisory Committee, in considering the proposed revisions to Rule 23, recognized that there appears to be a trend toward the filing of class action complaints before the putative class counsel have enough facts for the parties and the court to evaluate whether the action is properly maintained as a class action. There are a number of reasons for this trend. Filing class complaints at the earliest possible moment increases the chances that the lawyer filing the complaint will be named class

counsel; it may afford an opportunity to obtain more clients through class notice procedures; and the existence of a putative class action complaint places more pressure on the party opposing certification to settle than if it were faced with a few individual actions.

This trend has numerous unfortunate consequences for both courts and litigants. First, it increases the likelihood that unmeritorious class action complaints will be filed. This is particularly troubling when one considers the stigma attached to being the subject of a class action complaint. Second, it makes the resolution of the class certification issue more difficult and time consuming for the court and the parties, as the issue necessarily involves a factual inquiry into whether the litigation meets the criteria identified elsewhere in this Rule. Third, some courts have allowed costly discovery before dismissing such premature complaints, resulting in a waste of judicial resources and unnecessary costs to the parties opposing class certification.

The Advisory Committee considered various proposals to address this trend, including the possibility of requiring the class action proponent to demonstrate a sufficient likelihood of success on the merits to justify the burdens of class certification. The Committee ultimately rejected a merits approach, fearing that such a requirement would delay decisions on the certification issue by prompting requests for discovery on the merits of the case and recognizing that a preliminary finding on the merits might unfairly disadvantage parties in the litigation.

Ultimately, the Committee chose to borrow from a concept embodied in Fed. R. Civ. P. 9(b): the particularized pleading requirement. In so doing, the Committee is relying on the principle that the facts establishing whether a class action is proper should be known to the class action proponent before the filing of the class action complaint; the filing of such a complaint should not be used as a pretext for obtaining discovery for unknown wrongs. As we have discussed elsewhere in this Note, class actions impose significant burdens on the litigants and the courts. Because of this fact, the class action is an extraordinary procedure; put differently, individual actions are preferred unless all of the requirements of Rule 23

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are met. The determination of whether a particular case meets the requirements of Rule 23 cannot be made in a vacuum or on the basis of generalities. The addition of the particularity requirement is a recognition that the class action proponent has an affirmative duty to investigate the facts to determine if Rule 23's criteria are met before invoking the jurisdiction of the court with the filing of a class action complaint. This rule would require the proponent to aver with particularity the facts demonstrating that there are a number of people other than the named representatives interested in the controversy. As a practical matter, this factual investigation most likely will come through individual litigation prior to the filing of the class action complaint. As numerous courts and commentators have observed, particularly in the mass tort context, class actions typically are appropriate only after a litigation "matures." In assessing the maturity of litigation, courts often look to the number of cases filed, the status of those cases, and the number and results of actual trials.

The particularized pleading element of Rule 23 requires that in a class action complaint, all elements of all claims of all named plaintiffs must be pleaded with the sort of particularity contemplated by Fed. R. Civ. P. 9(b) and all elements of all claims of each putative class member must also be pleaded with sufficient particularity to allow at least a preliminary assessment of whether class treatment may be afforded to the action under the applicable requirements of Rule 23. For example, in a misrepresentation action, a class action complaint must contain not only specific "who, what, when, where" allegations about the misrepresentations allegedly made and relied upon by the named plaintiffs, but also comparable information about the misrepresentations allegedly relied upon by the unnamed members of the putative class.

Courts should dismiss under Rule 12(b)(6) the claims of a class action complaint that do not satisfy this particularized pleading requirement. Further, courts should dismiss under Rule 12(f) any class allegations that, on the face of the particularized pleadings of the complaint, do not satisfy the applicable requirements of Rule 23. For example, if the complaint makes evident that the named plaintiffs' claims are not typical of the claims of all putative class members, the class allegations in the

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complaint should be stricken. Because of the enormous burden and expense associated with class action discovery, courts should consider suspending the mandatory disclosure requirements of the Federal Rules where 12(b) motions are pending in putative class actions.

With respect to the second part of this proposal, I suggest that Rule 23(b)(3)(ii) be amended to read:

the court finds . . . (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.

The purpose of this provision is to place on the class proponents the burden of demonstrating that the kinds of proof which would be used at a trial of the class claims would be "classwide" (*i.e.*, substantially the same as to all putative class members). The court must make this "classwide proof" finding with respect to both the affirmative case (*i.e.*, the plaintiffs' case) and the defendant's case. This is *not* intended to be a merits inquiry. Rather, the court should certify a class only if it is satisfied that the proponents have presented a plausible evidence plan that would in fact apply to all claims of all class members.

This "classwide proof" requirement is not novel; it already has been embraced by a number of federal courts. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *McCarthy v. Kliendienst*, 741 F.2d 1406, 1413 n.8 (D.C. Cir. 1984); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 321-22 (5th Cir. 1978); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 269 (D.D.C. 1990) ("the plaintiffs must show that the substance of the evidence is substantially the same for all class members"), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991). It focuses the court on a procedural issue -- whether the claims actually may be tried as a class -- rather than on the merits.

The following is some proposed commentary for the Note accompanying this "classwide proof" provision:

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The new factual finding required by Rule 23(b)(3)(ii) is intended to complement and strengthen the predominance requirement of 23(b)(3)(i) by placing on class proponents the burden of demonstrating that the kinds of proof which would be used by both the named plaintiff(s) and the defendant(s) at any trial of the claims asserted on behalf of the class would in fact be "classwide" in nature (i.e., substantially the same as to all class members). If the class proponents demonstrate that the body of evidence that likely would be presented to a jury on the class claims or defenses is substantially the same, then class treatment of the claims or defenses may be appropriate. However, if this "classwide proof" inquiry reveals that the body of evidence that would be necessary to prove the claims or defenses of class members will have significant individualized elements, then class certification is inappropriate and the overall preference for trying claims on an individual basis should apply.

The inquiry envisioned by this requirement recognizes the critical due process considerations involved in a court's decision regarding class certification. A class action trial simply is unable to accommodate all evidence supporting the claim or defense of each class member. Accordingly, the trial typically proceeds on the claims of "representative" class members whose claims are deemed "typical" of other class members' claims. Where the evidence supporting the "representative" class member's claim differs from the evidence supporting the claims of other class members, there is a risk that one of the parties -- a representative class member, an unnamed class member, or the party opposing the class -- will be denied a fair adjudication of his or her claim or defense. This risk increases as the evidence at trial becomes more individualized or unique to specific representative class members. Individualized proof increases the complexity of the trial, requiring special safeguards such as limiting instructions and complicated jury questionnaires. In short, the more individualized the proof at trial, the more likely it is that juror confusion or prejudice may develop and that the complexity of the trial will defeat the efficiency considerations used to justify class certification in the first place.

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By requiring that the court find, as a prerequisite to class certification, that the evidence to be used at trial is substantially the same as to all class members, the Committee intends for the court to look beyond the boilerplate allegations of commonality in the class action complaint to determine, from a procedural standpoint, whether a classwide trial is viable. See, e.g., Walsh v. Ford Motor Co., 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987); McCarthy v. Kliendienst, 741 F.2d 1406, 1413 n.8 (D. C. Cir. 1984); Alabama v. Blue Bird Body Co., 573 F.2d 309, 321-22 (5th Cir. 1978); Walsh v. Ford Motor Co., 130 F.R.D. 260, 269 (D.D. C. 1990), appeal dismissed, 945 F.2d 1188 (D.C. Cir. 1991). The classwide proof examination is not intended to be a merits inquiry. Walsh, 130 F.R.D. at 269. Rather, the court should certify a class under Rule 23(b)(3) only if it is satisfied that the class proponent has presented a plausible evidence plan that would in fact apply to all claims of all class members.

SETTLEMENT CLASSES

I have significant reservations about the current approach to the issue of settlement classes in the Draft Rule and the Draft Note. My concerns are fourfold. First, I do not believe that settlement class issue should be included as a factor to be considered under Rule 23(b)(3). Second, I believe that the rule should include a requirement that a settlement class be consensual. Third, I do not believe the Committee should codify the position that the certification of a settlement class must automatically afford class members an opt-out right, even if they previously were members of a trial class. Fourth, I strongly disagree with the position stated in the Draft Note on "futures" and "actual notice." If the Committee changes present law to require actual notice for all settlement classes, there will effectively be no more class action settlements. I know of no case which holds that due process requires actual notice in all class actions; to the contrary, the Supreme Court has declared that class members must receive the best practicable notice.

I am well aware that the issue of settlement classes is one of the most divisive issues before the Advisory Committee, and that some of the

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Committee members strongly believe that a revised Rule 23 should contain no mention of settlement classes whatsoever. I believe there is a role for settlement classes to resolve complex litigation. However, I would much prefer having no mention of settlement classes rather than having the Draft Rule and Draft Note in their current state.

Before outlining my preferred approach to the issue, let me explain my reservations regarding the current Draft Rule and Draft Note.

- Concerns about Draft Rule 23(b)(3)(G) -- As drafted, Factor G would allow the court to consider the "opportunity to settle" claims as a reason for certifying a (b)(3) class. I am very concerned that this approach may have the unintended effect of liberalizing the criteria for certification of *litigation* classes. Indeed, the amendments could be read by some to convey the impression that one of the purposes of the 23(b)(3) class is actually to *encourage* plaintiffs to file claims otherwise unworthy of class certification for the express purpose of achieving mass settlements. The Committee's proposed amendment thus may lead to the anomalous result of loosening the very standards that the Committee is trying to tighten in other parts of the Rule.

In addition, without any requirement that all parties consent to the certification of a settlement class, Factor G presents the risk that a court might certify a class in an effort to coax (or coerce) reluctant parties into a settlement. My concern is heightened by the comment in the Draft Note that "[t]he certification may be made before settlement efforts have even begun, as settlement efforts proceed, or after a proposed settlement has been reached."

Finally, I am concerned that Factor G will promote confusion by failing to adequately differentiate between settlement and trial classes. As I have discussed with you previously, a "settlement" class is very different from a "trial" class. Indeed, most settlement classes would never present a workable class if they were to proceed to trial; the whole point behind the settlement class is that because the parties have reached agreement on fundamental issues, cases that once were not manageable as a "trial" class

become amenable to classwide judicial management through the consent of the parties. As the settlement class provision presently is drafted, however, I can see proponents of trial classes using the certification of settlement classes as precedents, arguing that the same criteria apply to both settlement and trial classes. This problem could be exacerbated by the Draft Note, which provides that a court ruling on certification of a settlement class should consider all certification requirements applicable to certification of 23(b)(3) litigation classes.

In recognition that some certification requirements properly take on a different cast in the context of settlement class certification, it is important that any settlement class provision preclude inappropriate litigation classes from proceeding in the event that the settlement ultimately fails. I believe much of the confusion between "trial" and "settlement" classes could be avoided if settlement classes were treated separately in the rule, as I have outlined below. At the very least, there should be strong language in the rule explaining that the certification of a settlement class cannot be used as precedent supporting the certification of a trial class.

- **Concerns about Automatic Opt-Out Rights** -- The Draft Note's discussion of opt-out rights represents a significant departure from existing law. There are situations under current precedents in which courts may, in their discretion, choose not to allow class members to opt out after certifying a settlement class. The classic example is where the court previously had certified a trial class and conducted the notice and opt-out period, and then the parties reach a settlement. Under the current Draft Note, each class member would be entitled to a second opportunity to opt out. That is contrary to current precedent. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir.) ("Here, the MDL 551 Class Members were given notice of the action and afforded an opportunity to opt out. [They] were also given notice of the proposed settlement and afforded the opportunity to object. This is all that Rule 23 requires."), *cert. denied*, 506 U.S. 953 (1992); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982) ("[W]e have found no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3)

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class be given a second chance to opt out. We think it does not."), *cert. denied*, 459 U.S. 1217 (1983).

The change in the law proposed in the Draft Note is counter-productive and unfair. It is counter-productive to the extent that this "recognition" of settlement classes will result in a dramatic reduction in their utility. If defendants cannot buy "peace" in settling a certified "trial" class, they have little, if no, incentive to settle at all. At the very least, the change contemplated in this Draft Note will result in a proliferation of "defense opt-out" settlements of the kind that failed in the breast implant litigation. There, the defendants reserved the right to opt out of the settlement if too many plaintiffs opted out of the settlement.

The change also is unfair. Under the present system, when the class members receive notice that they are members of a "trial" class, the risks are explained to them and they make an informed choice. They know that there is the potential they will recover everything, nothing, or something in between. The Notice usually explains that class members will be bound by any judgment *or settlement*. See, e.g., *Gottlieb v. Wiles*, 11 F.3d 1004, 1012 (10th Cir. 1993) (no second opt out was required where notice advised that "[a]ll members of the Class who do not request exclusion will be bound by any settlement or judgment"). Class counsel is appointed to represent the interests of the class members, and if the members do not opt out, they are bound by the result of the class action. If class counsel reach a settlement with the defendants, they remain under the obligation to zealously represent their clients. Moreover, the court, before approving the settlement, holds a fairness hearing in which it must independently evaluate whether the settlement fairly and adequately compensates the class members. Members are given an opportunity to object to the settlement at the hearing. In short, the class members' interests are adequately represented under present law.

Changing the rule -- and allowing class members a second opt out right -- gives class members two bites at the apple. They may lie back, declining to assume the risk of opting out in the first instance, and then at a later date -- once class counsel have invested significant time and

resources -- decide to escape the binding effect of their earlier decision by opting out and pressing the defendant towards trial, where they may be able to cut a deal -- because of the timing -- that is both better than they would have received under the class settlement and better than if they had exercised their opt out rights immediately after the first notice.

The effect of the rule change reflected in the Draft Note will be to encourage late exercise of the opt out right, driving up the price of settlements generally and discouraging defendants from participating in class action settlements. I would submit that this is not a result that the Advisory Committee should favor.

- Concerns about an "Actual Notice" Requirement -- The "actual notice" requirement contained in the Draft Note is, I believe, ill-advised. It would effect a fundamental change in the law that would present an extraordinarily serious barrier to the settlement of class actions.

Due process does not require *actual* notice to bind absent class members; it requires the *best practicable* notice. Achieving actual notice, or even knowing whether actual notice has occurred, would be virtually impossible. First, it often is simply unrealistic, or even impossible, to identify all of the class members. Consider, for example, the difficulty a food product manufacturer would have in identifying everyone who consumed its product. Second, due process concerns are lessened appreciably when the value of the individual claim is quite low. Thus, even where actual notice might be theoretically possible, it may be exorbitantly expensive in cases where the value of the individual class members' claims is relatively insignificant. This may be particularly true in the case of "consumer" class actions.

Under the Draft Note, a class member presumably would not be bound by the settlement and could pursue the settling defendant long after the settlement is concluded simply by claiming that he did not receive actual notice. Such a rule deprives the defendant of the very benefit that motivates the settlement in the first place -- the ability to buy peace at a fixed price. Often a class member may become unhappy with a class

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action settlement after an opt-out plaintiff obtains a large verdict; sometimes such a class member may then attempt to file an individual suit. Under present law, however, a settling defendant may remain confident that the claims of the class members are closed so long as the best practicable notice has been provided to the class members. The approach outlined in the Draft Note, however, interjects uncertainty in the process by essentially shifting the burden to the settling defendant to prove -- most likely in state court -- that the plaintiff bringing the post-settlement case received actual notice. Thus, no defendant may be sure that it will be precluding new claims by agreeing to a settlement unless the case involves an identifiable group of claimants to whom it can give notice by certified mail. Where there is uncertainty that the terms of the settlement can be enforced, the amount of the settlement most likely will be less; increased risk of continued litigation causes the defendant to value settlement less.

I submit that no change is required to the current provisions regarding notice to absent class members, and certainly not the fundamental alteration contained in the current Draft Note. Equity and fairness are assured to members of settlement classes even in the absence of actual notice. "Constructive" notice plans are, of course, approved by the court. In addition, it is the court that ultimately must pass on the fairness and adequacy of the settlement, which further assures the just resolution of the claims of those who may not have received actual notice.

- **Concerns about "Futures"** -- The Draft Note provides for an absolute right for "futures" to exercise opt-out rights after their injuries manifest themselves. The whole question of what to do about "futures" is perhaps the most divisive one in the whole topic of settlement classes, and it currently is the subject of heated litigation. I cannot believe that the Committee can come to agreement on this contentious issue, and I propose that the Committee refrain from addressing the issue in this round of amendments to Rule 23.
- **Appointment of Settlement Masters** -- The Draft Rule 23(e)(3) provides that a court may refer a proposed class action settlement to a settlement master or magistrate judge, and that the expenses should be borne by the

Honorable Patrick E. Higginbotham
Professor Edward Cooper
March 7, 1996
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parties as directed by the court. Although I do not have strong objections to this provision, I believe that the inclusion of this provision in the rule is both unnecessary and may actually encourage a procedure that would, in the end, be expensive and less fair.

There is nothing under the present rules to preclude a court from appointing a special master or magistrate judge to submit a report and recommendation on the fairness and adequacy of a proposed settlement. I am well aware of the argument that parties approach fairness hearings with trepidation because they fear that the judge will hear arguments or evidence in the fairness hearing that -- if the settlement is not approved -- will prejudice him or her against the parties' case. In my experience, however, there is little real danger of such a result. Most class action settlements are reached with the knowledge -- if not the direct participation -- of the judge in the negotiation process. There is little that comes out in a fairness hearing that the attentive judge does not already know. In short, the risk of prejudice from participation in a fairness hearing is relatively low.

By the same token, the benefits of judicial participation are high. I believe the judge who has lived with the case -- who knows the strengths and weaknesses of each party's case -- can be invaluable in helping the lawyers and the clients understand the risks of the litigation and reach a fair and reasonable settlement. Injecting into the process a master who is unfamiliar with the litigation deprives the parties of a knowledgeable arbiter and risks the mischief that can result from having an authority who is not aware of the factual context of the litigation.

In sum, my concern is that by including (e)(3) in the Rule, the Committee will encourage judges to utilize a procedure that may be less effective. Given that judges presently are vested with the authority to appoint such masters or magistrates, I see little benefit in including this provision in the revised Rule 23.

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My Settlement Class Proposal

We all recognize that settlement classes exist under current precedent. Where the Advisory Committee experiences the most disagreement is over the opt-out rights and the "futures" problem. I suggest that the Committee take a modest approach to revising Rule 23, recognizing the existence of settlement classes and leaving to the courts the issues of opt-out rights and "futures." The recognition should not come, however, within the body of Rule 23(b)(3). Including the settlement provision there risks judicial interpretations that ultimately would liberalize the certification of "trial" classes. Instead, I believe the settlement class provision should be included in Rule 23(e), which addresses Dismissal or Compromise:

(e) Dismissal or Compromise.

* * *

(4) An action may be certified as a class action as to a settlement class only, even if the claims could not be litigated on a class basis or could not be litigated by a class as comprehensive as the settlement class, so long as the parties agree to the certification and the court finds that the settlement is fair and reasonable.

(5) Whether or not a court certifies a settlement class shall not be deemed evidence as to whether, absent settlement, the action or any other action is or could be properly maintained as a class action.

AMENDMENTS NOT DISCUSSED IN TUSCALOOSA

As I mentioned at the beginning of this letter, it is my opinion that the Advisory Committee should concentrate on the revisions discussed in Tuscaloosa in November and should leave for another day topics such as opt-in class actions, and revisions of subsections (c) and (d) to address notice and timing issues. However, given the possibility that these provisions may be on the agenda for the April meeting, I shall briefly outline my position on them, while being mindful of the length of this letter.

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OPT-IN CLASSES -- 23(b)(4)

I am opposed to the creation of opt-in classes. I have serious concerns that Draft Rule 23(b)(4) would become the *de facto* consolation prize for counsel who fail in their attempts to certify a class under 23(b)(3). This is especially troubling when one considers that the proposed (b)(4) class apparently is not required to meet the strict requirements of a (b)(3) class in the Draft Rule. Moreover, I am unconvinced that there is any serious need for this type of "class" that cannot be met through other means; such as the consolidation of individual actions. One likely result of this provision is that counsel will seek to use notice of a (b)(4) class certification as a solicitation tool for obtaining new clients.

I have some suggestions as to how the current draft of (b)(4) could be made somewhat more palatable. Please let me know if you would like to see them.

NOTICE ISSUES -- 23(c)

I strongly oppose the bracketed provision of 23(c)(2)(A), which seeks to supersede the very clear holding of the U.S. Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), by allowing the court to require the defendant to pay for class notice where the plaintiffs are likely to win on the merits. Aside from the sheer unfairness of forcing defendants to pay for class notice, I note that this proposed revision would require a merits determination, which would result in many of the detriments outlined above.

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TIMING ISSUES -- 23(d)

Although I believe courts already are vested with the authority to decide dispositive motions before class certification, I think the proposed revision reinforces that such motions are available and should be heard by the courts. Some of my clients have suggested that removing the "as soon as practicable" requirement may cause, as a practical matter, unnecessary delay in decisions on certification, depriving them of their right to know at the outset of the litigation about the size and composition of the class. Delay is certainly a major concern of class action defendants, as it results (in most states) in a tolling of the statute of limitations. It might be possible to address this concern by including, either in the Draft Rule or the Draft Note, language to the effect that the consideration of dispositive motions "shall not unduly delay the determination of the class certification issue." I would be very interested in seeing the Draft Note accompanying this provision if it will be on the agenda at the April meeting.

THE FIDUCIARY DUTY OF CLASS REPRESENTATIVES

The proposed modification of Rule 23(a)(4) to include the notion of a fiduciary duty presents a possible danger of weakening the typicality requirement, as fiduciaries generally need not be in the same position as the party they represent.

COMBINATION CLASSES -- 23(b)(5)

This proposal may create a sort of "hybrid" class that has, in practice, less onerous requirements than a straight (b)(3) class.

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CONCLUSION

Once again, thank you for the opportunity to share with you my thoughts on the current Draft Rule and Draft Note. I am excited by the work being undertaken by the Advisory Committee and remain eager to discuss with you the available options for improving class action practice in the federal courts.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sheila L. Birnbaum".

Sheila L. Birnbaum

926

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June 14, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, District of Columbia 20544

Re: Proposed Revisions to Fed. R. Civ. P. 23

Dear Judge Stotler:

I am writing in support of the proposed revisions to Federal Rule of Civil Procedure 23 that have been forwarded to you by the Advisory Committee. I have been involved in product liability litigation -- including many national class actions -- for over two decades. I usually represent defendants in these cases and have many clients who are keenly interested in the revisions to the class action rule. I came to the practice of law from academia, and I am presently Adjunct Professor of Law at New York University School of Law.

I have been troubled by how a number of academics have characterized the Advisory Committee's proposal in recent days, and strongly believe that the Standing Committee should resist the repeated suggestions to table, remand, or reject the Advisory Committee's proposal. The proposal should be published for public comment, and the objections submitted by the *ad hoc* Steering Committee of Academics, as well as the other correspondence that you have received, should be considered during the comment period along with the comments of the bar who have been directly involved in class action litigation.

I have attended the meetings of the Advisory Committee and have observed first-hand its cautious consideration of a panoply of proposed revisions, including many of those advocated in law review articles by the academics who

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have written in opposition to this proposal. In the end, the Advisory Committee recognized that a wholesale gutting of Rule 23 was impractical, as it would unsettle existing precedents and spawn a flood of new litigation, with its attendant uncertainty. The Advisory Committee thus chose to leave to the courts and Congress some of the more radical plans currently in vogue in academia, adopting instead what it believed was a modest proposal -- which it called the "minimum changes draft" -- that would clarify some elements of existing class action practice and restrict slightly the availability of class actions at the very extreme ends of the spectrum. The Advisory Committee did not view its actions as precluding future revisions to the class action rule; it adopted, however, a more incremental approach to reforming class action practice.

I would like to highlight briefly the strengths of the Advisory Committee's proposal and address some of my academic colleagues' concerns levelled against the settlement class and cost-benefit balancing provisions.

SETTLEMENT CLASSES

The Steering Committee of Academics describes the settlement class as a "new device" and a "major innovation," but it is nothing new. As Judge Higginbotham explained at the April 19 meeting of the Advisory Committee, settlement classes have been around virtually since the beginning of Rule 23. Indeed, as Tom Willging pointed out in his May 29 letter, a full 25% of the class certification rulings in the Federal Judicial Center's study certified a class for settlement purposes only. The Advisory Committee, in adopting 23(b)(4), merely amended Rule 23 to acknowledge current practice, and specifically eschewed radical reform.

According to the Steering Committee of Academics, the Advisory Committee's proposed (b)(4) has loosed the settlement class from the moorings of (b)(3)'s predominance and superiority requirements without providing an alternative anchor. Nothing could be further from the truth. In fact, as the Draft Note explains, (b)(4) merely allows the trial judge faced with a putative settlement class to evaluate whether it meets the requirements of 23(a) and (b) while taking notice of the fact that the action will not proceed to trial. See Draft Note at 42-43 ("Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is

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affected by the many differences between settlement and litigation of class claims or defenses").

It has long been obvious to those involved in class action practice that one may use the class action device to settle a series of disputes that could never be tried together as one class. For example, a decade ago I was involved in a tort action involving a chemical spill. The trial judge denied certification of a trial class because he correctly recognized that individual issues of causation would predominate at trial. *Abernathy v. Union Pacific Railroad Co.*, No. LR-C-85-104, slip op. at 3 (E.D. Ark. June 2, 1986). Two years later, however, the court approved a settlement class. *See Abernathy v. Missouri Pac. R.R.*, 972 F.2d 353 (8th Cir. 1992) (briefly recounting procedural history) (table, text in Westlaw). It was clear that, because of the parties' voluntary agreement, the issues that would have made the case unmanageable at trial did not present a similar problem in a settlement class.

Some academics have criticized the Advisory Committee for addressing certain recent decisions even before they have been dissected in law reviews. The "very recent decisions" the Draft Note alludes to are authored by Judge Becker in the Third Circuit, who found that settlement classes may contravene the text of Rule 23. *See 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); *Georgine v. AmChem Prods, Inc.*, 1996 WL 242442 (3d Cir. May 10, 1996). The core of Judge Becker's concern was that neither the text of Rule 23 nor the Note accompanying it authorized using a "liberalized criteria for settlement classes." *GM Pick-Up*, 55 F.3d at 798. In Judge Becker's view, the current Rule 23 mandates that a trial judge must evaluate a settlement class as if it were going to be tried. *Georgine*, 1996 WL 242442 at *9-*10.

The problem with Judge Becker's analysis, however, is that there also is no language in Rule 23 or the Note to suggest that trial judges confronted with a proposed settlement class must -- in the course of evaluating the requirements of Rule 23(a) and (b)(3) -- turn a blind eye to the fact that the case will never go to trial and thus will never present the manageability difficulties presented by a trial class. Indeed, many courts have long recognized that they do not need to hypothesize that there will be a future trial in evaluating whether a settlement class meets Rule 23's criteria.

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Judge Becker recently invited the Advisory Committee, in revising Rule 23, to make plain that "settlement classes need not meet the requirements of litigation classes." *Georgine*, 1996 WL 242442 at *21. The Advisory Committee's proposal does just that and, in doing so, embraces the overwhelming majority of precedents. In reality, this amendment is merely a response to the few decisions that wrongly rely on the text of Rule 23 to conclude that a court *must* employ the artifice of a future trial to preclude settlement classes for cases that would present horrific management and conflicts of law problems if they ever were to be tried as a class. Proposed (b)(4) does not authorize a "liberalized criteria" for settlement classes; rather, it encourages trial judges to take a clear-eyed view of the facts before them when assessing whether a putative class action meets the requirements of Rule 23(a) and (b).

It is important to note that this revision would not preclude Judge Becker from using the existing Rule 23(a) requirements to address his concerns about the adequacy of representation and conflicts of interest in the *Georgine* case. The only thing that proposed 23(b)(4) would do is make it clear to a judge that in evaluating the 23(a) and (b) prerequisites to class certification, he or she is not forced to pretend that the case actually will be tried.

The Steering Committee of Academics also seems to suggest that strong criteria must be established for settlement classes because the trial judges, plaintiffs' counsel and defendants' counsel could succumb to pressure to dispose of litigation at the expense of absent class members. In this argument, the professors apparently fear that trial judges will be led to ignore their responsibilities to evaluate whether the requirements of Rule 23 are met and whether the settlement is fair and equitable. I believe that federal judges historically have carefully examined settlements to determine if they are fair, have rejected some, and have requested that the parties renegotiate certain provisions the court believed to be unfair.

The Steering Committee of Academics also suggests that the requirement under Rule 23(b)(4) that a settlement class be certified only where the parties to a settlement request it is some sort of radical change that will promote "collusion." Once again, this revision represents no change in existing practice. The mere fact that a settlement precedes certification does not mean that the parties have engaged in collusion or that the lawyers who negotiated the settlement were not adversaries in real litigation, even though that litigation was not brought as a class action initially.

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The academics suggest that a defendant under the new (b)(4) may "shop" around a settlement to the "lowest bidder" and then certify a settlement class and thereby take advantage of absent class members. This view deals with a hypothetical situation, not reality. If a putative class claim is of any merit, experience indicates that there likely will be dueling class actions filed, with various firms vying for the choice spot of lead counsel. If one firm actually were willing to "sell out" the class cheaply and file a collusive settlement class action, those firms that lost the "bidding war" would strongly oppose the settlement and most likely would object to the settlement class or pursue parallel opt-out litigation.

RULE 23(b)(3)(F): SMALL CLAIMS CLASSES

The Steering Committee of Academics, as well as a number of others who have commented, strongly suggests that the overarching purpose of Rule 23 when it was drafted was the consolidation of small claims that otherwise would not be litigated in order to deter "wrongful conduct that injures each individual slightly but in the aggregate costs society a good deal." It is clear from an examination of the text of Rule 23 and the Note that this was not the driving force of the federal class action rule.

Rather, the 1966 Advisory Committee was creating a rule of procedural efficiency. Where claims were similar enough and could be tried together fairly, Rule 23 authorized a court to "consolidate" them into one action for one final resolution. Nowhere did the 1966 Advisory Committee suggest that Rule 23 was intended to be a mechanism to deputize possessors of private attorneys general to divert from state courts thousands of claims that otherwise would not meet the federal jurisdictional minimum and which would not provide meaningful relief to the very parties on whose behalf the actions were brought.

The Advisory Committee's proposed Factor F is in keeping with this efficiency purpose, as it encourages federal courts to evaluate -- as only one factor relating to (b)(3)'s superiority requirement -- the costs and the benefits of class litigation and to avoid certification where, as at least one Advisory Committee member put it, the costs of class certification "just ain't worth it" when compared with the actual benefits that would be conferred on individual class members.

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Congress has created mechanisms for private citizens to implement "public values" through civil litigation only in particular, narrowly-defined subject areas. Where it makes such a determination, it may create special incentives to encourage suits, such as allowing attorneys' fees or treble damages. *See, e.g.*, the Clayton Act, 15 U.S.C. § 15; the Fair Labor Standards Act, 29 U.S.C. § 216(b); the RICO statute, 18 U.S.C. § 1964. *Cf., Alyeska Pipeline Serv. Co. v. The Wilderness Society*, 421 U.S. 240, 270 (1975) (observing that Congress has, by statute, indicated where "the encouragement of private action to implement public policy has been viewed as desirable," and declining, in the absence of statutory authorization, "to invade the legislature's province by redistributing litigation costs" to encourage private litigation to protect the environment).

Not only has Congress narrowly construed the public's interest in encouraging private litigation, but on the one occasion that Congress directly considered the question of what sorts of "consumer" class actions should be allowed, it adopted a particularly restrictive approach in order to keep relatively minor actions out of the federal courts. In enacting the Magnuson-Moss Warranty Act -- which is the core "consumer" action statute -- Congress specifically provided that a putative class action under the statute is permissible in federal court *only* if the complaint includes 100 named plaintiffs. 15 U.S.C. § 2310(d)(3). Obviously, the "jurisdictional provisions of section 2310(d) were designed by Congress to assure that [only] substantial class actions could be brought in federal court." *Jacks v. The Firestone Tire & Rubber Co.*, Civ. A. No. C78-1261A, slip op. at 6 (N.D. Ohio June 4, 1974). *See also Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541, 543 (N.D.N.Y. 1978) (the purpose of this provision, as well as the other restrictive jurisdictional provisions in the statute, is to "avoid trivial or minor actions being brought as class actions in Federal district courts"); *Skelton v. General Motors Corp.*, 660 F.2d 311, 319 n.15 (7th Cir. 1981), *cert. denied*, 456 U.S. 974 (1982). To the extent the Steering Committee of Academics wants to amend Rule 23 to encourage the use of class actions involving insubstantial relief for individual class members, it appears to contravene Congress' clear determination that the maintenance of such class actions in federal courts is not in the public interest.

Class action litigation arises in the context of private disputes between individual litigants. The judicial system's only interest is in determining the dispute fairly and efficiently when those litigants have sufficient interest in the outcome to proceed with the case. Part of that efficiency interest is a realization that some individual claims are so insignificant as to not be worth the costs associated with class action litigation in the

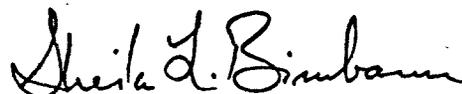
Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules
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June 14, 1996
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federal courts. The Advisory Committee's proposed (b)(F) allows a federal court to take that fact into account as one factor in evaluating whether class treatment is superior. The Advisory Committee is not the only group to recognize the need to evaluate whether individual claims are substantial enough to warrant the burdens of class certification. The Uniform Law Commissioners proposed a similar test -- without using terms such as "public values" or "public interest" -- when they drafted a model class action statute. See Uniform Law Commissioners' Model Class Actions Act § 3(a)(13).

CONCLUSION

The Advisory Committee's proposed revisions should be approved for public comment. As with any proposal, the comments and criticisms received from the bar, academia and the bench may well improve the present draft. That, of course, is the theory behind a comment period in the first place. But to delay the process for an additional year would give short shrift to the Advisory Committee's long-considered proposal. The Advisory Committee clearly believes that what is called for is modest reform of Rule 23 that primarily further legitimizes current practice, increases the opportunity for appeals and restricts the availability of class actions at the outer margin. The academics who have commented appear to want a much more extensive redraft of the rule. The time has come to hear from the rest of the bench and bar. I encourage you to move this process forward by publishing the Advisory Committee's proposal for public comment.

Sincerely,



Sheila L. Birnbaum

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June 14, 1996

Honorable Alicemarie H. Stotler
Chair, Committee on Rules of
Practice and Procedure
United States District Court
751 West Santa Ana Boulevard,
Room 101
Santa Ana, California 92701

Dear Judge Stotler:

It is my understanding that the Committee on Rules of Practice and Procedure is scheduled to meet on June 19-21, 1996. At that time, the Committee will consider whether or not to publish for public comment proposed amendments to Rule 23 ("Class Actions") of the Federal Rules of Civil Procedure. The purpose of this letter is to strongly urge that you publish the proposed changes in Rule 23, so that judges, lawyers, legislators, academics and other interested parties have an opportunity to analyze these proposed changes and to comment on them.

As you know, the current law on class actions has been a matter of concern for some time. In fact, the Private Securities Litigation Reform Act of 1995 (H.R. 1058; Pub. L. 104-67) was designed to address some of those abuses in securities cases. However, the problem is much broader: companies have been driven into bankruptcy by the aggregation of a wide range of claims, millions of dollars have been paid to attorneys with no real clients, and some courts have significantly expanded the reach of the due process clause to accommodate such cases.

Accordingly, the Committee on the Judiciary has a keen interest in the work of your Committee in this important area and we will follow closely the progress of the proposals now before you. As you know, the proposed amendments already have stimulated some controversy among certain law professors. That is healthy and to be expected, but it should not deter you from presenting these proposals for consideration by broader segments of the bench and bar, as well as this Committee and the Congress as a whole. The comments of the

academics as well as those of other interested parties will, I am sure, be given full consideration by your Committee, following the comment period. The comments received from a broad cross-section of interested parties should greatly assist you in determining whether or not the Advisory Committee's proposals should be revised or, indeed, whether additional changes in Rule 23 are needed and/or justified.

I commend your Committee and the Advisory Committee for advancing this important issue to the forefront of the legal community's agenda. The Judiciary Committee will continue to follow this issue with great interest.

Sincerely,

A handwritten signature in black ink, appearing to read "Hy Hyde". The signature is fluid and cursive, with the first "Hy" being larger and more prominent than the second "Hyde".

HENRY J. HYDE
Chairman

HJH:acw

cc: Peter G. McCabe, Secretary,
Committee on Rules of Practice and Procedure

Hon. Patrick E. Higginbotham, Chair
Civil Rules Advisory Committee



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96-CV-016

June 18, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
C/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544.

BY FACSIMILE

Re: Proposal to Amend Rule 23, F. R. Civ. P.

Dear Judge Stotler:

On behalf of the Association of Trial Lawyers of America (ATLA), I am writing to urge the Standing Committee not to circulate the Advisory Committee's proposal on Rule 23, but to recommit it to the Advisory Committee for further study.

Although ATLA hesitates to argue against publication for public comment, we are very concerned that the Advisory Committee has not yet addressed adequately several important considerations.

The first, and foremost in our minds, is that even the present Rule 23 does not adequately protect the constitutional right of jury trial for future claimants, and it makes no provision for those who do not presently recognize the nature or origin (and sometimes even the fact) of their injuries to exclude themselves from the effect of class action adjudication.

An ATLA committee considered the potential threat to the right to trial by jury posed by class actions and mass tort litigation in 1994. Based on its work, our Board of Governors adopted the attached resolution at that time. The Advisory Committee's proposal does nothing to address these concerns, and may in fact exacerbate the diminution of the right to trial by jury under the present rule through its suggested new section 23(b)(4) which would give special recognition to "settlement classes."

Beyond our concern about the right to jury trial, we believe the breadth of the emerging academic and consumer opposition to the Advisory Committee proposal, evidenced by recent letters to the Standing Committee from the academic Steering Committee to Oppose Proposed Rule 23 and the Public Citizen Litigation Group, strongly suggests that the Rule 23 proposal has not received the depth of analysis that should precede publishing it for public comment.

Accordingly, ATLA respectfully urges the Standing Committee not to publish the proposal for comment but, rather, to recommit it to the Advisory Committee for further study.

Thank you for your consideration of these comments.

Sincerely,



Pamela Anagnos Liapakis
President

CC: ATLA Board of Governors
Howard Twiggs, Esq.
Tom Henderson, Esq.

Attachment: ATLA Board of Governors Resolution, July 28, 1994

ATLA BOARD OF GOVERNORS

JULY 28, 1994

CHICAGO, ILLINOIS

POLICY ON THE ADJUDICATION OF MASS TORT CLAIMS

The aggregation of mass tort claims within a single legal proceeding impacts on individual rights within the jury trial system; therefore, such consolidations should be restricted to only those instances in which the rights of the victims to fair and timely compensation overall and the deterrent effect on those whose culpability has generated the risk are best served.

1. The constitutional right to trial by jury in civil cases is a fundamental right.
2. Meaningful exercise of the right to trial by jury requires that individual tort plaintiffs have autonomy in the decision to seek a jury trial, that individual tort plaintiffs be entitled to counsel of their choice whose loyalty is undivided by any conflict of interest, and that the right to trial by jury may be waived only by a knowing and informed choice of the individual.
3. Because anything less than full funding violates the constitutional separation of powers, ATLA strongly supports full funding of the judicial branch co-equal with the other two branches of government and supports the use of technology and court-annexed administrative forms and procedures, such as mediation, that increase the effectiveness of the judiciary, its operations, and the administration of justice.
4. ATLA opposes the use of procedural devices designed to facilitate the adjudication of claims of victims of mass torts unless they preserve the right to trial by jury and assure equal access to the courts in accordance with the 5th and 14th Amendments to the Constitution, the provisions of 42 USC 1981, and applicable U.S. treaties.
 - 4a. ATLA opposes the use of consolidated trials or representative trials unless each claimant is afforded a meaningful opportunity to exclude himself or herself from the binding effect of the outcome of the proceedings and is afforded the right to counsel of his or her choice.
 - 4b. ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings. ATLA opposes class actions which purport to adjudicate the rights of future claimants who have not yet been injured, whose injuries could not reasonably have been discovered, or who could not reasonably discover the causal link between the conduct of the wrongdoer and the injuries. The right to jury

trial for such persons must be preserved and such persons should be afforded the opportunity to opt out of the class action without penalty during a reasonable period of time following the date they are injured, could reasonably discover their injury, and could reasonably discover the causal link between the conduct of the wrongdoer and their injury.

- 4c. In cases where potential injuries have not yet become apparent, ATLA opposes the use of class actions procedures to resolve current claims, such as medical monitoring or property damage, unless the rights to bring the latent injury claims are preserved.
5. ATLA opposes "limited fund" class actions and settlements unless a genuine danger exists that claims against the defendant so far exceed resources available to the defendant that a substantial number of tort victims will be deprived of a source of compensation under traditional tort proceedings, and only where such tort victims are accorded the same rights in regard to the defendant as any other secured creditor.

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96-CV-017

Honorable Patrick E. Higginbotham
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for the Fifth Circuit
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RE: COMMENTS ON NOVEMBER, 1995 DRAFT RULE 23

Dear Judge Higginbotham and Professor Cooper:

Thank you for inviting me to submit comments on the November, 1995 draft amendments to Rule 23 of the Federal Rules of Civil Procedure. These comments are being submitted on behalf of Lawyers for Civil Justice ("LCJ"). LCJ is a non-profit coalition of the three leading defense bar organizations and numerous Fortune 500 corporations, working to promote those policies and procedures that will ensure excellence and fairness in our civil justice system.

We commend the Advisory Committee for its latest effort to draft revisions to Rule 23 regarding class actions, which we believe are designed to move the rule in the right direction and we express our appreciation for the opportunity to submit these comments.

Comprehensive reform of a rule as complex and far-reaching as Rule 23 is a formidable task. While it now seems that many parts of the Rule would benefit from some adjustment, efforts to fix everything in one fell swoop might obscure the substantial gains that could be realized from improving those few aspects of the Rule that seem to be causing the most problems. Indeed, few rules lend themselves to incremental revision as well as Rule 23 would, with its three distinct class formulations. Amendments focused primarily on the most problematic provisions would be easier for bench and bar to implement than comprehensive amendments; could be monitored and evaluated more efficiently; and would not foreclose additional incremental revisions later on to fine-tune the initial amendments.

Therefore, we have focused our comments on Rule 23(b)(3) because in our experience that is the provision of Rule 23 that has engendered most of the problems. As we explain in greater detail below, use of the 23(b)(3) class action device in ways that were never intended has led to untenable proceedings and unacceptable results. Careful revision of Rule 23(b)(3) can solve many of the most egregious abuses of the class action device, without disrupting all aspects of the class action rule or its substantial body of jurisprudence.

Although we urge the Advisory Committee to go further, we recommend that, at minimum, Rule 23(b)(3) be revised to require four specific findings that courts must make before allowing an action to proceed as a class. First, we concur with the Committee's proposed finding of both superiority and necessity. Second, we recommend replacing the proposed preliminary merits review with a cost-benefit analysis in which the court would assess whether the likely benefits to the individual class members outweigh the burdens and complexities of maintaining the action as a class to the parties and the system as a whole. Third and fourth, we propose adding objective findings, such as, requiring the parties to meet heightened pleading requirements and to demonstrate a common evidentiary plan applicable to the class as a whole. The latter two findings were first suggested in Comments dated March 7, 1996 from Sheila L. Birnbaum, Esq., obtained from the Administrative Office on March 15, 1996.

In addition, references throughout the draft revisions to splitting actions into individual "issues" and "claims" should be deleted because of the inequities that piecemeal litigation has already spawned. Finally, we urge the Committee to leave consideration of notice requirements and class settlements for another day when additional courts have had the opportunity to explore the ramifications of these issues in more and varied concrete factual situations.

Background

The Advisory Committee's study of class actions and its deliberations on amendments to Rule 23 over the last several years, coupled with our members' experience with the Rule in actual litigation, reveal one overarching reality that is the driving force behind our comments and which should inform the amendment process. That reality is that Rule 23(b)(3) rarely serves as a mechanism for resolving dispersed mass torts without frustrating or defeating the goals and purposes of the traditional litigation process as well as basic precepts of due process. The result in far too many cases is that the litigation no longer serves the litigants, the courts, or the ends of justice. Indeed, Rule 23(b)(3) dispersed mass tort class actions have wreaked unwarranted and unprecedented financial disaster on once profitable businesses, have made small groups of attorneys enormously wealthy at the expense of their "clients'" interests, have caused Article III judges to reach far beyond their traditional grasp, and at times have increased cynicism and disrespect for the legal system as a whole.

The struggle by courts and litigants to accommodate dispersed mass torts under a procedural framework for which they were never suited (or intended) has been costly and has yielded little of value. We strongly urge this Committee to put an end to the struggling and to announce affirmatively that dispersed mass torts are not appropriate for resolution under the rubric of Rule 23(b)(3). The most certain way to circumscribe the filing of dispersed mass tort claims would be to delete (b)(3) in its entirety.

If (b)(3) were deleted, it would eliminate the most problematic aspects of class action jurisprudence without necessarily curtailing the ability of tort claimants to vindicate substantive rights in individual litigation or through other consolidation mechanisms presently available and in use. For the most part, cases that would be foreclosed would be those that are insufficient to stand on their own, perhaps due to the lack of a sufficient financial stake to justify litigation or the lack of a presently compensable injury. As John Frank said in his November 21, 1995 letter to Professor Hazard, "trivial recoveries as a sort of social admonition or fluid recovery are a bit of social engineering that no one has entrusted to a Rules Committee."

Further, foreclosing these cases from the federal courts does not translate into cutting off the rights of these individuals to every form of relief. Perhaps Frances Fox put it best in his letter to the Committee, where he wondered "[w]hy is it that the judiciary always believes that when other societal agencies fail to deal with a problem,

judges and lawyers must lick it? If the only way they can do it is by abandoning their function of providing individual justice, perhaps they should decline the temptation." Numerous federal and state mechanisms exist to resolve disputes and provide redress for grievances in a more cost effective manner than a class action. And where they may fail, it may be more appropriate for Congress to establish an entirely new process outside the Article III courts for resolving mass injury claims.

Although a compelling case can be made to eliminate Rule 23(b)(3) actions altogether, we recognize that the Committee may be disinclined to cause the immediate collapse of such an intricate superstructure by a few bold strokes of the pen. Since the elimination of Rule 23(b)(3) might likely have unintended consequences, an alternative that would eliminate the most problematic cases would be to narrowly circumscribe the Rule to permit only certain clearly defined actions, limited for tort claims, to single accident mass torts, such as airplane crashes. Though such actions were not within the contemplation of the drafters of the 1966 amendments,¹ tort actions stemming from a single accident, fixed in time, generally can be limited to a clearly deducible class of claimants, who have a discernable range of injuries that can be readily identified as arising from within a clearly defined geographic vicinity. Common elements of proof among the various claims are more likely to predominate, and maintenance of a class action at least has the potential to realize the efficiency gains that Rule 23 was meant to provide.

Again, however, although significant support exists for establishing a brightline rule that would confine Rule 23(b)(3) to clearly defined actions such as single accident mass torts, the Committee may be unwilling to go so far. If that is the case -- at a minimum -- we strongly urge the adoption of clear, objective guidelines that would at least help to reduce the burdens that inappropriate class actions often impose on the civil justice system. Although crafting a brightline rule may not be possible, that should not deter the search for objective standards that can be uniformly applied. Indeed, any amendments that decrease the subjective nature of the current certification analysis will improve the Rule.

One way to decrease reliance on subjective factors during the certification process is to increase the objective obligations on the parties themselves. Stated another way, Rule 23(b)(3) should contain hurdles that the parties must overcome in order to take

1. F.R.C.P. 23, Advisory Committee Notes, 1966 Amendment, *reprinted in Federal Civil Judicial Procedure and Rules* 93 (West 1995).

advantage of the extraordinary class action device. Rather than relying on the court to sift through a panoply of abstract claims and defenses to divine whether class certification is appropriate, the Rule should place more responsibility and initiative on class representatives and counsel to demonstrate with a high degree of specificity that the claims they bring are ripe, concrete, and substantial. Specific evidentiary and pleading devices, as explained in greater detail below, should be employed to achieve this result.

Another theme that continually recurred in the writings, meetings, and deliberations about class actions was the notion that there is a universe of cases that simply does not confer sufficient benefit on the class members to make maintenance as a class action worthwhile. Whether this is called a cost-benefit analysis, a balancing test, or something else, it captures the sense of the discourse about class actions, as you both have said, that some cases "just are not worth it." Such a central organizing principle needs to be more clearly and objectively enshrined in the Rule 23(b)(3) certification process. By balancing the potential benefits and burdens of certification, judges would be better equipped to identify the actions that fall at the extreme ends of the spectrum of cases presented for certification, even though these extreme cases might otherwise meet the technical requirements of Rule 23.

At one end of this spectrum are complex legal claims such as single product liability actions which, although sometimes large in number, are so inherently different from one another on the merits that they can and should stand alone as individual actions. At the other end are those cases where the value of individual claims is so low that class members have no incentive to bring the claims on their own; or where the value may be substantial but the individual claims are so weak on the merits that they should not stand alone or as a class. In both types of cases, aggregation creates an *in terrorem* effect due to the powerful pressure it creates for all parties to settle just to avoid the risk of one disastrous roll of the dice. Thus, once aggregation is accomplished, it becomes impossible to administer individual justice.

The Committee's proposed amendments, we trust, were intended to signal the judiciary that it is permissible to refuse to certify, at a minimum, the cases that fall at the extremes. Amendments that equip judges to refuse certification of cases at either end of the spectrum, would go a long way toward eliminating the class action abuses that have plagued the courts for some time now. While the proposed amendments appear to advance such objectives, some clarification and revisions to the proposed language now being considered is needed. A redraft of Rule 23(b)(3) incorporating the specific language changes that we propose is as follows:

Rule 23. Class Actions

(b)

* * *

(3) the court finds that (i) the questions of law or fact common to the certified class predominate over individual questions included in the class action, (ii) the evidence likely to be admitted at trial regarding all elements of the claims asserted is substantially the same as to all class members, (iii) the benefit of the relief sought in each class member's claim substantially outweighs the burden, complexity and expense of affording class treatment, and (iv) a class action is superior and necessary for the fair and efficient disposition adjudication 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 action class claims, issues, or defenses; and~~
- ~~(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~~

KEY

text = addition in Advisory Committee Draft

text = addition in this draft

~~text~~ = deletion in this draft of Advisory Committee addition

* * * * *

Proposed (b)(3) Revisions

The Committee's proposed amendments to 23(b)(3) establish three findings that courts must make before certifying a (b)(3) class; two of the findings are revised versions of earlier (b)(3) certification requirements and one is new. The draft Amendments then identify seven factors that courts should consider when making these findings. Four factors have been substantially revised and three are new. The discussion that follows will address each finding in turn and then address the revised factors.

23(b)(3)(i) - We propose the following revisions:

Rule 23. Class Actions

(b)

* * *

- (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).

The Advisory Committee made non-substantive, conforming revisions to the requirement that common questions of law and fact must predominate over individual questions. We recommend further revisions to reflect that the class has not yet been certified when this finding is being evaluated and to emphasize that the court's analysis should focus on the action as a whole, not on the individual issues, claims, or defenses.

References to class certification solely for purposes of resolving individual "claims or issues" outside the context of a whole case and controversy should be deleted not only here, but in each of the instances where that language appears.² Rule 23 should not promote the splitting of whole cases into separate issues and claims because it invites consolidation of what are, in reality, disparate claims, which, when viewed as a whole, may call for very different results.

The Supreme Court repeatedly has admonished that each member of a class in a class action must have a live, concrete, justiciable case and controversy before an action can be maintained under Rule 23. Permitting issues to be split off and tried separately would lead to anomalous results whereby a defendant can be found liable to a

2. Reference to "issues" should be deleted in the November 1995 draft at lines 4, 42, 45, 69, 106, 129, and 191.

plaintiff in a separate proceeding, even though the plaintiff may not have satisfied the "injury-in-fact" requirement in the main proceeding, and thus, would have no standing to bring the lawsuit in the first place. Skewed results inevitably flow from piecemeal adjudication of issues instead of whole cases.

Congress has considered this issue a number of times during recent years and has declined the invitation to permit easier consolidation of disparate claims in the federal courts, failing to pass mass tort legislation such as H.R. 2450 in the 102nd Congress, and H.R. 3406 in the 101st Congress. Congress declined to act even though the proposed legislation was limited to consolidation of separate claims arising out of a "single accident." Indeed, the legislative history of these bills makes it clear that Congress is not receptive to even the most limited expansion of federal court jurisdiction that would permit consolidation of disparate claims.³ The Committee should not rush in where Congress has refused to go. Consequently, all references to class adjudication of individual, split-off claims or issues should be deleted from the draft, and Rule 23(b)(3)(i) should specifically require the court to focus on the action as a whole.

23(b)(3)(ii)-(iii) - Here, the Advisory Committee has proposed two new alternatives for a finding. One asks the court to find that the claims are not insubstantial on the merits, and the other calls for a balancing of the merits of the claims against the costs and burdens that certification imposes. We have serious concerns that using the term "merits" anywhere in the findings paragraph would have potential adverse implications. Further, requiring the court to make any finding on the merits may trigger discovery demands and requests for hearings on the issue, escalating consideration of this one factor into a series of mini-trials. Nonetheless, we strongly support the Committee's attempts to write a rule that will require the courts to weigh the benefits of class actions against their enormous costs and risks. Accordingly, we propose substituting the following two findings for the merits determination proposal:

(b)

* * *

(3) the court finds (i) . . . (ii) 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, (iii) the benefit of the relief sought in each class member's claim substantially outweighs the burdens, complexities and expense of affording class treatment, and

3. See, e.g., 101 Cong. Rec. H3118-19 (daily ed. June 5, 1990).

The finding in subsection 23(b)(3)(ii) examines the suitability of the proposed class action from an evidentiary standpoint. It places the burden on the class proponents to show that the kinds of proof that would be used at trial would be classwide, and that the class lends itself to a unified evidence plan. A number of federal courts have adopted similar requirements.⁴ This finding ultimately verifies that proceeding in class action form will result in the efficiencies that class actions were intended to provide, and that due to those efficiencies, resolution of the action may be quicker and less costly.

To allow the court and all involved parties to engage in a meaningful determination of this "classwide proof" issue, it is critical that the class proponents provide at the outset a full explication of the claims being asserted. Indeed, the quality and specificity of the initial pleadings often provide insights into how mature and carefully planned the proposed class litigation is and will give the court useful perspectives into how quickly and efficiently the action will proceed if afforded class treatment.⁵ To that end, we propose adding a particularized pleading requirement to Rule 23(b)(3) actions.

The Committee has utilized a particularized pleading requirement quite recently for its 1993 amendment instituting mandatory pre-discovery disclosure in FRCP 26(a)(1), and Rule 23.1 action -- shareholder derivative cases.⁶ Several courts have attempted to impose heightened pleading requirements in other types of class actions.⁷ However, in *Leatherman v. Tarrant County*,⁸ the Supreme Court rejected attempts by

4. See, e.g., *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-18 (D.C. Cir. 1986), cert. denied, 482 U.S. 915 (1987); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n.8 (D.C. Cir. 1984); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 321-22 (5th Cir. 1978).

5. Moreover, failure to provide particularized pleadings may signal that the class proponents lack adequate knowledge about the key elements of the lawsuit, suggesting that they have failed to conduct an adequate pre-filing investigation and have not invested sufficient time and effort into the litigation to warrant imposition of class burdens, costs and risks on the courts and other litigants.

6. See, e.g., *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1577-78 (D. Kan. 1986).

7. See, e.g., *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985) (§ 1983 civil rights case alleging sexual harassment); see generally, Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986).

8. 507 U.S. 163 (1993).

lower courts to impose heightened pleading requirements in cases in which notice pleading under Rule 8 was applicable. The Court based its rejection on a plain reading of the Rule, essentially inviting the Committee to revise the pleading rules if higher pleading standards are considered desirable. We believe that it is time for the Committee to act on the Court's suggestion and that a heightened pleading standard applicable to putative class actions would be extremely beneficial.

The second new finding, 23(b)(3)(iii), requires the court to engage in what is essentially a cost-benefit balancing that compares the value of the claims and adjudication to each individual class member with the cost to the litigants, the courts, and the system itself of the class action proceeding, requiring a finding that the benefits to the individual class members substantially outweigh the burdens of class treatment. This objective assessment and balancing of benefits and burdens replaces the Advisory Committee's preliminary merits evaluation with a broader examination that recognizes that the likelihood of success on the merits should not be sufficient to justify a class action. Moreover, a finding on the merits during the preliminary stage of the litigation would either irreparably compromise the ability of the parties to obtain a fair and impartial trial or lead inevitably to a forced settlement.

Weighing against certification in the proposed balancing analysis are the substantial costs that the entire class proceeding, whether litigated or settled, imposes on the courts, the defendants, and the justice system as a whole. Along with costs, the Notes could direct courts to consider the risks that aggregation of multiple claims poses to the litigants and the litigation process, including distortion of settlement values, increased pressure to settle, changing case values based on the likelihood of certification, the likely *res judicata* implications, and other potential pitfalls. Only when the court finds that the claims' value to individual class members substantially outweighs the costs and risks associated with class actions, should the court find that the balance favors certification.

In making this assessment, the court should consider the pleadings, the class evidentiary plan, materials from already concluded individual cases involving the same issues and defendants (when available), and other information readily available from the parties in support of their positions. The Advisory Committee Note should include a clear statement that full merits discovery is not necessary and not desirable for the resolution of these issues; discovery in the pre-class certification phase should be limited to discovery clearly necessary for the resolution of class certification issues. In addition, the

Note should include a clear statement that the (b)(3) finding is not to be construed as a finding on the merits and is not binding on any issue except class certification.

23(b)(3)(iv) - We concur in the following proposal:

(b)

(3) the court finds (i) . . . , (ii) . . . , (iii) . . . , and (iv) that a class action is superior and necessary for the fair and efficient adjudication of the controversy.

The Advisory Committee added the requirement that a class action must be necessary, as well as superior, as required in the existing version of the rule, to the fair and efficient adjudication of the controversy.⁹ Initially there were concerns that the "necessary" requirement, while intended to limit class action claims, might actually militate toward certification of claims that were too minimal to be maintained on their own. However, the addition of the balancing finding in (b)(3)(iii) should resolve that problem by requiring claims to have substantial value to class members. Further, addition of the necessary requirement is fundamental to precluding class certification of substantial claims (such as high exposure product liability cases) that could stand on their own as individual cases. The Note should further clarify this intention, and it should expressly indicate that there is a decided preference for allowing individual adjudication of claims.

Factors - Among the factors to be considered when making (b)(3)(i)-(iv) findings, we recommend deleting factors (E), (F), and (G) for the following reasons:

Factor (E) - This factor, which the Committee initially added to direct the court to examine the probable success on the merits as a means of screening weak and insubstantial class claims, is no longer needed and should be deleted. Our earlier recommendations, that Rule 23(b)(3) should require a cost-benefit balancing, along with particularized pleadings and a common evidentiary scheme, replace merits consideration with more objective considerations. Consideration of the merits is highly undesirable as part of the Rule 23(b)(3) certification analysis in any event because of its potential for undue prejudice of the parties' positions.

Factor (F) - For several reasons, we suggest deleting this factor, which would call for consideration of the "public interest" as a factor in the certification process.

9. If the Committee does not address the issue of settlement classes it should return to the word "adjudication" in order to avoid any implication that the amendments are intended to facilitate settlements.

The public interest in litigation often is not coterminous with the legal merits of the litigants' claims, the litigants' interests, or the interests of the justice system as a whole. Thus, the public interest is not a reliable guidepost for determining whether class certification is appropriate. Allowing the court to consider the "public interest" when determining whether to certify a class action under (b)(3) would inject ambiguity into the class certification analysis, inviting the court to apply its own subjective understanding of what the public interest is, or may be, to justify a certification decision that satisfies some personal sense of justice.

Thus, we have deleted consideration of the public interest as a factor altogether and replaced it with directions for the court to rely on the *prima facie* showing set out in the particularized pleadings for assessing whether class certification is appropriate. We believe that the quality and level of specificity set forth in the pleadings are accurate indicia of how mature and carefully planned the class litigation is, and will give the court insight into how quickly and efficiently the action will proceed if certified as a class. Failure to provide particularized pleadings may signal a lack of adequate knowledge about the key elements of the lawsuit, suggesting that class counsel has failed to conduct an adequate pre-filing investigation and has not invested sufficient time and effort into the litigation to warrant the imposition of class action burdens, costs, and risks on the courts and other litigants.

Factor G - We have deleted this factor entirely, consistent with our strongly held view that the Committee should not address class settlement issues at this time, as explained more fully below. In the event the Committee feels compelled to address some aspects of class settlement, we highly recommend confining references to settlement to the Dismissal and Compromise section, Rule 23(e).

Settlement Classes

The proposed amendments to Rule 23 that would facilitate certification of settlement classes raise some troubling issues from both a theoretical and practical standpoint, as the developing case law in this area demonstrates.¹⁰

10. See, e.g., *In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 790 n.10 (3d Cir. 1995) citing *Carlough v. Amchem Prod., Inc.*, 834 F. Supp. 1437, 1462-67 (E.D. Pa. 1993); *In re: Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995); see also *In re American Medical Systems*, 75 F.3d 1069 (6th

(continued...)

However, the Committee need not address these and other thorny issues now because our members believe it would be in the best interests of all involved if no changes were made at this time to Rule 23's settlement provisions. Instead, the Committee should focus on revising the more basic provisions of the Rule, such as those addressed earlier in these comments, that establish the parameters for bringing a class action in the first place. While the Committee works on these other, more troublesome aspects of the rule, the issues related to settlement classes will continue to move through the courts, allowing fuller exploration of the various issues that class settlements raise.

While there have been abuses of the class settlement device that the Committee ultimately may wish to address, these abuses are triggered by the distorted dynamics that the class action device itself provokes. Given the enormity of the financial threat that dispersed mass tort class action litigation poses, neither party can take the chance of testing the merits of the claims or defenses without taking on life or death-like risks. To minimize these often unfathomable risks, the parties have invented ways to come to terms on a settlement that binds all present and future purported class members. This has been criticized as buying *res judicata*, but it accurately describes what is often the only viable alternative for a corporation facing a dispersed mass tort class action, whether or not that action has any merit.

If Rule 23(b)(3) were properly circumscribed to permit class actions only in those cases where its use resulted in net benefits to all, as was initially intended, resort to the class settlement device as a means of buying peace and keeping the corporation out of bankruptcy would lessen quite naturally. We recommend that the Committee allow such a natural reduction to occur, and that it revisit the need for amendment of the settlement provisions once the more substantive problems with Rule 23 have been fixed.

If the Committee decides to proceed with some revisions to Rule 23 that affect settlement, those revisions should not have the effect of inadvertently promoting class actions. For example, amendments to Rule 23 that make certification easier for settlement classes in cases that would not otherwise be brought, may do more than facilitate resolution of those cases; they may encourage the filing of more cases. The easier it becomes to bring such cases and have them settled quickly, the more cases of *de minimis* or no value there will be. We recommend a more cautious approach that pays

10. (...continued)

Cir. 1996); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 *Corn. L. Rev.* 858, 863-64 (1995).

as much attention to promoting the quality and merit of such cases as it pays to resolving them quickly and easily, whatever their merit.

We also recommend that, if the Committee decides to make changes to the settlement provisions, the treatment of settlement classes be removed from the rubric of Rule 23(b)(3) and inserted in Rule 23(e), which already pertains to settlement. Placing the new provision in (b)(3) may mistakenly convey the impression that one of the purposes of the (b)(3) class is to promote settlements, which could have the unfortunate effect of encouraging more marginal cases that could not survive class certification for litigation.

Another concern we have is that a provision permitting certification for settlement purposes might be used, if the settlement ultimately were to fail, as a justification for later certifying a trial class. Therefore, the rule should make it clear that certification for settlement purposes remains distinct from certification for litigation.

Finally, we strongly oppose the actual notice requirement for settlement classes as unrealistic, unworkable, not required by due process, and likely to impose exorbitant costs; and we strongly oppose any requirement that the defendant advance funds to pay for it. The suggestion that defendant pay for the notice should fall with the deletion of the preliminary merits finding.

In most cases it will be impossible to determine whether actual notice was ever received, even in those rare instances where most members of the class have been identified in advance with a reasonable degree of certainty. Absent actual notice, however, a class member presumably would not be bound by the class settlement and could pursue the settling defendant separately long after the main case is concluded. Under this scenario, a settling defendant would never be able to "buy peace" or end a controversy, undermining one of the most important components of any settlement agreement. In reality, the requirement already in Rule 23(e) for court approval of the settlement is the best guarantee that any class settlement reached will be equitable and fair to all members of the class.

Miscellaneous Amendments

As discussed above, we recommend that the Committee include within Rule 23 a particularized pleading requirement along the lines suggested in Ms. Birnbaum's March 7, 1996 letter (p. 16). Of course, the Committee might consider it appropriate to include a heightened pleading requirement for class actions in Rule 9, but it seems more appropriate to us to keep class action matters "of one piece" under Rule 23. Requiring

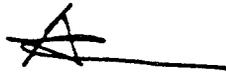
particularized pleadings will help courts identify those cases that are based on nothing more than unsubstantiated allegations, which nonetheless have a settlement value to the defendant equal to the cost of avoiding discovery and making the plaintiff go away. A heightened pleading requirement will help prevent opportunistic individuals from unilaterally imposing baseless costs on defendants, the court, and ultimately, the taxpayers. Nor should it be forgotten that a defendant named in a lawsuit inevitably suffers reputational injury that could be avoided if more effective gatekeeping functions were built into Rule 23(b)(3). Indeed, failure to plead sufficient specifics should result in denial of the request for class certification. Also, the Committee Notes should be revised to include guidance to courts that pending motions under Rules 12 or 56 should be decided in advance of the class certification unless it would undermine the fair and efficient adjudication of the controversy. Last, we believe that the Committee Note should be revised, or an amendment to Rule 26 drafted, directing the trial court to stay mandatory disclosure and discovery until after the resolution of 12(b)(6) motions.

Conclusion

We strongly support the Committee's efforts to develop a process for courts to use to cull and reject cases whose introduction into the class action process is not warranted because of the marginal nature of the claims or the distorting, potentially dangerous force that aggregation will unleash on the defendants, the courts, and the civil justice system as a whole. The Committee's draft amendments and proposed Notes already go a long way toward accomplishing this goal. Nonetheless, some fine-tuning is needed to eliminate unintended side-effects, to increase the objectivity and definiteness of the certification standards, and to ensure that (b)(3) actions that are certified are worth the substantial costs that they impose.

We thank you for the opportunity to comment on these proposals and would be pleased to discuss any of the ideas set forth herein in greater detail.

Yours sincerely,



Alfred W. Cortese, Jr.

cc: John K. Rabiej, Esq.
Administrative Office of
United States Courts

3



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June 18, 1996

VIA MESSENGER

Honorable Alicemarie H. Stotler
Chair, Committee on Rules of Practice
and Procedure

U.S. District Court
751 West Santa Ana Boulevard
Santa Ana, California 92701

96-CV-017

Re: Proposed Amendments to Rule 23, Class Actions

Dear Judge Stotler:

These comments regarding the proposed amendments to Federal Rule of Civil Procedure 23 are being submitted on behalf of Lawyers for Civil Justice ("LCJ"), a national coalition of corporate and defense trial counsel. Rule 23 and the growing efforts of the plaintiffs' bar to aggregate product liability lawsuits into mass tort litigation are matters of the greatest concern to our members. Accordingly, LCJ has submitted comments on earlier versions of proposed amendments to Rule 23, the most recent of which are attached. We now take this opportunity to communicate our views directly to the Standing Committee in view of the importance of Rule 23 to the practicing bar and the particular importance of expeditious adherence to the Rules Enabling Act process.

We strongly urge the Committee to move the Rules Enabling Act process forward by seeking public comment on the proposed amendments to Rule 23. We understand that a "Steering Committee" of academics has asked this committee to stifle public debate of the proposed amendments by returning them to the Advisory Committee. However, we believe that this Committee should follow the Advisory Committee's recommendation and encourage robust public debate of the proposals. The Advisory Committee conducted an exhaustive, five year study of Rule 23 class actions prior to drafting the pending revisions. In our view, this Committee is at the point where more can be gained from public debate than from further internal consideration.

LCJ's membership finds itself in agreement with the Advisory Committee on many levels, but also notes that there are areas of disagreement as well. Most important, we maintain that mass tort litigation class actions should not be permitted under Rule 23(b)(3) at all. Indeed, in many such cases there is no actual injury or loss, with the result that in far too many cases the litigation no

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Honorable Alicemarie H. Stotler

June 18, 1996

Page 2

longer serves the litigants, the courts, or the ends of justice. Consistent with the views that several members of the Advisory Committee expressed during deliberations, our members believe that the only instance in which Rule 23(b)(3) might be appropriate for mass tort litigation would be in the case of a single-incident mass accident, such as an airplane crash, where there are at least some common issues of fact and law, and real injuries.

However, although it may be that other amendments would resolve the underlying problems with class actions more efficiently or completely, we respect the Rules Enabling Act process and regard the Advisory Committee proposals as a reasonable result culled from the myriad of alternatives. Therefore, we strongly support going forward with the public comment period as the Advisory Committee has recommended, and look forward to the debate regarding the issues that the academics' "Steering Committee" has raised. At this stage, public vetting of these important issues will add significant value to the end result.

We appreciate the opportunity to share our views with you and the members of the Committee and to submit more detailed comments regarding the proposed amendments during the public comment period.

Sincerely yours,



Barry Bauman
Executive Director

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June 19, 1996

#931

The Honorable Alicemarie H. Stotler
Chair
Committee on Rules of
Practice and Procedure
United States District Court for
the Central District of California
Santa Ana, CA 92701

96-CV-018

Dear Judge Stotler:

I understand that the Committee on Rules of Practice and Procedure will review proposed amendments to Rule 23 of the Federal Rules of Civil Procedure concerning class actions at its June 19-21, 1996, meeting in Washington, D.C.

This is a subject of great interest to me and, of course, is of great importance to the civil justice system.

I take no position on the merits of the proposed amendments. But the Senate Judiciary Committee has always had great interest in the work of your committee. I hope that your committee will publish the proposed amendments for public comment. I believe that comment on these proposals will be very valuable to all interested parties, including this committee.

Sincerely,



Orrin G. Hatch
Chairman

OGH:mda

cc: Hon. Patrick E. Higginbotham
Chair, Civil Rules Advisory Committee

932

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96-CV-019

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June 20, 1996

Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Court
Washington, D.C. 20544

Dear Judge Stotler:

I am writing to oppose in part the letters dated May 28 and 31, 1996 that were sent to the Standing Committee by Professor Susan Koniak of Boston University Law School, on behalf of herself and some 144 other solicited law professor co-signers. That letter opposes the proposed Rule 23(b)(4) amendment whereby settlement classes *could* be approved under Fed. R. Civ. P. 23(e) as fair and adequate for the class, *even if* such classes *might not* (but might) have been certified prior to settlement had class certification been earlier contested.

The purpose of proposed 23(b)(4) is to overturn (and stop the spread of) Judge Becker's decisions in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (asbestos), and *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Lit.*, 56 F.3d 768, 797-804 (3d Cir. 1995) (allegedly defective trucks).¹ Both of those cases involved proposed mega-class settlements, which for a variety of reasons (*not* that they were "mega") should never have been approved as fair and adequate for the class under Rule 23(e)—e.g., in *Georgine* the settlement amount offered was not enough, or some groups within the total class were discriminatorily treated, or "futures" class members might be bound though never having been individually notified.² In *GM*, of course, (1) the class action never should have been brought because over 99% of the class members never experienced (or will) a side gas tank collision causing them *damage* (a small class limited to those actual property damage claims would have been proper), and (2) the \$1,000 "coupons" to

¹ *Accord, General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996).

² See generally Koniak, "Feasting While the Widow Weeps," 80 *Cornell L. Rev.* 1045 (1995).

be offered to class members would be worthless, because almost no one would use them.

This publication has vigorously criticized such inadequate class settlements for a quarter century, because the primary beneficiaries of the class action device should be class members and society, not lawyers. Rule 23(e) already requires that settlements be fair and adequate for the class and practically assures that at least the Rule 23(a) requirements will be satisfied—i.e., if the class was inadequately represented, the settlement will likely not be fair, and certification is rarely denied on commonality or numerosity grounds. Judge Becker's rationale will thus largely impact certain consumer, mass tort, and environmental class actions in which (b)(3) predominance and manageability turn on whether issues of causation, affirmative defenses, and applicable state law are common or individual.

Requiring that these issues be certifiable for litigation purposes will not, however, prevent inadequate class settlements. Nor will it prevent defendants from seeking out the competing class counsel who will settle for the least. These abuses can and do occur in cases where classes have been certified prior to settlement. Although class counsel who has a certified class is in a stronger position to argue for a larger settlement, that only means that counsel with a not yet certified class must factor in the *legitimate risk* of class denial in making his settlement demands. If there is a substantial risk that class certification will eventually be denied, defendants will ordinarily oppose certification rather than settle anyway.³ The bottom line impact of Judge Becker's rationale, if not corrected by the 23(b)(4) amendment (which Judge Becker himself has invited), will be that in many cases class members will recover nothing instead of something, because settlement certification will be denied, or they will recover less instead of more, because of the *risk* of settlement certification denial that will now have to go into the parties' settlement

³See *Castano v. American Tobacco Co.*, 1996 WL 273523 (5th Cir. May 23, 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 129 (7th Cir. 1995); *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996) (all of which we believe were erroneously decided). The exception may be certain mass tort class actions, such as *Georgine* and *Breast Implants*, in which defendants realize that many or most class members have claims large enough to sustain individual lawsuits (though with much higher transaction costs) and seek to buy "total peace" through an inadequate classwide settlement that could and should be disapproved under Rule 23(e). However, in *Breast Implants* the classes were certified prior to the double opt out settlement, though Judge Becker's *Georgine* analysis would likely have overturned that certification. Ironically, after Judge Posner's class denial in *Rhone-Polenc*, the defendants nonetheless renewed a \$640 million/\$100,000 per claimant *classwide* settlement offer. However, were Judge Becker's rationale the law in the Seventh Circuit, that settlement could not be approved, because class certification requirements (including Posner's new "legalized blackmail" criterion) had already been found not to be satisfied.

calculus. The deterrent and compensatory functions of the class action device will be correspondingly diminished. See Scott, "Two Models of the Civil Process," 27 *Stan. L. Rev.* 937 (1975). This would not seem to be an outcome that Judge Becker would have wanted. See *Ungar v. Dunkin Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975) (Becker, J), *rev'd*, 531 F.2d 1211 (1976).

Of equal importance, uncorrected by the 23(b)(4) amendment, Judge Becker's doctrine will totally distort the jurisprudence of Rule 23(b)(3) class certification decisions. Judge Becker's decisions will require every judge in every class action that is settled prior to a contested class certification decision (which is many of them) to take the extra step of making "findings" that the requirements of Rule 23, including (b)(3) predominance and superiority, would be satisfied for litigation purposes. Until recently this was a perfunctory process whereby the settlement-approving judge eagerly signed off on settlement class certification to get the complex case off of his docket—knowing that such settlement class certifications are of no precedential value.

There are two scenarios. First, judges eager to approve settlements (most of them)—even what look like very good settlements for the class—will go through the Rule 23(b)(3) requirements and find them all satisfied, even if under prior certification precedent they are not. These settlement class certification decisions will then take on the same precedential value as fully litigated class certification decisions. If I were a defense lawyer, I would dread that prospect, because there would eventually become some body of citable precedent to support the filing of even the most obviously uncertifiable class action.

The second and more troubling scenario cuts the other way. In rejecting the *Georgine* settlement, Judge Becker almost flatly held that no large personal injury mass tort class actions could ever be certified. Rather than reaching the merits (or lack thereof) of the *Georgine* settlement itself, Judge Becker cited such completely erroneous asbestos decisions as *Yandle v. PPG Indus.*, 65 F.R.D. 566 (E.D. Tex. 1974), and *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), for the proposition that such mass tort class actions can never satisfy the predominance requirement—and even repealing the Rule 23(c)(4)(A) provision that such claims can at least be certified for limited classwide issues. Nowhere mentioned were such well reasoned contrary decisions as *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 659-663 (E.D. Tex. 1990) (using classwide statistical sampling to put *Fibreboard* (same case) to rest); *In re Estate of Ferdinand Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995) (9,541 class members executed, tortured, or disappeared recovered \$766 million); *Allen v. United States*, 588 F. Supp. 247, 416-419 (D. Utah 1984) (atomic fallout victims' multiparty action); *In re Copley Pharmaceutical, Inc. "Albuterol" Prods. Liability Lit.*, 161 F.R.D. 456

Honorable Alicemarie H. Stotler
June 20, 1996
page 4

(D. Wyo. 1995) (adulterated prescription drugs), and many others. Thus, at least in the Third Circuit, whole classes of potentially meritorious class actions are now dead letters because Judge Becker decided to finesse the Rule 23(e) issue and reject the inadequate *Georgine* settlement on feigned Rule 23(b)(3) grounds.

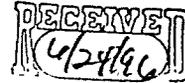
The proposed 23(b)(4) amendment should be accepted, so as to require federal judges to do their duty of *disapproving* proposed inadequate settlements under Rule 23(e), which judges have heretofore usually declined to do. Everyone agrees that many judges want to rid "complex" class actions from their clogged dockets, so they will approve virtually any proposed settlement (though this is changing). Rule 23 jurisprudence should not be distorted by requiring judges to issue Rule 23 settlement certification precedents that will either be overly generous or foreclose certain types of class actions forevermore. The issue is to devise some amendment to Rule 23(e) to make judges disapprove inadequate settlements under that provision. This is an issue that the Committee has not addressed, but it should.

Sincerely,



Beverly C. Moore, Jr.
Editor, *Class Action Reports*

#934



LINDA SYLVIA SILVER
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96-CV-020

JUNE 21, 1996

Standing Committee of Rules and Practices and Procedures
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Gentlemen:

It is so important that you help to protect the small investor from Investment Companies and Brokers who would be unscrupulous. These companies have the ability to hire law firms to help them take money from the small investors. We need some strong laws and guide lines to help us.

Sincerely yours,

Linda Sylvia Silver

#935

MICHAEL P. SMALL, M.D., P.A.

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June 17, 1996

96-CV-021

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The Standing Committee of Rules &
Practices & Procedures
Administrative Office of the U.S. Courts
Washington, D.C. 20544

To Whom It May Concern:

I am writing this letter to express to the federal judges who are meeting regarding protecting investors' rights.

The small investor has absolutely no recourse against big companies and we need the same rights and privileges other people get in other areas of litigation regardless of whatever settlements in the past have been.

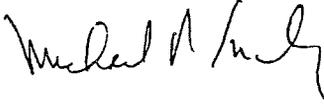
It is wrong to effectively tell companies "that they can steal millions of dollars provided it caused the average victim less than \$20.00" and they should have the right to get away with that.

I feel that it is your responsibility to look out for us, the small investor.

I also don't feel that we should be locked into arbitration or into mediation in contracts that the big investment companies try and force us to sign.

If you have any questions, please don't hesitate to contact me.

Very truly yours,



Michael P. Small, M.D.

MPS:pat

#937

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96-CV-022

June 18, 1996

VIA FACSIMILE

Honorable T. S. Ellis, III
200 S. Washington St.
Post Office Box 21449
Alexandria, VA 22320-2449

Re.: Rule 23

Dear Judge:

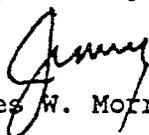
I hope you won't think it presumptuous of me to address you on the subject of your role in the rule making process. I have followed the potential amendment of Rule 23 for a number of years, serving on a special committee of the American College of Trial Lawyers devoted to that precise topic and as a supporter of Lawyers for Civil Justice. From a personal view, I agree with some and oppose some of the proposed amendments, but I believe it is time that it be released.

As a practicing trial lawyer, I was looking forward to the opportunity for the trial bar to actively participate and comment in the process when your committee "reported out" the proposed amendments after four to five years of careful study. Now, I am informed that opposition has arisen to even releasing the proposed amendments for public comment; hence my letter.

The trial bar is looking forward to an opportunity for open comment from the standpoint of the practice as we know it. Of course, there are significant policy questions at stake here and not just technical changes in the rules. That alone would make it important that everyone be allowed to participate in an open forum so that your committee can have the full input of all of the interested parties.

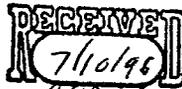
From my standpoint, I believe the committee process has functioned well and that the report should be released to allow the full panoply of commentary it deserves.

Respectfully yours,


James W. Morris, III

JWM, III/nr

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96-CV-023

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July 8, 1996

Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice and Procedure
c/o John K. Rabiej, Chief, Rules Committee Support Office
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Revisions to Fed.R.Civ.P. 23

Dear Judge Stotler,

I am writing in response of the proposed revisions to Federal Rule of Civil Procedure 23, which I recently had the opportunity to review. These proposed changes were of great interest to me, as I have been involved in complex mass tort and product liability class action litigations in the role of class counsel since 1977. The cases in which I have worked in the past, and currently, have been both in the federal and state courts.

Also, I have participated as lead counsel in a variety of complex cases consolidated through the Panel on Multidistrict Litigation. Therefore, while I have for many years been involved in a multitude of complex cases, I have not always selected a class action as the vehicle through which to manage each of these cases. I do proceed pursuant to Rule 23 when a class action is the most expedient and economical vehicle for purposes of case management.¹

The following are my comments on the proposed revisions to Rule 23, which I have attempted to keep short and to the point.

(b)(3)(A): The addition of "the practical ability of individual class members to pursue their

¹ I have attached a partial listing of complex cases in which I have been involved, for your review.

claims" should not be included as a primary consideration in determining whether a class action is a superior method for the fair and efficient adjudication of the controversy presented. In many (B)(3) class actions, class members do have the ability, as a practical matter, to individually litigate. The more relevant inquiry is whether or not class members have an interest in and desire to individually litigate. If class members elect to proceed via a class action, it would be improper to deny them the opportunity to do so upon the basis that class members are capable of proceeding individually. Further, including "practical ability" as a certification consideration provides the opposing party with a very easy argument through which to defeat class certification. One of the most relevant situations which I can submit as an example is the Bowling heart valve litigation. A class of more than 50,000 valve recipients worldwide was certified for settlement purposes. The claims of the class members all centered upon a particular heart valve manufactured by Shiley Incorporated and Pfizer Inc, which was allegedly defective in that the valve had a propensity to fracture. All class members had identical causes of action. The injuries actually suffered fell into several distinct categories. Damages, of course, differed. A large number of the class members had the practical ability of pursuing individual litigation. However, due to the complexities and expense of proving liability, more than 90% of the class desired to move forward in a class action, and the class action ultimately proved to be the most efficient and practical manner by which to resolve these claims. Further, the equitable relief obtained through the Bowling settlement, such as diagnostic research, was extremely important to the class members and could not be accomplished through individual litigation.

(b)(3)(C): The "maturity" of related litigation concerning the controversy already commenced by or against members of the class would be a relevant inquiry. The "maturity" of any related litigation, irrespective of the subject matter of the controversy, may not be relevant. The causes of action set forth in related litigations may be far different from those which are alleged in a class action suit. The maturity of such differing causes of action is not a proper issue for consideration when determining class certification. Same and similar causes of action in related litigation should be the proper area of inquiry.

(b)(3)(F): Class certification decisions are typically made at a very early stage of the litigation. It is usually very difficult, if not impossible, to determine the probable relief to which class members will be entitled and the costs of the litigation in a (b)(3) class action. At the time of class certification, it is impossible to know whether or not the litigation will be resolved through settlement prior to trial or if trial will be necessary. If trial is needed, the costs increase dramatically. From a practical standpoint, any argument made as to this factor would be extremely speculative. Certification should be neither granted nor denied upon the basis of speculation.

(c)(1): The change in language from "as soon as practicable" to "when practicable" is counterproductive. It is not common practice in most class actions to decide motions to dismiss and motions for summary judgment prior to certification. If the court decides such motions prior to certification, the decision is not res judicata as to any claims but those of the named class representatives. Decisions so early in the proceedings do not benefit the court or the parties filing such motions, for closure cannot be accomplished. Further, the majority of discovery usually does not take place until subsequent to class certification and

thus motions for summary judgment are premature prior to certification. In many cases, until class certification, discovery is stayed as to all issues except for certification issues. Also, as a practical matter, many district court local rules require speedy certification decisions. The only benefit derived from such a change would be to courts which have a history of delayed certification decisions. Finally, this change in language does nothing to encourage pre-certification negotiations. In the first instance, pre-certification settlements are rare. If settlement is a possibility, a delay in the certification process does not promote speedy resolution.

(e): The proposed language change is burdensome and unnecessary. In many class actions, the suit is not dismissed upon settlement. More typically, the court retains jurisdiction to administer the settlement and the case remains open until final distribution. The language change appears to require another notice and hearing at the time of the dismissal subsequent to settlement. This would constitute an unnecessary cost and would not be expedient for the court or the parties. It must be recalled that many class actions involve thousands of class members and notices must often be published as well as mailed individually. The cost involved may be extremely substantial.

(f): The proposed rule is inherently unfair, unnecessary and defeats the primary purposes of the class action, i.e. efficiency and expediency. An order denying class certification is already considered final and appealable. The new rule arbitrarily and inequitably alters the nature of such an appeal from one of right to one of discretion. Further, appeal time is arbitrarily shortened to only 10 days. Currently, the granting of class certification may be questioned by filing a Writ of Mandamus. This assures a quick determination on the merits by a court of appeals. By making the order of denial immediately appealable as an interlocutory order, a delay of twelve to eighteen months or more is guaranteed before a decision is rendered by a court of appeals. It is irrelevant whether or not jurisdiction then remains with the district court, for as a practical matter, the parties and the court will not want to move forward and continue the litigation for such an extended period of time. It would simply be a waste of time and money to move forward when the possibility of reversal exists.

Last, I question the finding of the Federal Judicial Center that the median individual class member recovery has been \$315 to \$528 in (b)(3) class actions. I have never been involved in a class action in federal court where monies in this range have constituted the only recovery. There have been instances wherein the equitable relief has been primary and the individual damages recovered have been secondary and minimal, but never a full recovery such as that stated. I believe that it is inaccurate to rely upon this median range when addressing the need for amendments to Rule 23. Also, in the same vein, Rule 23 provides a much needed vehicle for accomplishing equitable relief over and above money damages, and this factor should be seriously considered before changes are instituted.

Thank you.

Sincerely,

Stanley M. Chesley

WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.
COMPLEX LITIGATIONS

Bowling, et al. v. Pfizer, et al., U.S. District Court, Southern District of Ohio, Western Division (Class Action)

Procter & Gamble Co. vs. Bankers Trust, et al., U.S. District Court, Southern District of Ohio, Western Division

Chamberlain, et.al. v. AK Steel Corp., Court of Common Pleas, Butler County, Ohio (Class Action)

In Re Copley Pharmaceuticals, Inc., "Albuterol" Products Liability Litigation, U.S. District Court, District of Wyoming (Class Action)

In Re Teletronics Pacing Systems, Inc., Accufix Atrial "J" Leads Products Liability Litigation, U.S. District Court, Southern District of Ohio, Western Division

In Re Commercial Explosives Price Fixing Litigation, U.S. District Court, District of Utah

Amy Adams, et.al. v. Beverly Kaech, et.al., U.S. District Court, Southern District of Ohio, Western Division at Dayton

In Re Silicone Gel Breast Implant Products Liability Litigation, U.S. District Court, Northern District of Alabama, Southern Division (Class Action)

In Re Fernald Litigation (I and II), U.S. District Court, Southern District of Ohio, Western Division (Class Action)

In Re: US Air Disaster at New York LaGuardia Airport on March 22, 1992, U.S. District Court, Northern District of Ohio, Eastern Division

State of Ohio, ex rel. Lee Fisher, Attorney General v. Louis Trauth Dairy, Inc., et al., U.S. District Court Southern District of Ohio, Western Division

Nelson, et al. v. BASF Corp., et al./ Ewing, et.al. v. BASF Corp., et.al., Court of Common Pleas, Hamilton County, Ohio (Class Action)

In Re Miamisburg Train Derailment Litigation, Court of Common Pleas, Montgomery County, Ohio (Class Action)

Ferguson, et al. v. United States Government, U.S. District Court, Western District of Kentucky, at Owensboro

Teresa Boggs, et al. v. Divested Atomic Corp., et al., U.S. District Court, Southern District of Ohio, at Columbus (Class Action)

In Re Choice Care Litigation, U.S. District Court, Southern District of Ohio, Western Division (Class Action)

In Re Chubb Drought Insurance Litigation, U.S. District Court, Southern District of Ohio, Western Division (Class Action)

In Re San Juan DuPont Plaza Hotel Fire Litigation, U.S. District Court, District of Puerto Rico

In Re Northwest Flight #255 Air Crash at Detroit Metropolitan Airport, on August 16, 1987, U.S. District Court, Eastern District of Michigan, Southern Division

In Re Aircrash Disaster of Pan Am World Airways Flight #103, on December 21, 1988 at Lockerbie, Scotland, U.S. District Court, Eastern District of New York, at Brooklyn

In Re Air Crash at Gander, Newfoundland on December 12, 1985, U.S. District

Court, Eastern District of Kentucky at Louisville
In Re Union Carbide Corporation, Gas Plant Disaster at Bhopal, India In December, 61984, U.S. District Court, Southern District of New York
In Re Agent Orange Litigation, U.S. District Court, Eastern District of New York (Class Action)
In Re MGM Grand Hotel Fire Litigation, U.S. District Court, District of Nevada
In Re "Bendectin" Product Liability Litigation, U.S. District Court, Southern District of Ohio, Western Division (Class Action)
In Re Holiday Inn, Cambridge, Ohio Fire Litigation, U.S. District Court, Southern District of Ohio, Western Division
In Re Air Canada Disaster, U.S. District Court, Middle District of California, at Los Angeles; Eastern District of Kentucky at Covington
In Re Beverly Hills Fire Litigation, U.S. District Court, Eastern District of Kentucky, at Covington (Class Action)
In Re E.W. Scripps-Howard Post Printers Litigation, U.S. District Court, Southern District of Ohio, Western Division

#1007

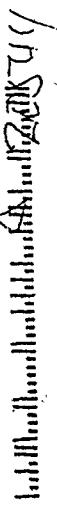
96-CV-0047
7/9/96
DEC 31

JOHN W. GAY
P.O. Box 974 #54 Hoff Rd
Kenwood, CA 95452
707-833-5469
707-833-5447F



DEC 31 17/6/96

USA 20
Standing Committee
of Rules & Administration
of the
U.S. Court
Washington DC



It is outrageous & beyond
comprehension that the
courts will consider a
proposal making it tougher
to bring class action suits
in cases of possible securities
fraud or price fixing.
We must have that
protection! JWB

10.31

Tiled

RECEIVED
7/16/96

96-CV-025
025

Penny OMARA 30%
PO 613
Reedport
OR 971467

Hello!!

Could you please
send me proposals on
fraud or price fixing lawsuits
to be heard soon - if not
already read. If its' too late,
I'd like to know status, im
against weakening of this rules.
Thankyou Penny O'Hara

1196

Protect your rights

In mid-June a group of federal judges are meeting to consider a proposal that would make it tougher to bring class-action securities fraud or price-fixing lawsuits charging that many people have suffered small losses.

"It would effectively tell companies that they can steal millions, provided it costs the average victim less than \$25," says Columbia University law professor John Coffee. A second proposal under review could encourage plaintiffs' attorneys to forge settlements that may not be in the best interests of their clients. Both would need approval by the Supreme Court.

You can get the proposals and submit comments by writing to the Standing Committee of Rules and Practices and Procedures, Administrative Office of the U.S. Courts, Washington, D.C. 20544. — Ruth Simon

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8/16/96

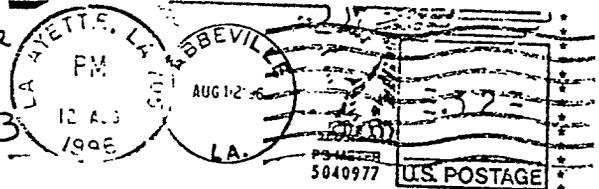
96-CV-026A

Dear Sirs,

I do not feel that this proposal is in the best interest of the American public. Please work to protect our rights!

Sincerely,
Kim Moresi

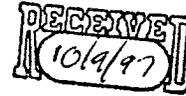
Kim Moresi
610 W. Lastic
Ezath, LA
70533



Standing Committee
of Rules and Procedures
Administrative Office of
the U.S. Courts

#1485

United States District Court
Northern District of Texas



Chambers of
Judge John McBryde

96-CV-027 501 W. 10th Street, Rm. 401
Fort Worth, Texas 76102
(817) 885-7574

October 4, 1996

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice
& Procedure of the Judicial
Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

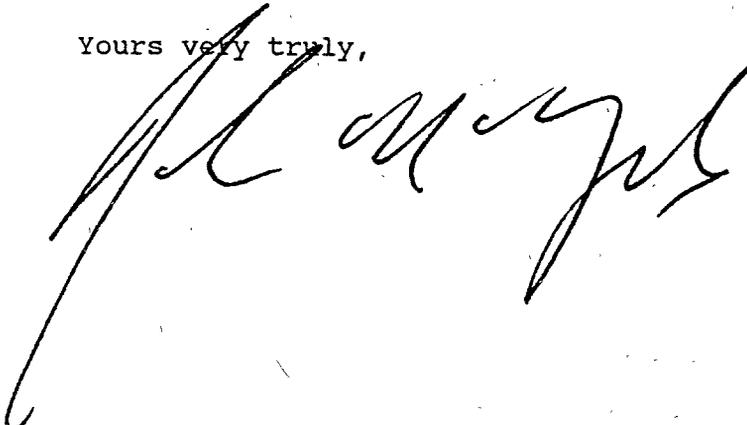
Re: Preliminary Draft of Proposed Amendments to the Federal
Rules of Appellate, Civil, and Criminal Procedure dated
August 1996

Dear Mr. McCabe:

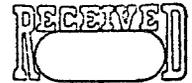
This letter is in response to the request for comments by
the Committee on Rules of Practice & Procedure of the Judicial
Conference of the United States.

I object to the proposed amendment of Fed. R. Civ. P. 23 to
allow the certification of a class for purposes of settlement
even though the requirements of certification might not be met
for purposes of trial. The addition of proposed section (b)(4)
will tend to defeat safeguards built into Rule 23 against
improper class action activity. If the action does not meet the
requirements for certification, it should not be certified as a
class action for any purpose.

Yours very truly,



JM/lt



96-CV-028

Bartlett H. McGuire
P.O. Box 7287
Bend, OR 97708

Phone: 541-383-2136 Fax: 541-382-9168

September 30, 1996

MEMORANDUM TO: ADVISORY COMMITTEE ON CIVIL RULES

RE: SUGGESTED REVISION TO PROPOSED RULE 23(b)(3)

Enclosed is an article I have drafted regarding preliminary hearings on the merits under Rule 23(b)(3). The article comments favorably on the Advisory Committee's current proposals to amend Rule 23, but suggests a further amendment that would supplement those proposals. The suggested amendment would permit district courts to assess the merits as part of their analysis of superiority.

The article takes a fresh look at an issue that the Committee has considered in detail during the past year:

- It suggests that many of the current problems with Rule 23 have been caused, at least in part, by the Supreme Court's dictum in *Eisen v. Carlisle & Jacquelin*:

"[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

- It suggests that *Eisen* was ill-considered to begin with, and has been undermined by subsequent Supreme Court holdings. Nevertheless, *Eisen* retains considerable vitality today.

- It catalogues the approaches taken by the lower courts to circumvent *Eisen*.

- It documents the inconsistencies and splits in authority that have followed -- inevitably -- from the coexistence of decisions circumventing *Eisen* and decisions following it.

- It discusses five significant appellate rulings, issued during the past year and a half, that have further undermined *Eisen*:

Castano, Georgine, In re Asbestos Litigation -- all 1996 rulings --
Rhone-Poulenc, and *General Motors Pick-Up Trucks*.

- It suggests that the Advisory Committee's proposals would further weaken *Eisen* -- without overturning it. Those proposals would accordingly resolve few of the inconsistencies and splits in authority that *Eisen* has engendered.

- It addresses the concerns about preliminary hearings on the merits that were expressed at the Advisory Committee's meeting of April 18-19, 1996.

- It suggests specific language that could be added to Rule 23(b)(3), in order to permit preliminary hearings on the merits. The language is intended to be as neutral as possible. Alternative language is noted, however -- in case some Committee members favor preliminary assessments of the merits, but prefer language different from mine.

The article draws on my experience as a class action litigator but also reflects the scholarship and detachment that are, I hope, hallmarks of my reincarnation as a law professor. As a litigator, I concluded long ago that judges often peeked at the merits before ruling on class action motions. As a professor, I have provided (1) research to support that conclusion, and (2) policy arguments (as well as practical arguments) to support the proposition that judges should be permitted to consider the merits in assessing the superiority of class action treatment.

Based on the analysis presented in the enclosed article, I urge the Committee to reconsider the issue of preliminary hearings. I would be pleased to talk with any of the Committee members at any convenient time. The article will appear in the November advance sheets of Federal Rules Decisions.

Bart M'bine

**THE DEATH KNELL FOR EISEN:
WHY THE CLASS ACTION ANALYSIS
SHOULD INCLUDE AN ASSESSMENT OF THE MERITS**

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**THE DEATH KNELL FOR *EISEN*:
WHY THE CLASS ACTION ANALYSIS
SHOULD INCLUDE AN ASSESSMENT OF THE MERITS#**

By Bartlett H. McGuire*

In *Eisen v. Carlisle & Jacquelin*, the Supreme Court said, in dictum:

"[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."¹

That statement has been cited extensively and retains substantial vitality today.² However, insofar as it applies to actions for monetary damages, the statement is unsound as a matter of policy, inaccurate as an interpretation of Rule 23, and inconsistent with later Supreme Court statements. It has accordingly been circumvented with increasing boldness by the lower courts.

Five recent appellate court opinions illustrate the judiciary's reluctance to apply *Eisen*:

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*Visiting Professor of Law, Northwestern School of Law (Lewis & Clark College); Senior Counsel, Davis Polk & Wardwell. The author acknowledges with thanks the thoughtful contributions of his colleague, Edward J. Brunet; and his research assistant, Scott Kerin.

¹*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152 (1974).

²See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *Shores v. Sklar*, 844 F.2d 1485, 1494 (11th Cir. 1988), cert. denied, 493 U.S. 1045 (1990); *McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 n.8 (D.C. Cir. 1984); *Anderson v. Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982); cases cited *infra* at note 63. As recently as last year, the *Harvard Law Review* cited *Eisen* for the following proposition: "As a matter of doctrine, the Supreme Court has held that the merits of a class's claims are irrelevant to the granting of certification." Recent Case, *Class Actions -- Class Certification of Mass Torts -- Seventh Circuit Overturns Rule 23(b)(3) Certification of a Plaintiff Class of Hemophiliacs -- In re Rhone-Poulenc Rorer, Inc.*, 109 HARV. L. REV. 870, 873 (1996).

- In *Rhone-Poulenc* and *GM Trucks*, the courts based Rule 23(b)(3) rulings in large measure on their preliminary assessments of the merits.³

- In *In re Asbestos Litigation*, the court upheld a Rule 23(b)(1)(B) settlement after a detailed review of the district court's preliminary assessment of the merits.⁴

- In *Castano*, the court overturned the certification of a nationwide class of allegedly-addicted tobacco users, because (among other things) there was no track record of previous trials that would shed light on the merits. The court held that such a track record was a necessary predicate to determining whether class action treatment was the superior method of adjudicating the controversy.⁵

- In *Georgine*, the court urged the Advisory Committee to consider an amendment to Rule 23 that would permit a preliminary assessment of the merits.⁶

There is an obvious tension between decisions that permit assessment of the merits as part of the class action analysis, and decisions that continue to follow *Eisen*. The line between the two kinds of decisions is unclear,⁷ as is the logic of the courts' line-drawing process.

³See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995) (vacating class certification); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liabil. Litig.*, 55 F.3d 768, 814-17 (3d Cir.), cert. denied, 116 S.Ct. 88 (1995) (hereinafter "*GM Trucks*") (disapproving settlement and vacating the certification of a settlement class).

⁴*In re Asbestos Litig.*, 90 F.3d 963, 988 (5th Cir. 1996).

⁵See *Castano*, 84 F.3d at 740, 744.

⁶See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635 (3d Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3159 (U.S. Aug. 19, 1996) (No. 96-270) (vacating the certification of a settlement class).

⁷There are differences among the courts as to when a preliminary assessment of the merits will be permitted and when it will not. See *infra* notes 10, 64-65, 79, 102-03, 112 and accompanying text. Those differences are reflected by the fact that in four of the recent cases discussed above -- *Rhone-Poulenc*, *GM Trucks*, *Castano* and *Georgine* -- the courts of appeals vacated the district courts' decisions.

The Advisory Committee on Civil Rules has proposed several amendments to Rule 23(b)(3) that relate to *Eisen*, but deal incompletely with the confusion and inconsistencies that *Eisen* has generated. Those amendments would (1) remove some of the bases for the *Eisen* dictum, and (2) incorporate into Rule 23 several judge-made principles that foster assessment of the merits -- but only in limited circumstances.⁸

The better solution, in my view, is to jettison *Eisen* entirely, at least in suits involving claims for monetary relief. This article makes the case for doing so.

- Section I outlines many of the problems, such as the proliferation of settlements unrelated to the merits, that are associated with class actions seeking monetary relief. Those problems would be ameliorated if the courts were permitted to make preliminary assessments of the merits.

- Section II suggests that the *Eisen* dictum (a) was ill-considered as an interpretation of Rule 23, and (b) has been undermined by subsequent Supreme Court decisions.

- Section III catalogues the circumstances in which the courts have refused to apply *Eisen*. This section also notes the splits in authority and inconsistencies in approach that *Eisen* has engendered.

- Section IV recognizes that the lower courts cannot completely disregard a Supreme Court precedent that has yet to be overruled. Therefore, after analyzing prior suggestions for amending Rule 23, the section outlines a proposed amendment that would definitively overturn *Eisen*. The amendment would provide that an assessment of the merits can be included in the Rule 23(b)(3) analysis of the superiority of class action treatment. Such an assessment could be made on a preliminary basis, after limited discovery, in a proceeding modeled after Rule 65 (which deals with preliminary injunctions).⁹

⁸See *infra* notes 144-53 and accompanying text. The Advisory Committee on Civil Rules has been appointed by the Judicial Conference of the United States, pursuant to 28 U.S.C. ss 2072-74, to recommend changes in the Federal Rules of Civil Procedure for consideration by the Supreme Court and, ultimately, by Congress.

⁹See FED. R. CIV. P. 65; *infra* notes 54, 161-62, 166-69 and accompanying text.

This proposal could readily be considered, along with the Advisory Committee's proposals, during the six-month comment period (August 15, 1996 to February 15, 1997) that has been established by the Advisory Committee. The number and importance of the recent decisions circumventing *Eisen*, and the controversy that they have already generated,¹⁰ suggest the need for an immediate reconsideration of both *Eisen* and Rule 23.

I. Policy Reasons for Considering the Merits

A. The Impact of Class Certification Today

Where claims for monetary relief are made under Rule 23, the issue of class certification is "the single most important issue in the case."¹¹ The reasons are obvious. Class certification transforms a relatively small case, involving at most a handful of plaintiffs, into one involving hundreds, thousands or even millions of potential claimants. Classwide damages can reach into the billion-dollar range. The transformation from individual to class action status can have dramatic effects on the dynamics of the litigation.

In some situations (e.g., the asbestos, Agent Orange and Dalkon Shield litigations), class action treatment is designed to bring order and efficiencies to thousands of individual cases that have already been brought, or that would be brought absent class certification. The transaction costs of litigating these individual cases are so high, and the adverse effects on the administration of justice are so substantial, that class action treatment -- with all of its potential

¹⁰See, e.g., *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 460-61 (D. Wyo. 1995) (criticizing and refusing to follow *Rhone-Poulenc*); Recent Case, *supra* note 2, 109 HARV. L. REV. at 873-75 (criticizing *Rhone-Poulenc*). See also *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996) (criticizing and refusing to follow *Georgine's* insistence upon "strict application" of the Rule 23 criteria to settlement classes (83 F.3d at 617-18, 625)). See also *infra* note 152.

¹¹See ARTHUR R. MILLER, FEDERAL JUDICIAL CENTER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 12 (1977); Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 300 (1980).

disadvantages -- may become the most practical method of handling the claims.¹²

In other situations, class certification allows the pursuit of meritorious claims that would be uneconomic to bring on an individual basis. Absent class treatment, the wrongdoers would escape liability.¹³

1. Settlement Leverage

On the negative side, class certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous.¹⁴ Despite the courts' heightened receptivity to summary judgment in recent years,¹⁵ tenuous claims are hard to

¹²See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *In re "Agent Orange" Prod. Liabil. Litig.*, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004, 108 S.Ct. 695 (1988); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 852, 107 S.Ct. 182 (1986). See also William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 839 (1995) ("The pressures generated by mass tort litigation are driving the justice system toward comprehensive aggregation procedures and, apart from bankruptcy, Rule 23 offers the most readily available tool").

¹³See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 99-100 (1994) (the small-claimant class action "creates litigation where none would otherwise exist The principal reasons have to do with deterrence and disgorging unjust gains"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 2973 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually").

¹⁴See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.), cert. denied, 116 S.Ct. 184 (1995); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring), cert. denied, 421 U.S. 963, 95 S.Ct. 1950 (1975) ("what [plaintiffs' counsel] seek to create will become . . . an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust"); 1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(f) (on file with the author); Berry, *supra* note 11, at 300-01; Joseph A. Katarincic & Allan McClain, *Federal Class Actions Under Rule 23: How to Improve the Merits of Your Action Without Improving the Merits of Your Claim*, 33 U. PITT. L. REV. 429, 432, 437 (1972); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits -- The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) ("Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlements is not a rule of procedure -- it is a form of legalized blackmail").

¹⁵See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355-

dispose of before trial; and jury trials are risky propositions, in part because critical facts can be established by proof that they are more likely than not to have occurred. Even a small degree of risk -- e.g., ten percent -- can lead to a substantial settlement if the aggregate class claims are in the million or billion-dollar range.¹⁶ As the Supreme Court has stated:

"Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense."¹⁷

In addition, class action treatment -- because of the leverage it affords to plaintiffs -- can create multi-party litigation where it would not otherwise exist and where, because of the weakness of the claims, it should not exist.¹⁸ As the Fifth Circuit noted in

56 (1986); *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932, 107 S.Ct. 1570 (1987) (regarding the "perception that this court is unsympathetic" to summary judgment: "Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time").

¹⁶See, e.g., *In re "Agent Orange" Prod. Liabil. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987), cert. denied, 484 U.S. 1004, 108 S.Ct. 695 (1988) (\$180 million settlement despite "slim" chances of plaintiffs recovering in a case the district judge viewed as "virtually baseless"). See also *Castano*, 84 F.3d at 746.

¹⁷*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476, 98 S.Ct. 2454, 2462 (1978). See *Castano*, 84 F.3d at 746 ("class certification creates insurmountable pressures on defendants to settle The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). Additional factors, such as the risk of losing insurance coverage and corporate indemnification if plaintiffs win, can also contribute to defendants' willingness to settle tenuous class action claims. See, e.g., Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 550-57 (1991). The notice that attends a class certification may also prove harmful to defendants and drive down the stock prices of defendant corporations. The "publicity and its official source may inflate the apparent importance of the action. . . . [M]any persons would incorrectly infer that this Court regarded the plaintiffs' complaint as prima facie well-founded." *Dolgow v. Anderson*, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), reversed on other grounds, 438 F.2d 825, 830 (2d Cir. 1971). See *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 757-58, 760 (3d Cir.) (en banc), cert. denied, 419 U.S. 885, 95 S.Ct. 152 (1974); *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 399 (S.D.N.Y. 1967).

¹⁸See, e.g., *In re "Agent Orange" Prod. Liabil. Litig.*, 818 F.2d at 165 ("The drum-beating that accompanies a well-publicized class action claiming harm from toxic exposure and the speculative nature of the exposure issue may well attract excessive numbers of plaintiffs with weak to fanciful cases"); *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974) (It is important "to avoid creating lawsuits where none

Castano, "Class certification magnifies and strengthens the number of unmeritorious claims."¹⁹

2. The Tendency to Settle Without Regard to the Merits

In class action litigation, plaintiffs' lawyers generally make the litigation decisions because they have much more at stake than their clients.²⁰ The lawyers work on a contingent basis, without compensation until the end of the case. This creates a temptation to engineer settlements, with little regard to the merits, that will provide the plaintiffs' lawyers with a prompt and secure return.²¹

previously existed. . . . If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason"); Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 105 ("Rather than making one case out of many, the *Eisen* category involves making one enormous case out of none").

¹⁹Castano, 84 F.3d at 746; see John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L. J. 625, 628 (1987); *infra* note 22 and accompanying text.

²⁰See, e.g., *Mars Steel Corp. v. Continental Illinois Nat'l Bk. & Tr. Co.*, 834 F.2d 677, 678, 681 (7th Cir. 1987) ("Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest"); Alexander, *supra* note 17, at 536; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 700-01 (1986).

²¹See, e.g., Bone, *supra* note 13, at 92 n.45, 105; 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, 22-23, 44-45 (1991); Alexander, *supra* note 17, at 536-43; Coffee, *supra* note 20, at 717-18, 724-25; MINUTES OF THE ADVISORY COMM. ON CIVIL RULES at 18 (Nov. 9 & 10, 1995) (on file with the author of this article) (some "class actions are simply means by which complaisant plaintiffs' lawyers offer res judicata for sale at bargain rates to intimidated defendants"). See also *Chesny v. Marek*, 720 F.2d 474, 477 (7th Cir. 1983), *rev'd on other grounds*, 473 U.S. 1, 105 S.Ct. 3012 (1985).

A noteworthy example of the problem -- which resulted in the rejection of a proposed settlement -- was *In re Ford Motor Co. Bronco II Prods. Liabil. Litig.*, 1995 WL 222177 (E.D. La. 1995). The class members had allegedly suffered economic injury due to the propensity of Ford Broncos to roll over. The court found that the class had "a reasonable chance of success on the merits." Nevertheless, the proposed settlement called for the class to receive "no or merely speculative consideration" -- i.e., "safety information . . . to which they were already entitled . . ." Class counsel, by contrast, were to receive \$4 million directly from Ford -- 2.59 times the lodestar amount of \$1,546,777, or \$441.23 per hour for each member of plaintiffs' legal team (fewer than half of the members were lawyers). See *id.* at **5, 7-9.

Since plaintiffs' lawyers as well as defendants can thus have financial interests in settling regardless of the merits, the results of class action litigation tend to be skewed toward the middle. Strong cases are often settled for too little, and weak cases for too much -- which further encourages the filing of marginal claims.²²

The temptation for plaintiffs' lawyers to settle strong cases too early, and for too little, can be enhanced by pre-certification settlement negotiations that occur "without any effective monitoring by class members who have not yet been apprised of the pendency of the action."²³ Those negotiations can lead to inadequate settlements; "[w]ithout the benefit of more extensive discovery, both sides may underestimate the strength of plaintiffs' claims."²⁴

Another factor that affects settlements, at least in the mass tort arena, is the practice of certifying classes before there has been substantial experience with actual trials and decisions in individual cases. As the Advisory Committee has stated:

"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

²²See, e.g., 1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(b)(3); Coffee, *supra* note 20, at 714, 718 ("in some areas, the law seems to have institutionalized a process which ensures that a [class action] case will be settled on a basis that need not closely reflect the litigation odds. . . . [As a result,] plaintiffs' attorneys have less reason to screen their cases and may bring weak cases whose settlement value, when based simply on the litigation odds, would not normally cover the attorneys' opportunity costs"); *id.* at 724; Alexander, *supra* note 17, at 501 ("A nonmerits-based settlement regime also encourages the filing of more and weaker suits, while undercompensating actual victims").

²³*GM Trucks*, 55 F.3d 768, 788 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995) (holding that a pre-certification settlement was not fair and reasonable to the class). One potential problem, arising "because the court does not appoint a class counsel until the case is certified, [is that] attorneys jockeying for position might attempt to cut a deal by underselling the plaintiffs' claims relative to other attorneys." *Id.*; see *Mars Steel Corp.*, 834 F.2d at 681; *In re Asbestos Litig.*, 90 F.3d 963, 994-95 (5th Cir. 1996) (Smith, J., dissenting).

²⁴*GM Trucks*, 55 F.3d at 789. See *In re Asbestos Litig.*, 90 F.3d at 1000 (Smith, J., dissenting) (permitting settlement classes "creates an unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class").

time. . . . 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.*"²⁵

These conclusions derive additional support from empirical studies suggesting that in the securities law area, class actions are often settled for amounts that do not reflect the merits of the cases.²⁶ Although the statistical underpinnings of those studies have been challenged,²⁷ the conclusions make sense in theory and reflect the practical experience of judges and commentators.²⁸

²⁵1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(b)(3) (emphasis added). For a further discussion of "maturity," see *infra* notes 67-68, 80-86, 144-46 and accompanying text.

²⁶See Joseph A. Grundfest, *Commentaries: Why Disimplify?*, 108 HARV. L. REV. 727, 742-43 (1995) (the available data support the conclusion that "merits matter to varying degrees in different cases, and in many settlements the merits may not matter at all. . . . [T]hree [recent] studies suggest that from 22% to 60% of observed settlements are sufficiently low that the merits may not have mattered at all in the resolution of the litigation"); Alexander, *supra* note 17, at 500, 514-22, 597-98; FREDERICK C. DUNBAR, NATIONAL EC. RESEARCH ASSOCS., RECENT TRENDS IN SECURITIES CLASS ACTION SUITS (1992); FREDERICK C. DUNBAR & VINITA M. JUNEJA, NATIONAL EC. RESEARCH ASSOCS., RECENT TRENDS II: WHAT EXPLAINS SETTLEMENTS IN SHAREHOLDER CLASS ACTIONS? 14 (1993), reprinted in *Private Litigation under the Federal Securities Laws: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs, 103rd Cong., 1st Sess. 739-75 (1993) ("Hearings")* ("without overstating our statistical findings, if one had to choose among the more important of the three factors in explaining settlements -- stock price volatility, availability of assets and merits of the case -- it would appear that the merits matter the least"); Vincent E. O'Brien & Richard W. Hodges, *A Study of Class Action Securities Fraud Cases 1988-1993, summarized in Hearings* at 46-48, 138-41.

²⁷See Joel Seligman, *The Merits Do Matter, A Comment on Professor Grundfest's "Disimplifying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438, 448-55 (1994). Professor Seligman concludes, after analyzing several studies cited for the proposition that securities law class actions settle without regard to the merits: "[S]erious methodological deficiencies exist in all these studies. . . . What has been most lacking in the legislative debate to date has been authentic data that provides empirical or theoretical support for particularized law revision. If there is a case for significant changes in the federal securities class action law, it simply has not been presented to date." *Id.* at 450, 457.

In a response to the Seligman commentary, Professor Grundfest adopts an intermediate and readily-defensible position: "The debate over whether the merits matter in the settlement of securities fraud actions will not be won by those who claim that the merits never matter or by those who claim that the merits always matter.

In short, the result -- homogenized settlements that insufficiently reflect the merits -- is in substantial measure preordained by court rulings that class treatment is appropriate. From that point forward, there is a risk that the cases will be processed rather than resolved on the merits. "Indeed, in a world where all cases settle, it may not even be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes."²⁹

B. The Benefits of a Preliminary Assessment of the Merits

The dynamics of class action litigation would be dramatically altered if the courts, in making their class action rulings, were free to consider the merits of the underlying claims. The merits could be assessed by an analysis of prior judgments or test cases, especially in mass tort litigation where individual claims are large enough to be pursued. In small-claim cases where individual litigation is uneconomic, the courts could undertake an inquiry similar to that conducted in a preliminary injunction hearing. In some situations -- e.g., where only a handful of individual cases have been pursued -- a combination of the two approaches might be appropriate. See Section IV(C)(2), *infra*. If the courts were thus free to make preliminary assessments of the merits:

1. There would be far less risk of creating litigation where none should exist. Class treatment could be denied in cases that were frivolous or lacked substantial merit. However, litigation might still be created, properly, where the court found substantial

Instead, the evidence is that sometimes the merits matter a great deal and sometimes they matter hardly at all." Grundfest, *supra* note 26, at 728.

²⁸See *supra* notes 21-25 and accompanying text. My own anecdotal experience is consistent with these conclusions. In settlement negotiations, plaintiffs' lawyers frequently downplay the significance of the merits. A typical response, to assertions that plaintiffs' claims are losers, is: "We'll never be able to agree on the merits, so let's discuss the practical considerations" -- e.g., the difficulty of obtaining summary judgment, the risks of rolling the dice before a jury, and the magnitude of the damages that plaintiffs might recover if they did win the case. These are all considerations unrelated to the merits of claims that defendants have engaged in wrongful conduct.

²⁹Alexander, *supra* note 17, at 567.

merit to claims that would be too small to pursue on an individual basis.³⁰

2. Faced with the requirement of showing that their claims had substantial merit, plaintiffs' attorneys would be less likely to negotiate pre-certification settlements that are vulnerable to rejection because "[t]he case was simply settled too quickly with too little development on the merits."³¹

3. Fortified by rulings that their claims had substantial merit, the attorneys for class representatives would be less likely, after class certification, to settle strong claims on the cheap;³² and lawyers for unnamed class members would have additional ammunition for challenging settlements that appeared to be inadequate.³³

4. Although defendants would still be faced with economic pressure to settle class actions, the preliminary assessment of the merits would preclude certification of the weakest class action claims, where the pressures to settle are particularly unfair.³⁴

³⁰See Berry, *supra* note 11, at 337. See also MINUTES OF THE ADVISORY COMM. ON CIVIL RULES at 19 (Nov. 9 & 10, 1995) ("The class device should facilitate prosecution of strong claims, but should not be misused to add strength to weak claims").

³¹See *GM Trucks*, 55 F.3d at 818.

³²"[A]ny solution which attempts to re-emphasize the merits in settlement negotiations will mean that plaintiffs recover in fewer cases than they presently do. This does not necessarily mean that plaintiffs as a group will be worse off, however. *Plaintiffs with strong cases should recover more than they do now. . . . The total amount paid might equal or exceed the total amount paid under the present system.*" Alexander, *supra* note 17, at 577 (emphasis added).

³³There is no shortage of lawyers who are prepared to challenge the adequacy of class action settlements. According to a recent Federal Judicial Center study, "about half of the settlements that were the subject of a hearing generated at least one objection." THOMAS E. WILLGANG ET AL., FEDERAL JUDICIAL CENTER, AN EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 13 (Draft of January 17, 1996) (on file with the author).

³⁴See *GM Trucks*, 55 F.3d at 334.

5. In mature mass tort cases that were found to have substantial merit, the courts might be encouraged to find creative ways of invoking the class action procedure.³⁵

6. The issue of hearings on the merits would no longer generate the splits in authority and inconsistencies in approach that have plagued our class action jurisprudence for almost thirty years.

These considerations help to explain the post-*Eisen* development, among litigators and judges, of a "pervasive sentiment" in favor of "some sort of preliminary hearing on the merits."³⁶ In 1979, the Department of Justice developed a bill that would have required such a hearing.³⁷ Since 1979, the need has become even more clear, and the sentiment for an assessment of the merits has remained strong.³⁸ Reflecting that sentiment, many judges have found opportunities to address the merits in their class action rulings (see Section III, *infra*). In my view, this reflects their understandable discomfort with the *Eisen* dictum.

II. The *Eisen* Dictum Was an Incorrect Interpretation of Rule 23

Shortly after 1966, when Rule 23 was recast into its present form, some courts began to consider the merits of the cases in making their class certification decisions. The seminal opinions on

³⁵See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, THIRD 322 (1995) (hereinafter *MCL 3d*); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 321-22 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3159 (U.S. Aug. 19, 1996).

³⁶See *Berry*, *supra* note 11, at 314 & n.91, and authorities cited therein.

³⁷H.R. 5103, 96th Cong., 1st Sess. (1979), *discussed in Berry*, *supra* note 11, at 302 n.13, 322-23, 334-37.

³⁸See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3159 (U.S. Aug. 19, 1996) (No. 96-270); William W. Schwarzer, *Structuring Multiclaimit Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1263 (1996); Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, SA88-ALI-ABA 119, 142 (1996); Douglas M. Towns, Note, *Merits Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001 (1992); *Securities Fraud Litigation: Hearings before the Subcomm. on Telecomm. & Finance of the House Comm. on Energy & Commerce*, 103rd Cong., 2d Sess. (August 10, 1994), 1994 WL 417188 (F.D.C.H.) (statement of Janet C. Alexander).

the subject were written by Judge Weinstein in *Dolgow v. Anderson*.³⁹ The most widely-publicized opinion was written by the district court in *Eisen*; based on a preliminary assessment of the merits, the court sought to shift 90 percent of the costs of notice to defendants.⁴⁰

Peeking at the merits, however, proved highly controversial. Many courts refused to indulge, and commentators boxed the compass on the issue.⁴¹ The Supreme Court sought to resolve the issue in *Eisen*.

A. The Holding in *Eisen*

The Supreme Court's holding in *Eisen* was that plaintiff had the obligation, under Rule 23, to provide notice to all class members whose names and addresses could be ascertained through reasonable effort. That obligation could not be shifted to defendant.⁴² However, the plaintiff in *Eisen* consistently maintained that he would not bear the costs of notice to the 2.25 million potential claimants who were readily identifiable.⁴³ Because plaintiff was unwilling to carry out his obligations as a class representative, the Supreme Court remanded the case with instructions to dismiss the class action allegations.⁴⁴ Plaintiff simply did not meet Rule

³⁹43 F.R.D. 472, 481, 488 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825, 827 (2d Cir. 1971), *on remand*, 53 F.R.D. 664 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 437 (2d Cir. 1972).

⁴⁰See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152 (1974).

⁴¹For a useful compendium of opinions and articles addressing the issue prior to the Supreme Court's decision in *Eisen*, see Towns, *supra* note 38, at 1002 nn. 8, 9. Among the decisions refusing to follow the *Dolgow* approach was *Mersay v. First Repub. Corp.*, 43 F.R.D. 465, 469 (S.D.N.Y. 1968) ("I cannot conceive that the drafters of the rule intended necessarily extensive hearings to determine facts which may be ultimate to the litigation"). See also, e.g., *Vernon J. Rockler & Co. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335, 348 (D. Minn. 1971) (a *Dolgow* hearing would "embroil the court in a cumbersome fact finding procedure leading to a resolution of ultimate issues without affording plaintiffs their right to a jury trial").

⁴²*Eisen*, 417 U.S. at 173, 94 S.Ct. at 2150-51.

⁴³*Id.*, 417 U.S. at 166-67, 179, 94 S.Ct. at 2147, 2153.

⁴⁴*Id.*, 417 U.S. at 175, 179, 94 S.Ct. at 2151, 2153.

23(a)(4)'s requirement that "the representative parties [must] fairly and adequately protect the interests of the class."⁴⁵

In so holding, the Supreme Court affirmed a reversal of the district court's ruling that defendants must bear 90 percent of the costs of notice. The district court's ruling had been based on a finding, after a preliminary hearing, that plaintiff was "more than likely" to prevail on his claims.⁴⁶ The Supreme Court held that the district court's approach contravened Rule 23 by "allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it" (*i.e.*, the requirements of Rule 23(a)(4)).⁴⁷

B. The Dictum in *Eisen*

The Supreme Court should have stopped there. However, it added, in what was "clearly dictum,"⁴⁸ the following statements:

"We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. . . . This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '[a]s soon as practicable after the commencement of [the] action' In short, we agree with Judge Wisdom's conclusion in *Miller v. Mackey International*, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits,

⁴⁵FED. R. CIV. P. 23(a)(4).

⁴⁶See *Eisen*, 417 U.S. at 177, 94 S.Ct. at 2152.

⁴⁷*Id.* See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1438 (1995) ("the trial court had used its merits finding as a substitute for Rule 23's express criteria").

⁴⁸Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369, 370 n.3 (1995).

but rather whether the requirements of Rule 23 are met.' *Id.*, at 427.

Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.⁴⁹

This dictum was ill-founded:

- In drawing a sharp distinction between preliminary merits rulings and class action rulings, the Court overlooked the point that consideration of the merits can be relevant to determining whether the requirements of Rule 23 are met. In particular, determinations of superiority (whether a class action is superior to other methods of handling the controversy) should be informed by consideration of the merits, as should determinations of typicality, adequacy and predominance.⁵⁰

- In focusing on the potential unfairness to defendants of preliminary hearings on the merits, the Court missed the point that such hearings can protect defendants from (a) the risk of "stak[ing] their companies on the outcome of a single jury trial,"⁵¹ and (b) the settlement pressures engendered by class certification of marginal claims.⁵²

⁴⁹*Eisen*, 417 U.S. at 177-78, 94 S.Ct. at 2152-53. These broad statements about preliminary merits inquiries can be contrasted with the Supreme Court's narrow characterization of its holding: "[W]e find the notice requirements of Rule 23 to be dispositive of petitioner's attempt to maintain the class action as presently defined. We therefore have no occasion to consider whether the Court of Appeals correctly resolved the [other] issues" *Id.*, 417 U.S. at 172 n.10, 94 S.Ct. at 2150.

⁵⁰See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.12, 98 S.Ct. 2454, 2458 (1978); Weinstein & Schwartz, *supra* note 48, at 369-70; FED. R. CIV. P. 23(a)(3)-(4), 23(b)(3); *infra* notes 62, 83, 88-89, 96-100, 111-12 and accompanying text.

⁵¹*In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir.). *cert. denied*, 116 S.Ct. 184 (1995).

⁵²See *supra* notes 14-17 and accompanying text; Weinstein & Schwartz, *supra* note 48, at 381 ("recent litigations demonstrate that defendants as well as plaintiffs can benefit from early merits assessments"). Indeed, plaintiffs' lawyers sometimes resist class certification on the ground that it favors the defendants. See Diane Wagner, *The New Elite Plaintiffs' Bar*, A.B.A. J., Feb. 1, 1986, at 44, 48.

- In stating that preliminary hearings on the merits were not accompanied by "the traditional rules and procedures applicable to civil trials," the Court ignored the analogy to preliminary injunction hearings under Rule 65.⁵³ The procedures developed under that rule provide ample protection to the litigants.⁵⁴

- In stating that preliminary hearings were "directly contrary to the command" that class action rulings should be made "as soon as practicable," the Court ignored the flexibility inherent in the rule's invocation of practicability.⁵⁵ That flexibility would be enhanced by adoption of the Advisory Committee's current proposal to change the

⁵³FED. R. CIV. P. 65. See *Dolgow v. Anderson*, 43 F.R.D. 472, 502 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825, 830 (2d Cir. 1971) (noting the "close analogy" between preliminary injunction hearings and preliminary hearings on the merits in cases brought as class actions).

⁵⁴The procedural protections include notice, opportunities to be heard and to present evidence, a strong preference for oral testimony on disputed issues of fact, a requirement that the court file written findings of fact and conclusions of law, and a preservation of the right to trial by jury (the court's determination is only provisional, and upon a full trial the jury may redetermine any findings of fact that the court has made on a preliminary basis). See, e.g., 11A CHARLES A. WRIGHT ET AL., FEDERAL PRAC. & PROCED. § 2949-50 (2d ed. 1995). See also *infra* notes 166-67 and accompanying text. The argument that adequate safeguards would be lacking is effectively refuted in *Towns*, *supra* note 38, at 1019 n.121; see *id.* at 1013 n.71.

⁵⁵FED. R. CIV. P. 23(c)(1) provides: "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." See, e.g., Schwarzer, *supra* note 38, at 1263 ("Courts often read this as requiring that [the class action ruling must] be made at an early date. Courts ought to consider a less wooden approach" and, where appropriate, "permit further development of the record leading to a more informed decision"); Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41-42 (1967) ("the time when a hard determination is 'practicable' as to the propriety of a class action will obviously vary from case to case. In some cases, discovery may be necessary . . . ; inquiries of one kind or another may be appropriate in order to appraise the adequacy of representation, the availability of procedures different from and better than a class action, the extent of other litigation on the same subject, and other pertinent considerations")(footnote omitted); *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995); *Wright v. Schock*, 742 F.2d 541, 543 (9th Cir. 1984); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 758 (3d Cir.)(en banc), *cert. denied*, 419 U.S. 885, 95 S.Ct. 152 (1974).

language "as soon as practicable" to the more neutral "when practicable"56

- The Court's analysis did not take into account the "settlement class" practice -- disfavored at the time, but now widely accepted -- in which the parties agree to settle on a class-wide basis and then ask the court to certify the class.⁵⁷ Approval of the settlement, including approval of the agreed-upon class, requires the court to weigh the merits of the case against the relief to be awarded; on this basis the court determines, under Rule 23(e), whether or not the settlement is fair, adequate and reasonable.⁵⁸ It seems odd, at the least, to require the courts to weigh the merits in certifying settlement classes, while barring the courts from doing so when the class certification decision stands alone.

- More generally, the Court's analysis reflected

"an unrealistic conception of the judge's role -- and his or her mental processes -- in the prosecution and resolution of litigation, including class actions. Even when a decision on the ultimate merits of the case is not imminent, the trier is continually estimating the strength of the case"

In class actions, the judge must have a reasonable sense of where the case is going -- and of its momentum -- to make sensible determinations at each stage: [including] whether or

⁵⁶1996 ADVISORY COMM. DRAFT, PROPOSED FED. R. CIV. P. 23(c)(1). The proposed change should serve to eliminate any argument that holding a preliminary hearing on the merits is inconsistent with the "command" of Rule 23(c)(1).

⁵⁷See *GM Trucks*, 55 F.3d 768, 793-94 (3d Cir.), cert. denied, 116 S.Ct. 88 (1995). See also *In re A.H. Robins Co.*, 880 F.2d 709, 752 (4th Cir.), cert. denied, 493 U.S. 959, 110 S.Ct. 377 (1989); *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982) (Friendly, J.). Compare FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION s 1.46 (1969) with *MCL 3d*, supra note 35, s 39.45 at 243-45.

⁵⁸See, e.g., *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993), cert. denied, 114 S.Ct. 2707 (1994) (in assessing a proposed class settlement, the court must consider, among other factors, "the strength of plaintiffs' case"); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1324 (5th Cir. 1981), cert. denied, 456 U.S. 998, 1012, 102 S.Ct. 2283, 2308 (1982) (the reasonableness of a proposed class settlement is determined by weighing the likelihood of the plaintiffs' recovery against the amount offered in settlement).

not to certify the case (and if so, whether limited or more general certification is appropriate)

The fact that formal merits 'pronouncements' are rare (but Jovian in impact) in the context of the extended give-and-take of the pretrial process, does not mean that the judge never considers the merits in between such pronouncements."⁵⁹

The dictum in *Eisen* is perhaps understandable, though not justifiable, as a reaction against what were perceived in some quarters as abuses of the class action rule.⁶⁰ *Eisen* itself, involving a class with six million members, was characterized at an early

⁵⁹Weinstein & Schwartz, *supra* note 48, at 382. The authors also argue that the *Eisen* dictum has been "overruled by the recent rule revisions" that "imply greater pretrial judicial involvement and earlier information-sharing by the parties." *Id.* at 381, 382; see FED. R. CIV. P. 16, 26; 28 U.S.C. ss 471-82. While that argument may be overdrawn, it is fair to say that the revised rules have encouraged judges to manage class action litigation in a manner that is increasingly difficult to reconcile with *Eisen*.

⁶⁰See JAMES, HAZARD & LEUBSDORF, CIVIL PROCEDURE s 10.22, at 565-66 (4th ed. 1992); Handler, *supra* note 14, at 7-8. Justice Powell, writing for the Court in *Eisen*, pointedly quoted the Court of Appeals' statement (at an earlier stage of the litigation) that it was "reluctant to permit actions to proceed when they are not likely to benefit anyone but the lawyers who bring them." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 94 S.Ct. 2140, 2146 (1974), quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968)(*Eisen II*).

Equally overreactive was the Supreme Court's holding that personal notice had to be sent to 2.25 million class members. See *Eisen*, 417 U.S. at 175, 94 S.Ct. at 2151. The principal goals of notice are to give absent parties the rights to participate and opt out, and to ensure that under the Due Process Clause the judgment will be binding on all class members who choose not to opt out. See *id.*, 417 U.S. at 173-74, 94 S.Ct. at 2150-51; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, 70 S.Ct. 652, 659-60 (1950); PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, ADVISORY COMM. NOTES TO RULE 23(d)(2), 39 F.R.D. 69, 106-07 (1966); Macey & Miller, *supra* note 21, at 27-28. Given these goals, it was serious overkill to require that individual notices be sent to 2.25 million class members, most of whom had minuscule claims. See Bone, *supra* note 13, at 102-03 (in "the small-claimant class action, . . . class members have too little at stake to bring their own suits, to participate actively in the class suit, or to monitor the class attorney Thus, there is no reason to provide notice of the lawsuit, or to allow potential class members to opt out"); JAMES, HAZARD & LEUBSDORF, *supra*, s 10.22 at 566. The district court's approach in *Eisen*, which limited individual notice to the class members with the largest claims (plus 5000 more class members selected at random), seems far preferable. See *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 267 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded*, 417 U.S. 156, 94 S.Ct. 2140 (1974).

stage of the proceedings as a "Frankenstein monster posing as a class action."⁶¹

Although the Supreme Court has never expressly disavowed the dictum in *Eisen*, it has abandoned *Eisen's* absolutist position, and it has provided a road map to litigators who might seek to evade the dictum entirely. In *Coopers & Lybrand v. Livesay*, the Court stated:

"Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. *The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits.*"⁶²

Once the door has thus been opened to consideration of the merits, it is hard to assert with a straight face that there is a residual general principle barring such consideration. Indeed, if a default principle is necessary, that principle should favor consideration of the merits, at least in cases involving claims for monetary relief.

III. Courts Frequently Look at the Merits Despite *Eisen*

For more than twenty years, courts and commentators have cited *Eisen* for the proposition that courts may not conduct preliminary inquiries into the merits in order to determine whether

⁶¹*Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C. J., dissenting).

⁶²437 U.S. 463, 469 n.12, 98 S.Ct. 2454, 2458 (1978) (emphasis added), quoting 15 CHARLES A. WRIGHT ET AL., FED. PRAC. & PROCED. s 3911, at 485 n.45 (1976). See also *Coopers*, 437 U.S. at 469, 98 S.Ct. at 2458 ("the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'"), quoting *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 220, 222 (1963). Accord: *General Tel. Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372 (1982). According to one commentator, "even the Supreme Court implicitly required a merit-based certification inquiry in the Title VII case, *General Telephone Co. v. Falcon*, where the differing injuries rendered the claim not 'typical.'" Towns, *supra* note 38, at 1033 (footnote omitted).

class action treatment is warranted.⁶³ Nevertheless, the issue is far from dead. While paying ritual obeisance to *Eisen*, the lower courts have found consideration of the merits to be justified in a number of situations -- so many, in fact, that a reexamination of the justification for *Eisen* is long overdue.

A. Assessing the Merits of the Classwide Claims to Support Certification

In asbestos litigation, the courts initially denied class action treatment because of the individual issues presented and in order to preserve plaintiffs' control of their own cases.⁶⁴ However, many individual cases resulted in plaintiffs' verdicts that appeared to establish causative links between asbestos and certain illnesses. This evidence that the claims had merit -- coupled with the litigation explosion spawned by the plaintiffs' verdicts -- caused some courts to begin experimenting with class certification despite prior holdings to the contrary.⁶⁵

More extensive experience with mass tort litigation⁶⁶ has resulted in broader support for class action treatment in mass tort cases where the merits of the classwide claims appear strong. The 1995 revision to the Manual for Complex Litigation includes the following analysis:

⁶³See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *In re RepublicBank Secs. Litig.*, [1989 Transfer Binder], Fed. Sec. L. Rep. (CCH) 94,554 at p. 93,450 (N.D. Tex. 1989); *Fickinger v. C.I. Planning Corp.*, 103 F.R.D. 529, 531-32 (E.D. Pa. 1984); *MCL 3d*, *supra* note 35, at 214; authorities cited *supra* at note 2.

⁶⁴See, e.g., *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974); *Austin v. Johns-Manville Prods. Corp.*, No. 75 754 (D.N.J. 1977).

⁶⁵See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182 (1986); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470, 475 (5th Cir. 1986); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 261, 263, 337 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3159 (U.S. Aug. 19, 1996) (No. 96-270); *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 631-35, 640-42 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

⁶⁶See, e.g., *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), *on rehearing*, 53 F.3d 663 (5th Cir. 1994); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); cases cited *supra* at note 65.

"[T]hose mass torts in which general causation has become relatively clear over time are likely to be candidates for large consolidations or even class action treatment. . . . Thus, 'mature' mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases"⁶⁷

* * * *

"Litigation is 'mature' if through previous cases (1) discovery has been completed, (2) a number of verdicts have been received indicating the value of claims, and (3) *plaintiffs' contentions have been shown to have merit.*"⁶⁸

⁶⁷MCL 3d, *supra* note 35, at 322. *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734, 748-49 (5th Cir. 1996), was a textbook example of an "incipient mass tort" case -- as distinguished from one that was "mature" -- where class certification was inappropriate. The claims, involving an alleged cover-up of evidence regarding nicotine addiction, were novel (the district court called them "*sui generis*," 160 F.R.D. at 555); individual issues were rampant, as the district court recognized (*id.* at 556); and the size of the class (up to 90 million persons) made *Eisen*, by comparison, a candidate for small-claims court. The district court nevertheless certified certain "core liability issues" for class treatment. *Id.* at 553; see *A Classy Ruling*, WALL ST. J., May 24, 1996, at A10 (estimating the potential size of the class at 90 million persons). The district court's decision in *Castano* created an unprecedentedly large litigation where a test case approach would have been far preferable -- especially since the named plaintiffs represented to the court that they would continue with the case even if class certification were denied.

⁶⁸MCL 3d, *supra* note 35, at 322 n.1057 (emphasis added); see Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) (defining "mature mass torts" as litigation "where there has been full and complete discovery, multiple jury verdicts, and a *persistent vitality in the plaintiffs' contentions*") (emphasis added). The concept of maturity, as a factor to consider in Rule 23(b)(3) determinations, has been endorsed by the Advisory Committee in its most recent proposed amendments to Rule 23:

"The more important [proposed] change authorizes consideration of the 'maturity' of related litigation. . . . 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 is not yet advanced far enough to support confident decision on a class basis."

1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(b)(3); see *infra* notes 144-46 and accompanying text.

The analytical basis for this approach is that Rule 23(b)(3) permits class certification where the court finds that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."⁶⁹ Among the factors pertinent to this finding are "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class."⁷⁰

These provisions of Rule 23 provide ample support for the quoted passage from the *Manual*.⁷¹ Where prior litigation by class members has shown that the cases have substantial merit, and where that litigation has spawned hundreds or thousands of similar cases, the courts are obliged to search for sensible methods of aggregation, and class action treatment may well fit the bill.

Even some defendants, faced with prior adverse determinations, have argued for class action treatment because it provides efficiencies, savings in transaction costs, and a structure for global settlements.⁷² Class certification can also be appropriate

⁶⁹FED. R. CIV. P. 23(b)(3); see *Castano*, 84 F.3d at 740-41 ("at this time, while the tort is immature, the class complaint must be dismissed, as class certification cannot be found to be a superior method of adjudication").

⁷⁰FED. R. CIV. P. 23(b)(3).

⁷¹Indeed, these provisions provide support more generally for addressing the merits of the case in the course of the class action ruling. See ABA Section of Litigation, *Report and Recommendation of the Special Comm. on Class Action Improvements*, 110 F.R.D. 195, 205 (1986) (hereinafter "*Litigation Section Proposal*") (suggesting that "some assessment of possible merit in the action" be subsumed within the analysis of superiority), quoting MANUAL FOR COMPLEX LITIGATION s 142 n.72 (4th rev. 1977); 7B CHARLES A. WRIGHT ET AL., FED. PRAC. & PROCED., s 1759 at 102 (2d ed. 1986) (asserting that an evaluation of the merits "may well be appropriate in a Rule 23(b)(3) action to determine whether a class action is superior to other available methods" of adjudication); Katarincic & McClain, *supra* note 14, at 438-39 ("The real or imaginary nature of the wrong, and hence the existence or non-existence of a controversy, should play some role in making a superiority decision"). See generally Towns, *supra* note 38. But see Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 888 (1974).

⁷²See, e.g., *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993); *In re N.D. Cal. "Dalkon Shield" IUD Prods. Liabil. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), vacated and remanded, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983).

where defendants -- while declining to seek class action treatment -- nevertheless make concessions indicating that the claims have merit. In *In re Copley Pharmaceutical, Inc.*,⁷³ the court emphasized, in its opinion granting class certification, that:

"This case does not involve novel theories of hindsight liability, but instead concerns a defendant who has admitted that some of its product was contaminated and that it is liable for any resulting injuries."⁷⁴

Thus, the courts have found opportunities, with increasing frequency, to invoke the merits in support of determinations that class action treatment is appropriate. This is a recent development, based primarily (but not exclusively) on the concept of "maturity."

B. Assessing the Merits of the Classwide Claims to Support the Denial of Certification

1. Cases Denying Certification

Assessment of the merits can also result in the denial of class action motions. Rejecting class action treatment in *Rhone-Poulenc*, the Seventh Circuit stressed the fact that in prior cases brought by members of the purported class, defendants had won 12 out of the 13 reported judgments.⁷⁵ There was thus a "demonstrated great likelihood that the plaintiffs' claims, despite their human appeal,

A less benign interpretation of the conduct of settling defendants is that they "have come to understand that mass tort class action[s] can be utilized to obtain cheap settlements that pay little attention to the interests of certain structurally underrepresented classes of claimants." *Coffee*, *supra* note 47, at 1349; *see id.* at 1349-50 & nn.18-22; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 620 (3d Cir. 1996); *In re Asbestos Litig.*, 90 F.3d 963, 994 (5th Cir. 1996) (Smith, J., dissenting) ("it was the defendant -- Fibreboard -- who selected the class that was to 'sue' it and the class action lawyers who were to do the dirty work. Fibreboard hand-picked a class that was uniquely vulnerable to exploitation, [and] class counsel who were widely reported to have sold out a similar class Class counsel then cut a side deal with Fibreboard before agreeing to the class settlement").

⁷³161 F.R.D. 456 (D. Wyo. 1995).

⁷⁴*Id.* at 461; *see id.* at 465.

⁷⁵*See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995).

lack legal merit."⁷⁶ In these circumstances, it would have been unfair to require that defendants "stake their companies on the outcome of a single jury trial" in a nationwide class action.⁷⁷

Although the court in *Rhone-Poulenc* did not point to the specific language of Rule 23, its conclusion -- recast to track the language of Rule 23 -- was that class action treatment would not be "fair" to defendants or the "superior" method of dealing with the controversy, in view of all the "litigation concerning the controversy already commenced by . . . members of the class."⁷⁸ Based on the record before the court, that conclusion seems entirely correct.⁷⁹

Another basis for denying class certification, at least in mass tort cases, is the lack of a track record establishing the merits of the claim. As the *Manual* suggests:

⁷⁶*Id.* at 1299.

⁷⁷*Id.* According to the court, if the class certification had been affirmed, defendants might "easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy." *Id.* at 1298.

⁷⁸See FED. R. CIV. P. 23(b)(3); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1298-1300. Recasting the court's ruling in this manner helps to deflect the dissenting judge's argument that the majority had propounded "a rationale for amending the rule, not avoiding its application." *Id.* at 1308 (Rovner, J., dissenting).

⁷⁹But see *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 460-61 (D. Wyo. 1995). A settlement agreement has now been reached in *Rhone-Poulenc*, ironically on a classwide basis, for \$640 million. See Thomas M. Burton, *Makers of Blood Products Agree to Offer \$640 Million to Settle Cases Tied to AIDS*, WALL ST. J., Apr. 19, 1996, at B6 (describing settlement); Thomas M. Burton, *Judge Clears Pact Giving Payments to AIDS Victims*, WALL ST. J., Aug. 15, 1996, at B5 (reporting the district court's preliminary approval of the settlement, and noting that the \$640 million figure can be increased if more than the anticipated number of class members surface).

Even though the \$640 million figure is far smaller than the potential liability estimated by the Seventh Circuit (\$25 billion or more, see 51 F.3d at 1298), the magnitude of the settlement suggests that discovery had revealed, or was about to reveal, at least some evidence of potential liability. A premature class certification, before the evidence of potential liability had been developed, might have resulted in a cheaper settlement or even a defendants' verdict (see *infra* notes 94-95 and accompanying text). The approach suggested in this article would minimize the prospect of premature class certification by making evidence of potential liability a subject for discovery on the class action motion. If plaintiffs could not generate sufficient evidence of potential liability, class certification would be denied without prejudice to a subsequent renewal of the motion or certification in related cases, after further evidence of liability had been developed.

"Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units . . . until general causation, typical injuries, and levels of damages become established."⁸⁰

In *Castano*, the Fifth Circuit quoted this passage from the *Manual* in support of its denial of class action treatment.⁸¹ Initially, the court observed the amenities by citing *Eisen* for "the unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision."⁸² However, the court then stated that "a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority [determinations] required by rule 23."⁸³ That track record provides the basis for determining whether the litigation is mature, *i.e.*, whether "'general causation, typical injuries, and levels of damages [have] become established."⁸⁴

Perhaps out of deference to *Eisen*, the Fifth Circuit did not cite the *Manual's* explicit statement that litigation becomes "mature" when "plaintiffs' contentions have been shown to have merit."⁸⁵ However, the court's delicacy cannot mask the impact of its holding, which was to establish a new precondition to class certification in mass tort cases: a favorable track record on the merits. Absent such a record, "this class must be decertified because it independently fails the superiority requirement of rule 23(b)(3)."⁸⁶

⁸⁰*MCL 3d, supra* note 35, at 322.

⁸¹*Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).

⁸²*Id.* at 744.

⁸³*Id.* at 747; *see also id.* at 744 & n.17.

⁸⁴*Id.* at 748, quoting *MCL 3d, supra* note 35, at s 33.26.

⁸⁵*MCL 3d, supra* note 35, at 322.

⁸⁶*Castano*, 84 F.3d at 746.

*Makuc v. American Honda Motor Co.*⁸⁷ constituted a variation on the "lack of a track record" theme. Injured in a motorcycle accident, plaintiff claimed that defendant's motorcycle axles had been defectively designed. To satisfy the numerosity requirement of Rule 23(a),⁸⁸ plaintiff submitted an affidavit from an expert who stated that the defect would affect one out of fifty axles. After two years of discovery, however, plaintiff could not specify a single instance in which anybody else had been injured or any other axle had failed. Based on this record, the First Circuit affirmed the denial of class action treatment. The lack of evidence to support any claim of injury -- other than that of the named plaintiff -- made it appropriate to conclude that the numerosity requirement had not been satisfied, since "plaintiff's contention as to the size of the class was purely speculative."⁸⁹

2. Understanding the Courts' Discomfort With Class Action Treatment for Marginal Claims

Rhone-Poulenc, *Castano* and *Makuc* all reflect the courts' discomfort with the certification of claims that appear marginal -- i.e., claims that would have little chance of succeeding at trial. That discomfort appears to stem from the power and settlement leverage that class certification places in the hands of plaintiffs' counsel.⁹⁰ In extreme cases, like *Rhone-Poulenc*, that leverage arises because the economic viability of defendants would be threatened by a verdict in favor of the class, even though such a verdict would be aberrational.⁹¹ In *Agent Orange*, a less extreme case, defendants accepted a \$180 million class settlement of claims

⁸⁷835 F.2d 389 (1st Cir. 1987).

⁸⁸FED. R. CIV. P 23(a) permits class action treatment "only if (1) the class is so numerous that joinder of all members is impracticable"

⁸⁹*Makuc*, 835 F.2d at 394. Although the court in *Makuc* focused on the numerosity requirement of Rule 23(a), it could just as readily have invoked the superiority requirement of Rule 23(b)(3). Class action treatment should not be considered the superior method of handling the controversy when plaintiff -- after two years of discovery -- has developed no evidence that any other class member has suffered an injury similar to his.

⁹⁰See *supra* notes 14-17 and accompanying text.

⁹¹See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1298.

so tenuous that the district court entered summary judgment against the plaintiffs in the opt-out cases.⁹²

As *Agent Orange* indicates, the certification of such tenuous claims can lead to settlements that are very unfair to defendants.⁹³ In the rare class action that does not settle, an aberrational plaintiffs' verdict -- despite the weakness of the claim -- could be unfair, and devastating, to defendants. For plaintiffs as well as defendants, the trial on a classwide basis of an "immature" case -- *i.e.*, one where the merits of plaintiffs' claims have yet to be established -- could be equally troublesome.⁹⁴ As Professor Coffee has written:

"Imagine that a trial on the central issue of liability is held in a nationwide class action of a new 'immature' mass tort, and defendants win on their claim that there is no causal relationship between their product and the plaintiffs' injuries. A year later, new scientific evidence is discovered which establishes a causal connection. Unfortunately, the adverse decision may preclude the plaintiffs (who include future claimants) from bringing litigation for decades to come. Delaying the certification of the class action until the scientific evidence clearly supports the plaintiffs (if indeed that is the outcome) thus may benefit future claimants over the long run."⁹⁵

⁹²See *In re "Agent Orange" Prod. Liabil. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695 (1988) (Judge Weinstein approved the settlement; the Court of Appeals affirmed even though it was "clear that [Judge Weinstein] viewed the plaintiffs' case as so weak as to be virtually baseless"); *In re "Agent Orange" Prod. Liabil. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987)(summary judgment granted in the opt-out cases).

⁹³More generally, the settlement process is skewed when the courts certify classes without regard to the merits; strong cases tend to settle for too little, and weak cases settle for too much. See *supra* notes 21-28 and accompanying text.

⁹⁴See 1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(b)(3) ("Pre-maturity class certification runs the risk of mistaken decision [on the merits], whether for or against the class"); *Castano v. American Tobacco Co.*, 84 F.3d at 752 ("The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury").

⁹⁵Coffee, *supra* note 47, at 1439. Cf. *GM Trucks*, 55 F.3d 768, 789 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995).

By refusing to certify "immature" mass tort cases, and by refusing to certify cases like *Rhone-Poulenc* and *Makuc* -- where the classwide claims appear to have little substance -- the courts have circumvented *Eisen* and injected the merits into their denials of class action treatment. In so-called "limited fund" cases, the courts have gone even farther; they have made the merits a focal point of the class action analysis.

C. Assessing the Merits of the Classwide Claims in Limited Fund Cases Brought Under Rule 23(b)(1)(B)

Under Rule 23(b)(1)(B), an action may be maintained as a class action where "adjudications with respect to individual members of the class . . . 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"96 If defendants have limited funds in relation to the judgments that plaintiffs are likely to obtain, and if individual actions are allowed to proceed to judgment, the earliest judgments may well absorb the available funds. In such circumstances -- principally involving mass torts -- the earliest judgments can "as a practical matter be dispositive of the interests" of later claimants, or "substantially impair or impede" the ability of later claimants to collect.⁹⁷

To determine whether that is likely to happen, the court must analyze the facts regarding (1) the assets that will be available to satisfy plaintiffs' judgments (this part of the analysis can entail, among other things, projections as to the results of litigation between insured defendants and their insurers⁹⁸) and (2) the amounts of the judgments that plaintiffs are likely to obtain (this part can involve projections regarding the outcome of damage issues as well as liability issues). In some instances, courts have certified classes based on such projections of the merits;⁹⁹ in others, they

⁹⁶FED. R. CIV. P. 23(b)(1)(B).

⁹⁷See cases cited *infra* at notes 98-100.

⁹⁸See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 983-84 (5th Cir. 1996); *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 132 F.R.D. 332, 342 (E. & S.D.N.Y. 1990).

⁹⁹See, e.g., *In re Asbestos Litig.*, 90 F.3d at 982-86; *In re Drexel, Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992); *In re Diamond Shamrock Chems. Co.*, 725 F.2d

have denied certification because the projections were not sufficiently detailed or did not support the conclusion that the likely awards could exceed defendants' available assets.¹⁰⁰

Whether or not the court ultimately certifies a class under the limited fund theory, however, its analysis must include projections as to the liability and damage components of the class members' claims. These are preliminary determinations of the merits. Whatever the applicability of the *Eisen* doctrine in other contexts, it should be viewed as plainly inapplicable to Rule 23(b)(1)(B).

D. Denying Class Action Treatment Based on Early Rulings for Defendants on the Merits

1. Rulings on Classwide Issues

Some courts have concluded that Rule 23(c)(1), as interpreted by the Supreme Court in *Eisen*,¹⁰¹ requires that the class action ruling be made before the court decides any motions addressed to the merits.¹⁰² The better view, however, is that in the exercise of

858 (2d Cir.), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1417 (1984); *In re "Agent Orange" Prod. Liabil. Litig.*, 100 F.R.D. 718, 726, 728 (E.D.N.Y. 1983) (finding a "substantial probability" that the limited fund available to satisfy punitive damage claims would be exceeded; the findings extended to projections that the courts would impose limits on the aggregate punitive damages that would be permitted).

¹⁰⁰See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182 (1986) ("We are aware of the inherent limitations on any factual inquiry undertaken at such an early stage of the litigation, and we recognize that any record that could be developed would be inevitably predictive. Nonetheless, in our view [the district court's] findings fall short of the mark"); *In re Bendectin Prod. Liabil. Litig.*, 749 F.2d 300, 305-06 (6th Cir. 1984); *In re N.D. Cal. "Dalkon Shield" IUD Prods. Liabil. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 817 (1983) ("The district court erred by ordering certification without sufficient evidence of, or even a preliminary fact-finding inquiry concerning Robins' actual assets, insurance, settlement experience and continuing exposure"). It is significant that these circuit courts, while denying class certification, accepted the principle that such certification could be based on "inevitably predictive" and "preliminary" fact-finding inquiries regarding merits-related matters.

¹⁰¹See *supra* note 55 and accompanying text.

¹⁰²See, e.g., 7B CHARLES A. WRIGHT ET AL., *supra* note 71, s 1785 n.62, citing *McCray v. Standard Oil Co. (Ind.)*, 76 F.R.D. 490 (N.D. Ill. 1977) (when presented with a motion for class certification as well as a motion directed to the merits, the court "generally should resolve the class issue first in order to preserve the purely procedural character of a determination on the maintainability of a class action"); 1996

their discretion, the courts may decide motions addressed to the merits before considering the issue of class certification.¹⁰³ *In re Insurance Antitrust Litigation*,¹⁰⁴ for example, was a proceeding involving 19 state plaintiffs, many more private plaintiffs, 32 defendants, alleged boycotts, threats and other coercive conduct extending for several years, and legal issues of great complexity. Judge Schwarzer invited motions to dismiss and for summary judgment, so that he could sort out some of the legal issues. Finding the motions to be well-taken, he dismissed the complaints in their entirety. The dismissals extended to the class action allegations as well as the substantive allegations.¹⁰⁵

ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(c)(1). See also *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n.9 (4th Cir. 1976), vacated, 431 U.S. 952, 97 S.Ct. 2671 (1977) ("The language of Rule 23(c) makes it quite clear that the determination of class status is to be made 'before the decision on the merits'").

¹⁰³See, e.g., *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995) ("'practicable' allows for wiggle room. Class actions are expensive to defend. One way to knock one off at low cost is to seek summary judgment before the suit is certified as a class action"); *Wright v. Schock*, 742 F.2d 541, 545 (9th Cir. 1984) (*Eisen* "does not say that a court may never consider the merits of a suit prior to a class determination"); *Marx v. Centran*, 747 F.2d 1536, 1552 (6th Cir. 1984), cert. denied, 471 U.S. 1125, 105 S.Ct. 2656 (1985); 7B CHARLES A. WRIGHT ET AL., *supra* note 71, s 1785 nn.63-66. The Advisory Committee, in comments to its 1996 proposals to revise Rule 23, has endorsed the "useful practice" of "ruling on motions to dismiss or for summary judgment before the class certification decision." 1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(c)(1); see *infra* note 150 and accompanying text.

¹⁰⁴723 F. Supp. 464 (N.D. Cal. 1989), rev'd, 938 F.2d 919 (9th Cir. 1991), aff'd in part and rev'd in part sub nom. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891 (1993).

¹⁰⁵See *id.*, 723 F. Supp. at 468-72, 491. The procedure followed by Judge Schwarzer proved beneficial even though the judgments on the merits were ultimately reversed. See 938 F.2d 919 (9th Cir. 1991), aff'd in part and rev'd in part sub nom. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891 (1993). The various court decisions --and in particular the Supreme Court's 5-4 ruling establishing a definition of "boycott" under the McCarran-Ferguson Act (509 U.S. at 801-11; 113 S.Ct. at 2911-16) -- narrowed and focused the complaints and provided a solid foundation for settlement negotiations. Ultimately, the parties reached a settlement that included an agreement on class certification. See *Antitrust & Trade Reg. Daily (BNA)* (Oct. 18, 1994) (settlement filed in U.S. District Court as *In re Insurance Antitrust Litig.*, D.C. N.Calif., No. C-88-1688 CAL, Oct. 6, 1994). In light of the Supreme Court's ruling on the merits of plaintiffs' legal contentions, the settlement provoked almost no opposition (even though more than a million notices were circulated), and it was readily approved by the district court.

It should hardly come as a shock that the court's ruling on the merits also disposed of the class allegations. According to one commentary, written two years before *Eisen*:

"If there is no proper claim upon which relief can be granted, it follows *a fortiori* that a class action is not the superior vehicle through which to adjudicate a non-existent controversy."¹⁰⁶

In addition, it would be inappropriate to certify a class after ruling that the claims had no merit, since any alert class member would then opt out.¹⁰⁷ Requiring class members to take affirmative action, in order to avoid the preclusive effect of a judgment already entered, would seem akin to the "opt-in" approach that has been rejected under Rule 23.¹⁰⁸ Indeed, the Ninth Circuit has recently held that where defendant has obtained summary judgment against plaintiff, post-judgment notice of class certification is inappropriate, and the class will not be bound.¹⁰⁹

¹⁰⁶Katarincic & McClain, *supra* note 14, at 441; see *Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir. 1987) (the district court did not err in denying class certification because it had granted summary judgment to defendant on the merits).

¹⁰⁷See *Marx v. Centran Corp.*, 747 F.2d at 1552 ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake"); 7B WRIGHT ET AL., *supra* note 71, at s 1785 nn.20, 63.

¹⁰⁸*Cf. Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1556-57 (6th Cir.), *cert. denied*, 479 U.S. 883 (1986) (rejecting, as "an affirmative 'opt-in' device," a discovery order that "requires passive class members to take positive action to stay in the suit"); CHARLES A. WRIGHT, LAW OF FEDERAL COURTS s 72 at 521 (5th ed. 1994).

¹⁰⁹See *Schwartzchild v. Tse*, 69 F.3d 293 (9th Cir. 1995), *cert. denied*, 116 U.S. 1355 (1996). The chronology in *Schwartzchild* is instructive. After the district court granted class certification but before any notice had been distributed to the class, defendants moved for and were granted summary judgment. *Id.* at 294-95. The district court's subsequent order requiring distribution of the notice was reversed on appeal: "[S]everal circuits have held that a decision rendered by the district court before a class has been properly certified and notified is not binding upon anyone but the named plaintiffs. . . . By obtaining summary judgment before notice had been sent to the class, the defendants [in *Schwartzchild*] waived their right to have such notice given and to obtain a judgment that was binding upon the class." 69 F.3d at 297 & n.5 (emphasis added).

Where summary judgment has been rendered in favor of plaintiffs, however, there may be equitable reasons to allow post-judgment class certification. See *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1382 (D.C. Cir. 1980) ("Supreme Court

2. Rulings on Individual Issues: The Merits of the Class Representatives' Claims

Summary judgment may also be invoked in connection with individual issues that are specific to the claims made by the class representatives. As the Second Circuit has stated:

"some very basic merits determinations -- e.g., whether a named plaintiff suing his employer was ever employed by the defendant . . . -- may be made prior to certification because they affect whether the named representative has the nexus with the class required by Rule 23."¹¹⁰

Under this reasoning, when class representatives' claims are subject to dismissal or summary judgment on the merits, the class action allegations can be dismissed as well -- because the representatives' claims are atypical, or the representation is deemed inadequate.¹¹¹

This reasoning has been extended, by some courts, to cases where the class representatives' claims can survive summary judgment motions but are still subject to unique defenses on the merits. In such cases, class action treatment has been denied on the grounds of atypicality and inadequacy.¹¹²

decisions have provided for appeal of a Rule 23(b)(3) class certification denial after a decision on the merits of an action. A necessary corollary to those cases is that if the denial of the class certification is reversed and remanded, the class may be certified after the entry of judgment"); see also *id.* at 1383-84.

¹¹⁰*Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir. 1982).

¹¹¹See, e.g., *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995); *Wenning v. Jim Walter Homes, Inc.*, 606 F.2d 784, 785 (7th Cir. 1979); *Vervaecke v. Chiles, Heider & Co.*, 578 F.2d 713, 719-20 (8th Cir. 1978); *Dolgow v. Anderson*, 438 F.2d 825, 830 (2d Cir. 1971). See also *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403-04, 97 S.Ct. 1891, 1896-97 (1977).

¹¹²See, e.g., *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990), cert. denied, 111 S.Ct. 645 (1991); *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984); *J.H. Cohn & Co. v. American Appraisal Assocs., Inc.*, 628 F.2d 994, 998-99 (7th Cir. 1980); *Kas v. Financial General Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1984); *Kline v. Wolf*, 88 F.R.D. 696, 699-700 (S.D.N.Y. 1981)(Weinfeld, J.), aff'd in relevant part, 702 F.2d 400, 403 (2d Cir. 1983) (the unique defenses "could become, as they already have, the focus of the litigation and upon a trial, divert attention from the substance of the basic claim.

As a practical matter, courts adopting the "unique defenses" approach are unlikely to grant class action treatment unless a representative can be found with claims that are free from serious individual challenge or (at the least) can be shown to have substantial merit. If nobody with a respectable claim can be found to represent the class, that fact itself may suggest that the claims of the class are marginal and therefore unsuited for class treatment.¹¹³

E. Assessing the Merits to Determine the Fairness of a Settlement that Calls for Class Certification

Where the parties agree to settle a class action, the courts must assess the fairness and adequacy of the settlement by reviewing the merits of the case as well as the terms of the settlement.¹¹⁴ As the Ninth Circuit has stated, the review includes an analysis of "the strength of plaintiffs' case; . . . the extent of discovery completed, and the stage of the proceedings"¹¹⁵

The courts' scrutiny of the merits is particularly searching where the parties reach a settlement before any ruling on the class action motion, and then request the certification of a class as part

The remaining members of the class could be severely damaged by plaintiffs' representation of them"). *But see, e.g., Anderson v. Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982); *In re Telectronics Pacing Sys., Inc.*, 164 F.R.D. 222, 228, 229 n.5 (S.D. Ohio 1995), *on reconsideration*, 1996 WL 441784 (S.D. Ohio July 16, 1996); *In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 460 (D. Wyo. 1995).

¹¹³See MINUTES OF THE ADVISORY COMM. ON CIVIL RULES at 18-19 (Nov. 9 & 10, 1995) ("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").

¹¹⁴See *supra* notes 57-58 and accompanying text.

¹¹⁵*Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375-76 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2702 (1994); see *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1324 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 1012, 102 S.Ct. 2283, 2308 (1982).

of the settlement process.¹¹⁶ In that situation, the merits of the case are very much relevant to the class action ruling.¹¹⁷

The significance of the "settlement class" practice is reflected in a recent Federal Judicial Center study of class actions. The study analyzed all class actions terminated in four district courts during the period from July 1, 1992 through June 30, 1994. Of 152 cases certified as class actions, 59 were certified for settlement purposes only.¹¹⁸ This means that by virtue of the settlement class practice alone, the courts in the four districts reviewed the merits in connection with 39 percent of the cases that they certified as class actions.

F. The Impact of the Merits Generally on Class Action Rulings

As Judge Weinstein has suggested, class action rulings are affected by the merits even when the case does not fit within any of the categories discussed above.¹¹⁹ That analysis is consistent with my own experience.

*Broza v. Texas Instruments Inc.*¹²⁰ is a good example. There, plaintiff alleged that Texas Instruments had misled its stockholders, willfully or with reckless disregard, by failing to announce that it had been awarded a potentially-valuable Japanese patent. Challenged to explain why Texas Instruments would willfully mislead its stockholders by failing to disclose good news, plaintiff suggested that the company (which had yearly sales in

¹¹⁶See, e.g., *MCL 3d*, *supra* note 35, at 243-44; *GM Trucks*, 55 F.3d 768, 788 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Mars Steel Corp. v. Continental Illinois Nat'l Bk. & Tr. Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987).

¹¹⁷See, e.g., *GM Trucks*, 55 F.3d at 788.

¹¹⁸See THOMAS E. WILLGANG ET AL., *supra* note 33, at 6, 8. A principal factor in selecting the four districts (E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal.) was the volume of class action activity in each district. See *id.* at 7, 127.

¹¹⁹See *supra* note 59 and accompanying text. See also Miller, *supra* note 11, at 15: "[T]here is no way the judge can make the . . . findings required by Rule 23 without at least a preliminary exploration of the merits . . . to develop some feel for the contours of the case."

¹²⁰Civ. No. CA-3-89-3056-R (N.D. Tex. Sept. 25, 1992) (no written opinion).

excess of \$6 billion) wanted to permit two directors to buy a total of 1500 shares at artificially-depressed prices. Defendant stressed the insubstantiality of the claim while arguing that plaintiff was an inadequate representative with atypical claims. Since there were sound factual and legal bases for the inadequacy argument, the judge denied plaintiff's class action motion from the bench.¹²¹ However, the lack of merit in plaintiff's claim appeared to have a substantial impact on the judge's decision. During the oral argument, he asked whether this was "a situation where someone is trying to shake your client down"¹²² -- an indication that Professor Handler's concept of "legalized blackmail" was very much on his mind.¹²³

To summarize: in making class action rulings, the courts have frequently taken into account the merits of the classwide claims, as well as the merits of the individual claims made by the class representatives. In so doing, they have held that preliminary inquiries into the merits are relevant to the numerosity, commonality, typicality and adequacy requirements of Rule 23(a), the superiority and predominance requirements of Rule 23(b)(3), and the limited fund analysis required under Rule 23(b)(1)(B).

These court decisions, coupled with a practical analysis of Rule 23 and a careful reading of the Supreme Court's post-*Eisen* decisions,¹²⁴ support the conclusion that the merits are generally relevant to issues presented by monetary claims under Rule 23. Nevertheless, *Eisen* continues to be cited for the proposition that preliminary inquiries into the merits are inappropriate.¹²⁵ As a result, there are many splits in authority regarding the

¹²¹*Id.*

¹²²*Id.*, Transcript of Oral Argument, Sept. 25, 1992, at 36 (on file with the author).

¹²³See Handler, *supra* note 14, at 9.

¹²⁴See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.12, 98 S.Ct. 2454, 2458 & n.12 (1978). See also *General Tel. Co. v. Falcon*, 457 U.S. 159-60 & n.15, 102 S.Ct. 2364, 2371-72 & n.15 (1982) (holding that a Mexican-American employee, who had been denied promotion for allegedly-discriminatory reasons, could not represent a class of Mexican-Americans who had been denied employment. The Court noted, however, that plaintiff might be able to represent such a class if he adduced "significant proof that [the] employer acted under a general policy of discrimination" Such proof would tend to show that plaintiff's claims were typical of the class and that common issues predominated).

¹²⁵See *supra* notes 2, 63 and accompanying text.

appropriateness of such inquiries.¹²⁶ There are also troubling inconsistencies even in areas where the courts agree with each other:

- Preliminary inquiries into the merits are widely accepted where the certification decision is made in the course of approving a settlement, but are less widely accepted in other contexts.

- Preliminary inquiries into the merits are undertaken as a matter of course where monetary claims are brought under Rule 23(b)(1)(B), but *Eisen* is still invoked where the same claims are brought under Rule 23(b)(3).

- Preliminary determinations of merit appear to be less well-accepted in small-claim cases than in mass tort litigation. That is because in mass tort litigation, judgments in related cases can often provide the basis for such determinations. Where small-claim cases are involved, however, there are usually no judgments in related cases to provide a track record on the merits (unless the private claims have been preceded by government litigation).¹²⁷

These splits in authority and inconsistencies in approach, as well as the practical problems generated by adherence to the *Eisen* dictum,¹²⁸ could all be avoided if that dictum were overturned -- either by judicial decision or by amendment to Rule 23. Flawed in its analysis from the outset, riddled with exceptions and undermined by the Supreme Court's subsequent ruling in *Coopers*.¹²⁹ *Eisen* should

¹²⁶See, e.g., *supra* notes 7, 10, 64-65, 79, 102-03, 112 and accompanying text.

¹²⁷Justification for evaluation of the merits in mass tort cases, without any such analysis in small-claim cases, might be attempted on two grounds. First, Rule 23(b)(3) expressly permits the courts to consider related litigation -- which will almost always attend the filing of a mass tort class action. Second, judgments in related cases provide strong evidence of the merits of the class claims, whereas preliminary determinations based on incomplete factual records might be subject to skepticism. However, limiting the evaluation of the merits to certain categories of cases (e.g., mass torts) would be unsatisfactory as a policy matter and inconsistent with the even-handed approach of Rule 23. As to the preliminary hearing: its invocation in other procedural contexts (see, e.g., FED. R. CIV. P. 65; *Schlagenhauf v. Holder*, 379 U.S. 104, 119-20, 85 S.Ct. 234, 243 (1964)) belies the notion that it is too unreliable a device to be invoked in the class action context. See also *supra* notes 53-54 and accompanying text.

¹²⁸See *supra* notes 11-27 and accompanying text.

¹²⁹*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.12, 98 S.Ct. 2454, 2458 (1978).

be given a decent burial. In claims for monetary relief, the courts should be free to consider the merits of the claims (and their maturity) as part of the class action analysis. If this means deferring the class action rulings in some cases, so be it.

At present, however, *Eisen* retains a degree of vitality because *Coopers* stopped short of overruling it. The lower courts have accordingly chipped away at *Eisen* rather than declaring it inoperative.¹³⁰ In the absence of a further Supreme Court ruling on the subject, the most effective way to change the lower courts' approach would be to amend Rule 23. As the Third Circuit recently suggested, the Rules Committee "might . . . consider incorporating, as an element of certification, a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification."¹³¹ Any such change in Rule 23 would render the *Eisen* dictum nugatory, since that dictum -- like the holding in *Miller v. Mackey* -- was based almost exclusively on an interpretation of the rule.¹³²

IV. Suggested Changes in Rule 23

Several major proposals to revise the class actions rules have been presented in the past twenty years. The proposals include a Uniform Class Action Rule adopted in 1976 by the National Conference of Commissioners on Uniform State Laws;¹³³ proposed federal legislation submitted by the Department of Justice in 1979;¹³⁴ a revision to Federal Rule 23 that was proposed by the American Bar Association's Section of Litigation in 1985;¹³⁵ a draft

¹³⁰See *supra* notes 65-89, 96-122 and accompanying text.

¹³¹*Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 635 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3159 (U.S. Aug. 19, 1996) (No. 96-270).

¹³²See *supra* note 49 and accompanying text.

¹³³UNIFORM LAW COMMISSIONERS' MODEL CLASS ACTION [ACT] [RULE] 1976 ACT (Supp. 1995), 12 U. L. A. (hereinafter "*Model Class Action Rule*").

¹³⁴H.R. 5103, 96th Cong., 1st Sess. (1979) (hereinafter "*DOJ bill*"), *discussed in Berry, supra* note 11, at 321-43.

¹³⁵*Litigation Section Proposal, supra* note 71. The proposal provoked substantial opposition within the ABA and was ultimately tabled without any formal action having been taken. See Report of the Section on Antitrust Law, 110 ABA REPORTS 905 (1985); Bone, *supra* note 13, at 82 n.10.

revision of Rule 23 that was circulated in 1993 (but later withdrawn) by the Advisory Committee on Civil Rules;¹³⁶ and a less-ambitious draft revision circulated for publication by the Advisory Committee on August 15, 1996.¹³⁷

A. The Pre-1996 Proposals

The Department of Justice bill proposed abandoning the "vague certification prerequisites" of predominance and superiority; the superiority criterion, in particular, was viewed as unsatisfactory because it had been "inconsistently applied and analyzed"¹³⁸ In place of these prerequisites, the Department expressly called for a preliminary assessment of the merits.¹³⁹

The other three pre-1996 proposals took a different tack. Their approach was to abandon the distinctions among types of class actions;¹⁴⁰ the primary focus would be upon a revised and expanded list of criteria for determining whether class action treatment would be the superior method of handling the controversy.¹⁴¹ For reasons discussed throughout this article, I believe that a heightened emphasis on superiority would be appropriate -- particularly if the criteria were sharpened (to minimize the inconsistencies that troubled the Department of Justice) and expanded (to include a preliminary assessment of the merits).

¹³⁶Bone, *supra* note 13, at 109-112.

¹³⁷1996 ADVISORY COMM. DRAFT, PROPOSED FED. R. CIV. P. 23.

¹³⁸See Berry, *supra* note 11, at 324, 325; *Proposed Revisions in Federal Class Damage Procedures -- Bill Commentary*, 124 CONG. REC. 27,860 (Aug. 25, 1978) (hereinafter "*Bill Commentary*").

¹³⁹Berry, *supra* note 11, at 323, 334-37; *Bill Commentary*, *supra* note 138, at 27,862-64.

¹⁴⁰See FED. R. CIV. P. 23(b)(1), (b)(2) and (b)(3).

¹⁴¹See Bone, *supra* note 13, at 109-10; *Litigation Section Proposal*, *supra* note 71, at 200-04; *Model Class Action Rule*, *supra* note 133, at s 3 (for superiority, the Uniform Rule substituted the criterion of "fair and efficient adjudication of the controversy"; one factor, in determining whether that criterion has been met, was "whether a class action offers the most appropriate means of adjudicating the claims and defenses").

The report of the ABA Section of Litigation implied -- but did not explicitly provide -- that an assessment of the merits would be relevant to the analysis of superiority. The report quoted the following passage from the first edition of the Manual for Complex Litigation:

"[I]t would appear that the judge should not dismiss a suit purely for management reasons without *some assessment of possible merit in the action* and a determination of the issue of whether management problems would frustrate any ultimate relief. *That determination should be supported by fact. . . .* '[F]or a court to refuse to certify a class based on *speculation* as to the merits of the cause of action . . . is counter to the policy which originally led to the rule'"¹⁴²

The report also approved the practice of deciding motions addressed to the merits before making a class action determination -- at least "[w]hen such a [merits] ruling will not require substantial delay, as would be the case if extensive discovery was needed for fair consideration of the motion" ¹⁴³

B. The 1996 Advisory Committee Proposal

The 1996 Advisory Committee proposal is less sweeping than any of the pre-1996 proposals. It does, however, include four elements that would foster preliminary assessments of the merits:

1. Matters relevant to the findings of predominance and superiority would include "the extent, nature, and maturity of any related litigation involving class members" ¹⁴⁴ As noted above, litigation is considered mature "if through previous cases . . . plaintiffs' contentions have been shown to have merit." ¹⁴⁵ By bringing the element of maturity into the class action analysis, the

¹⁴²Litigation Section Proposal, *supra* note 71, at 205, quoting MANUAL FOR COMPLEX LITIGATION s 1.42 n.72 (4th rev. 1977) (citation omitted) (emphasis added).

¹⁴³Litigation Section Proposal, *supra* note 71, at 209.

¹⁴⁴1996 ADVISORY COMM. DRAFT, PROPOSED FED. R. CIV. P. 23(b)(3)(C).

¹⁴⁵MCL 3d, *supra* note 35, at 322 n.1057.

drafters are inviting the courts to assess the merits -- at least insofar as the merits are reflected in related litigation.¹⁴⁶

2. Rule 23(c)(1) currently requires the courts to make their class action ruling "as soon as practicable after the commencement of an action." The Advisory Committee proposes changing the language to read "when practicable"¹⁴⁷ This change reflects the Committee's view that class action inquiries "should not be made under pressure of an early certification requirement."¹⁴⁸ The change would render inoperative the Supreme Court's statement, in *Eisen*, that preliminary hearings on the merits are "directly contrary to the command" of Rule 23(c)(1).¹⁴⁹

3. "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."¹⁵⁰ By approving pre-certification rulings on the merits, the Committee is implicitly endorsing the practice, commonly followed by the courts, of using those rulings in the certification decision itself.¹⁵¹

4. In a new Rule 23(b)(4), the Committee proposes that certification be permitted if "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."¹⁵² Under this provision, settlements that

¹⁴⁶See *supra* notes 68-71 and accompanying text.

¹⁴⁷1996 ADVISORY COMM. DRAFT, PROPOSED FED. R. CIV. P. 23(c)(1).

¹⁴⁸*Id.*, NOTE TO PROPOSED FED. R. CIV. P. 23(c)(1).

¹⁴⁹See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2152-53 (1974). See also *supra* notes 55-56 and accompanying text.

¹⁵⁰1996 ADVISORY COMM. DRAFT, NOTE TO PROPOSED FED. R. CIV. P. 23(c)(1). See, e.g., *McCray v. Standard Oil Co. (Ind.)*, 76 F.R.D. 490, 495 (N.D. Ill. 1977).

¹⁵¹See *supra* notes 105-11 and accompanying text.

¹⁵²1996 ADVISORY COMM. DRAFT, PROPOSED FED. R. CIV. P. 23(b)(4). This provision would resolve a split among the circuits. Compare *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3159 (U.S. Aug. 19, 1996) ("Strict application of the [Rule 23(a)] criteria is mandated, even when the

include requests for class certification could more readily be approved by the courts. Since the approval process includes an assessment of the merits,¹⁵³ this proposed amendment is likely to increase the number of cases in which the class certification determination is based, at least in part, on the merits of the case.

In all of these respects, the Advisory Committee draft encourages preliminary assessment of the merits as part of the class action determination. The result is likely to be a further erosion of *Eisen*. However, under the Committee's approach, *Eisen* would still retain some vitality and would continue to be briefed and argued in every contested class action motion. Anomalies would continue to exist, with merits inquiries foreclosed in some areas and permitted in others; and splits in authority would also persist.

C. A Suggested Revision That Would Permit
Across-the-Board Assessments of the Merits

1. The *Dolgow* Standard:
A Substantial Possibility of Success

Having come this far, the Committee should take the final step by proposing that the dictum in *Eisen* be abandoned, with merits inquiries permitted under Rule 23(b)(3) as part of the superiority analysis. The Committee's own minutes support that conclusion, at least indirectly: "[I]f revisions are proposed now, care should be taken to pursue the project in such a way that Rule 23 will not have to be revisited in the near future."¹⁵⁴

parties have reached a proposed settlement [W]e do not believe that the drafters of the present rule included a more liberal standard for 23(b)(3)" with *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996) (declining to follow *Georgine*); *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) ("If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification").

¹⁵³See *supra* notes 114-17 and accompanying text.

¹⁵⁴MINUTES OF THE ADVISORY COMM. ON CIVIL RULES, May 3-5, 1993, at 2 (on file with the author of this article). According to the draft minutes of a later meeting, "[I]t is not likely that Rule 23 will be revisited for at least another ten years." DRAFT MINUTES OF THE CIVIL RULES ADVISORY COMM. at 188 (April 18 & 19, 1996) (on file).

Courts and commentators favoring an assessment of the merits have developed several different formulations of the degree of merit that a claim should have before it can be certified as a class action. Judge Weinstein, in *Dolgow v. Anderson*, invoked "substantial possibility of success" as the appropriate standard.¹⁵⁵ The Department of Justice bill suggested a lower standard, based on one of the preliminary injunction tests applied by the Second Circuit: whether there are "sufficiently serious questions going to the merits to make them fair grounds for litigation."¹⁵⁶ The District of Columbia rules provide that the court "may require the claimant upon adequate notice to make out a prima facie case on the merits of the claim."¹⁵⁷

Because of the serious consequences that attend class certification, including the potential harm to defendants from the mere fact of certification,¹⁵⁸ it seems fair to make class plaintiffs demonstrate that there is some substance to their claims. A claim that presents "fair grounds for litigation" may be little if anything more than a claim that withstands a summary judgment motion. A "prima facie case" may not even escape summary judgment.¹⁵⁹ Thus, the higher standard applied in *Dolgow* -- "substantial possibility of success" -- seems more appropriate.

Acceptable alternatives would be to require a showing that the claims have "substantial merit" (language that also appears in

¹⁵⁵*Dolgow v. Anderson*, 43 F.R.D. 472, 488 (E.D.N.Y. 1968), *reversed on other grounds*, 438 F.2d 825, 830 (2d Cir. 1971), *on remand*, 53 F.R.D. 664, 667, 685-86 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 437 (2d Cir. 1972)..

¹⁵⁶DOJ bill, *supra* note 134, at s 3022(b)(1); see Berry, *supra* note 11, at 335; *Bill Commentary*, *supra* note 138, at 27862-63; *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 443 (2d Cir. 1977); *Gulf & Western Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 692 (2d Cir. 1973).

¹⁵⁷D.C. ST. RCP. Rule 23-1(c)(3)(1993).

¹⁵⁸See *supra* notes 14-19, 24-26 and accompanying text; *Dolgow v. Anderson*, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825, 830(2d Cir. 1971).

¹⁵⁹Compare *Dolgow v. Anderson*, 53 F.R.D. 664, 667 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 437 (2d Cir. 1972) ("From the outset it was made clear to the plaintiffs that the standard required for going forward as class representatives was higher . . . than that required to withstand a motion for summary judgment").

Dolgow), or to require "significant proof" in support of the claims (language that the Supreme Court used in *General Telephone Co. v. Falcon*).¹⁶⁰ I have suggested "substantial possibility of success," however, because (1) that standard would more clearly permit certification where the court projected a possibility of success that was somewhat less than fifty percent, and (2) that standard is closer to (although less stringent than) the "reasonable likelihood of success" test used under Rule 65; therefore, the courts can import some of the learning that has been developed in preliminary injunction cases.¹⁶¹ There is a "close analogy" between preliminary injunction hearings and preliminary hearings on the merits of class actions; both are "drastic remed[ies] and may be dispositive of the case for all practical purposes."¹⁶²

2. Specific Amendatory Language

To preserve flexibility and to permit application of the rule in a manner that fosters fairness and efficiency, I would suggest that "substantial possibility of success" be included as one of the criteria under Rule 23(b)(3) -- but only as guidance for judges in determining superiority, not as a prerequisite for certification. Rule 23(b)(3) could thus be amended to read:

"(3) . . . The matters pertinent to the findings [of predominance and superiority] include: * * * *

(C) *The extent, nature and maturity of any related litigation involving class members;*

(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*

¹⁶⁰*Dolgow*, 43 F.R.D. at 481; *General Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15, 102 S.Ct. 2364, 2371 n.15 (1982).

¹⁶¹See *supra* note 54, *infra* notes 166-69 and accompanying text.

¹⁶²*Dolgow v. Anderson*, 43 F.R.D. at 502. See Johanna G. O'Loughlin, *Eisen v. Carlisle & Jacquelin: "Frankenstein Monster Posing as a Class Action"?*, 33 U. PITT. L. REV. 868, 882-83 (1972) ("The courts are concerned that the gearing up of the class action machinery will be decisive of the case without regard to the actual merits; therefore, these courts prefer to have a clearer picture of the merits of the case before allowing the class suit to proceed").

and a review of related litigation), that the claims of the class and the class representatives will succeed on the merits"¹⁶³

Substantial possibility of success might be easy to establish in litigation where (1) many related cases have already resulted in judgments, or (2) the class litigation has been preceded by criminal or civil cases filed by the government -- especially if pleas of *nolo contendere* or tough consent decrees have been entered. However, in small-claim litigation, where few related cases are likely to be brought, the findings would presumably be based on the initial disclosures under Rule 26(a)(1) (in districts that have not opted out of that rule),¹⁶⁴ some limited discovery, and evidentiary hearings. Such hearings have been proposed by members of the plaintiffs' bar, the defense bar, and the judiciary.¹⁶⁵

A similar amendment, permitting assessment of the merits under Rule 23(b)(1)(B), should not be necessary. The *Eisen* dictum, propounded in a case brought under Rule 23(b)(3), has not created serious problems in limited fund cases brought under Rule 23(b)(1)(B). It may be prudent, however, for the Advisory Committee to mention in its notes that assessments of the merits have been made, and will continue to be made, under Rule 23(b)(1)(B). An even cleaner alternative would be to apply the superiority analysis to all class actions -- an approach that the Advisory Committee proposed in 1993 but later abandoned.

¹⁶³Suggested changes are shown in italics. Subsection C simply tracks the Advisory Committee's proposed revision, which is a helpful one. I take responsibility for Subsection D.

¹⁶⁴See FED. R. CIV. P. 26(a)(1), permitting local districts to opt out of the disclosure provisions.

¹⁶⁵See, e.g., Maxwell M. Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365, 370, 371 (1972) ("I would urge a hearing -- after appropriate discovery -- on the probabilities of the plaintiff sustaining its claim on the merits prior to the determination of whether the case may be maintained as a class action. It is a sheer waste, in my view, to sustain a class action and go through the hocus-pocus required by the rule in a case in which the plaintiffs do not have a reasonable likelihood of recovery. . . . The procedure should be tightly controlled, expeditious and designed only to insure there is a case reasonably likely to be won by plaintiff. . . . [Such a procedure would, among other things, reduce] the danger of using the class action as a blackjack"); Katarincic & McClain, *supra* note 14, at 439-42; Weinstein & Schwartz, *supra* note 48, at 380-83.

3. The Interpretation of "Substantial Possibility of Success"

As indicated above, the "substantial possibility" test would be somewhat less stringent than the "likelihood of success" test that is used for preliminary injunctions.¹⁶⁶ Under either standard, a judge could decline to certify a claim that was strong enough to survive a summary judgment motion but still had only marginal factual support or appeared, on the basis of a preliminary assessment, contrary to the substantial weight of the evidence. However, the "substantial possibility" test would not require, for certification, a showing that plaintiff was more likely than not to succeed.¹⁶⁷

In the preliminary injunction context, the "likelihood of success" standard is a flexible one -- "a sliding scale" approach in which the hardships to plaintiff of denying preliminary relief are balanced against the hardships to defendant of granting such relief.¹⁶⁸ As the balance tilts toward defendant, plaintiff must make a stronger showing of "likelihood of success" in order to obtain relief; as the balance tilts toward plaintiff, the courts will accept a lesser showing of likely success.¹⁶⁹

A parallel sliding scale could be invoked in connection with the merits of cases brought as class actions. A court could certify a class on a diminished showing of merit where other considerations point strongly towards certification (e.g., common issues predominate, individual claims are too small to be pursued economically, the aggregate damages alleged are not large enough to

¹⁶⁶See, e.g., *American Hospital Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

¹⁶⁷Compare the following preliminary injunction cases: *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2567-68 (1975) ("likely to prevail on the merits"); *Colorado River Indian Tribes v. Parker*, 776 F.2d 846, 849 (9th Cir. 1985) ("probable success on the merits"); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (probability of prevailing is better than 50 percent).

¹⁶⁸See *American Hospital Supply Corp.*, 780 F.2d at 593.

¹⁶⁹See, e.g., *id.*, *Jackson Dairy, Inc.*, 596 F.2d at 72; John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

force defendants into settlement, and the problems of management are slight). But the substantial possibility test should be stringently applied in a case where, for example, the aggregate damages sought exceed the net worth of defendant, individual issues are significant, and the management problems are daunting.¹⁷⁰

4. "Likelihood of Success" Would Be Too Stringent a Standard

In light of the parallels between preliminary injunctions and class action determinations, and the established body of law in preliminary injunction cases, it can be argued that the "likelihood of success" standard should be imported into the class action arena. I have suggested a less stringent standard, however, for several reasons:

- The standard should not be so high that it precludes the litigation of small-claim cases where plaintiffs have been able to show a significant possibility of success, but may not yet have developed sufficient evidence to establish "likelihood of success."¹⁷¹
- There remains some currency to the concept that class action treatment should generally be favored, "at least at the early

¹⁷⁰Another parallel to the preliminary injunction model is reflected in the Advisory Committee's suggestion that class action rulings be made appealable at the discretion of the appellate courts. See 1996 ADVISORY COMM. DRAFT, PROPOSED FED. R. CIV. P. 23(f); compare 28 U.S.C. s 1292(a)(1) (permitting appeal as of right from the grant or denial of an injunction). Class action and preliminary injunction rulings are so important to both sides, and have such a dramatic impact on the course of proceedings as well as the settlement dynamics, that an appellate safety valve makes great sense. That safety valve will be particularly important as the courts seek to implement the changes to Rule 23 that have been proposed by the Advisory Committee. For example, the abandonment of *Eisen*, whether partial (as now proposed by the Committee) or complete (as I suggest), will doubtless create issues that warrant appellate review and guidance.

One small change in the Advisory Committee's proposal for appellate review might be appropriate: responses to petitions for appellate review should be filed only if the court of appeals requests them. Such a limitation, modeled on FED. R. APP. P. 40 (involving petitions for rehearing), could save significant time and expense in any case where the court of appeals is willing to dismiss the petition without hearing from the opposing side.

¹⁷¹It would be particularly inappropriate to import into the class action context some of the stricter interpretations of the "likelihood of success" test. See, e.g., cases cited *supra* at note 167.

stages of the litigation."¹⁷² The "likelihood of success" standard is arguably so stringent that it would run counter to this concept.

- In preliminary injunction cases, plaintiffs can often establish that denial of the motion will cause them immediate hardship; in such cases, the courts can reduce the showing necessary to establish likelihood of success.¹⁷³ Except perhaps in small-claim cases that will be dropped if the class action motion is denied, plaintiffs will be hard-pressed in the class action context to make similar showings of hardship.

Although the "substantial possibility" test is intended to be less stringent than "likelihood of success," it should still be viewed as a barrier to the certification of tenuous claims. Since class certification is an "extremely powerful weapon" for plaintiffs, it is appropriate to place a reasonably high burden on plaintiffs "to establish [their] right to that weapon."¹⁷⁴

D. Concerns About Revising the Rule to Permit Preliminary Assessments of the Merits

The Advisory Committee has considered several proposed amendments to Rule 23 that would permit preliminary assessments of the merits. To date, the Committee has declined to adopt any of these proposals.

Advisory Committee participants have expressed two principal reservations about such preliminary assessments. First, they are concerned that the assessments might have to be supported by "extensive discovery, protracting the certification determination

¹⁷²See *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977, 89 S.Ct. 2131 (1969). See also *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1194 (1969) ("if there is an error to be made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments . . . require"). The notion that class certification can be modified at some future time provides cold comfort, however, to defendants who are likely to suffer immediate adverse consequences from the certification. See *supra* notes 14-19, 24-26 and accompanying text.

¹⁷³See *supra* notes 168-69 and accompanying text.

¹⁷⁴Katarincic & McClain, *supra* note 14, at 437.

and adding great expense."¹⁷⁵ Second, they are concerned that the courts' "prediction of the merits may affect all future proceedings in the case and may have real-world consequences as well."¹⁷⁶ Neither of these concerns, in my view, warrants a rejection of the preliminary hearing on the merits.

1. The Potential Breadth and Expense of Class Action Discovery

In some situations, the merits can be demonstrated with little if any discovery -- for example, where mass torts are "mature," and related litigations have shown that the claims are strong ones. Extensive discovery may also be unnecessary where the private suits are based on criminal indictments, or on prior government civil suits in which discovery has been taken that can be made available to the private litigants. Finally, in the case of settlement classes, extensive discovery should be unnecessary for class action purposes -- particularly if the Supreme Court adopts the Advisory Committee's proposal to make the certification of settlement classes easier to obtain -- although discovery still may be needed to establish the fairness and adequacy of the settlement.

In other situations, substantial discovery may be required if the parties are to make meaningful presentations on the merits. However, the judge, magistrate judge or master should be able to control the scope of the discovery. In preliminary injunction proceedings, for example, the time constraints imposed by Rule 65 can force the parties to focus and expedite their discovery requests.¹⁷⁷ One technique in class actions might be to provide for limited discovery and a preliminary hearing within a relatively short period of time. The Department of Justice bill, for example, provided that the preliminary hearing should be held within 120 days after the complaint was filed, and imposed limitations on the extent

¹⁷⁵DRAFT MINUTES OF THE CIVIL RULES ADVISORY COMM. at 177 (April 18 & 19, 1996).

¹⁷⁶*Id.*

¹⁷⁷The movant often seeks a temporary restraining order to maintain the status quo until the motion for preliminary injunctive relief can be heard. Under FED. R. CIV. P. 65(b), TROs may remain in effect for only ten days, unless extended another ten days for good cause shown, or unless the parties consent to further extensions.

of discovery that could be exceeded only upon a showing of good cause.¹⁷⁸

Even where substantial merits discovery is needed for purposes of the class certification ruling, it should not add greatly to the expenses that would otherwise be incurred. If a class is certified, the merits discovery will be used in litigating or settling the case; if a class is not certified, the discovery will be used in any actions that are pursued on an individual basis by the named plaintiffs or by unnamed members of the class.

Furthermore, the preliminary assessment of the merits (and attendant discovery) should produce benefits that far outweigh the costs. In particular, a discovery-supported assessment should reduce the risk that the case will be settled on a class basis without regard to the merits. The costs of obtaining such an assessment would be small compared to the potential costs of obtaining too little money, or paying too much, in a class action settlement that is driven by considerations unrelated to the merits. The preliminary assessment should also provide the parties, and unnamed class members, with a more informed basis for making litigation and settlement decisions.

2. The Potential Impact of the Preliminary Assessment on Future Proceedings

Non-dispositive preliminary rulings often shape the conduct of the case, and even its ultimate disposition, by providing clues as to the strengths and weaknesses of the claims or defenses. That is true of rulings on motions to dismiss or for summary judgment, motions for preliminary injunctive relief, and other motions that give the court an opportunity to comment on the merits (e.g., motions in limine regarding critical evidentiary issues such as the admissibility of expert testimony).¹⁷⁹ In *Insurance Antitrust*

¹⁷⁸See *Berry*, *supra* note 11, at 335; see also *id.* at 337 ("if parties know they only have four months . . . they are likely to seek just the necessary discovery and focus on the core issues").

¹⁷⁹In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 592-93, 113 S.Ct. 2786, 2795-96 (1993), the Supreme Court held that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. . . . This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Preliminary

Litigation, for example, the two sides were unable to come close to settling -- because their perceptions of the merits were radically different -- until the merits were clarified by a Supreme Court ruling that definitively established the governing law.¹⁸⁰

Preliminary assessments of the merits are thus helpful insofar as they provide the parties with information that is relevant to their tactical and strategic decisions. Such assessments can also be helpful insofar as they give guidance to third parties regarding the possible outcome of significant cases.¹⁸¹ But preliminary assessments could be very troublesome -- and misleading -- if they were based on inadequate information and therefore unreliable.

The Supreme Court's decision in *Eisen*, and the Advisory Committee's discussions to date, have been shaped by concerns over the potential unreliability of preliminary assessments of the merit of the claims.¹⁸² I believe that those concerns are overwrought because ample safeguards can be built into the process, just as they have been built into the procedures developed under Rule 65.¹⁸³

assessments made pursuant to *Daubert* will manifestly affect future proceedings in the case, and may have real-world implications as well. These are not reasons to prohibit the courts from making such assessments.

¹⁸⁰See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 801-11, 113 S.Ct. 2891, 2911-16 (1993), discussed *supra* at notes 104-05 and accompanying text. The parties' inability to settle before the merits were clarified indicates that the merits do matter in the settlement of some class action litigation -- at least where, as in *Insurance Antitrust Litigation*, the parties believe from the outset that impending court decisions will help to shape the case and provide guidance as to the merits. If merits determinations are permitted as a matter of course in connection with class action rulings, those determinations are similarly likely to affect and facilitate settlement.

¹⁸¹For example, securities analysts and potential investors, in making their judgments about particular companies, might well take into account the projected outcome of litigation that is important to those companies. Today, projections about the outcome are rarely available. Under the AMERICAN BAR ASSOCIATION STATEMENT OF POLICY REGARDING RESPONSES TO AUDITORS' REQUESTS (Dec. 1975), litigators must tell their clients' auditors whether summary judgment motions are likely to succeed, but otherwise have no obligation to project the outcome.

¹⁸²See *supra* notes 53-54, 176 and accompanying text. There is, of course, a risk that any preliminary assessment will be less accurate than a final judgment based on a full trial record. But the comparison to such a final judgment is illusory, since very few class actions are actually tried. See, e.g., Alexander, *supra* note 17, at 524-25, and authorities cited therein.

¹⁸³See *supra* note 54 and accompanying text.

Indeed, since class action motions are not subject to the time constraints that can impact preliminary injunction proceedings,¹⁸⁴ there may be a lesser risk of unreliable assessments in the class action arena. On balance, the benefits of making the assessments far outweigh the risks, just as the benefits of merits discovery outweigh the costs.

Conclusion

For more than two decades, the Supreme Court's dictum in *Eisen* has made it difficult for the courts to assess the merits in the course of their class action analyses. *Eisen's* vitality has been sapped by subsequent Supreme Court decisions and by the lower courts' repeated efforts to circumvent it. *Eisen* would be further undermined by a number of amendments to Rule 23(b)(3) that have been proposed by the Advisory Committee.

Although the Committee has not chosen to deliver the coup de grace, I believe that it is now time to do so. Because *Eisen* has been riddled with exceptions, there is little logic to the line-drawing that separates areas where inquiries into the merits are prohibited from areas where such inquiries are permitted. Further, there are widespread splits of authority over the appropriate places to draw the lines. Even more troubling is the fact that under *Eisen*, monetary claims are often resolved with little or no regard for the merits. Attorneys who bring suits of dubious merit are rewarded, and class members who have strong claims are penalized. If *Eisen* is overturned, resolutions based on the merits will be fostered, and the inequities of the present situation, as well as the misplaced incentives, will be reduced.

My suggestion, therefore, is to amend Rule 23(b)(3) by permitting the district courts to determine whether class action claims have a substantial possibility of succeeding. Such determinations would inform, but not dictate, the courts' holdings on superiority (i.e., whether class action treatment is the superior method of adjudicating the controversy). If the claims meet the new standard, that would be a factor in favor of class certification. If

¹⁸⁴See *supra* note 177 and accompanying text.

the claims do not meet the standard, class certification would probably -- but not certainly -- be denied.

Preliminary assessments of the merits should help weed out the weakest class action claims, which have been characterized as "legalized blackmail." Preliminary assessments should also discourage settlements that favor plaintiffs' attorneys at the expense of the class. Attorneys for the class representatives should be emboldened, by findings that the claims have a substantial chance of succeeding, to insist upon adequate compensation for the class members. If the settlement does not provide for such compensation, attorneys for unnamed class members -- armed with the court's findings -- will doubtless seek enhanced compensation at the hearing on the fairness of the settlement.

To be sure, obtaining a preliminary assessment may be time-consuming; and there is a risk -- which can be ameliorated by procedural protections built into the system -- that the preliminary assessment will be ill-founded because it is based on a record that is less than complete. These are small prices to pay, however, for reducing the uncertainties and anomalies that have plagued our class action jurisprudence, and for increasing the likelihood that class action dispositions will reflect the merits of the claims. The time has come to jettison *Eisen*.

#1443

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October 4, 1996

96-AP-15

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Secretary of the Committee
of Rules and Practice of Procedure
Administrative Office of the US Courts
Washington, D.C. 20544

Ladies & Gentlemen:

I have received and carefully reviewed the Preliminary Draft of amendments to our federal rules of procedure. It was my honor to review the last such publication and make suggestions about it. I am eager to be of all possible help, which may have some good quality to it because of my more than 50 years in practice, regarding updating the federal rules of appellate, civil and criminal procedure. I respectfully suggest the following, if you please:

Addressing line 141, page 11, the term "cost bond" appears to me to be subject to criticism on the ground of vagueness. I know the phrase "cost bond" has for decades been in common use. And it has always troubled me. We certainly do not want to expand the rules or generate any redundancy or unnecessary verbiage. But I suggest that sub-section (B) on page 11 be modified to add this after the word "cost bond":

" * * * , including all printing costs, filing fees, reimbursement for sanctions which have been reversed and any other costs or expenses * * * "

Passing to page 43 I read carefully the materials beginning on line 37. Addressing line 39, "When" is substituted for the words "As soon as". It occurs to me that it may never be practicable and I suggest consideration be given to revising line 39 so it will read "when and if practicable * * * "

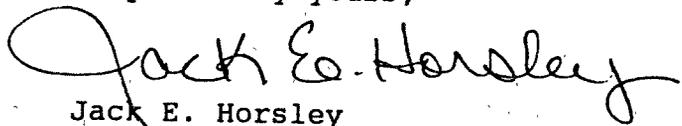
On line 62 there is a discussion of Rule 26.2 on production of the statements of witnesses. And on lines 2, 3 and 4 reference is made to a "suppression hearing". I referred back to Rule 12. I believe all trite legalisms should be avoided as much as possible. But "suppression" may not be sufficient to accomplish the purpose intended by the Rule. The common law term was "in limine". I do not favor using that term here. But I do suggest that consideration be given to expanding line 2 slightly so it will read:

" * * suppression or proscription hearing * * ."

I deem "proscription", technically "writing against", to be what is contemplated by the hearing conducted under Rule 12.

Careful study and evaluation of all of the other materials fail to produce any further suggestions on my part. I am honored always at the opportunity to review and submit observations about amendments to our Federal Rules in all areas of Procedure.

Respectfully yours,



Jack E. Horsley

JEH/sc

MEMORANDUM

DATE: December 20, 1996
TO: My Friends on the Civil Rules Committee
FROM: John P. Frank
RE: Response to 1996 Circulation of Proposed Rule 23 on Class Actions

Except for Judge Rosenthal, whom I have not met, we all know each other. I served on the Civil Rules Committee from 1960 to 1970 and, thus, was a member of the Committee that originally proposed Rule 23. For that reason, Judge Higginbotham included me as an emeritus member and I participated fully with you in recent years on reconsideration of the rule.

I had hoped to appear before you at the San Francisco hearing, but circumstances preclude it, so I am sending to each of you, as I so often made mailings during our time together, my materials on the proposed rule. The first is a historical account which some of you will remember; it is not much changed. In refreshing your memories, it may help you in your present determinations. As most of you will recall, I dissented from the (b)(3) portion of the original rule in the belief that it would foment fraud. For your casual interest, I enclose a note from Justice Black showing that I was not alone. I think this has happened and that to a great extent the rule has simply imposed a burden on the courts which benefits the attorneys who bring these cases, but does not do much good for the members of the class. At times, I have either appalled or entertained you by circulating reports on some of the class awards. I have collected some of those in this booklet so that your memories can be refreshed.

Finally, I have included in a brief way my own thoughts on some of the proposals immediately before you, what I would have said to you in San Francisco. I continue to think that settlement classes are quite undesirable and put the courts into being the trading floor for the barter of res judicata. If we must have settlement actions, I think that Judge Becker has shown us the way. Since the High Nine are now considering these matters, there is not much point in talking about them. I strongly believe in the provision in the rule which permits judges to reject class actions which will profit nobody but the lawyers. At the same time, I respect the sincere views of others to the contrary. As the most blatant "liberal" and old New Dealer in your company, I am chided by some friends for my view. But I think the court burden and what I regard as the plain corruption of the

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system outweighs the small social prod. I have had my own say in the latter part of these notes. At a minimum, if we are to allow these cases on the theory that the courts are to function as a regulating agency deterring ill conduct, I think these cases should have an "opt in" rather than an "opt out" component. If the proposed beneficiaries of these minuscule recoveries don't care enough about them to invest thirty-two cents to opt in, then these cases should not be in the system at all.

I close with appreciation for the companionship of the last few years. I am grateful for all I have learned and even more grateful for new friendships and for your tolerance of my warmly held convictions on this subject.

With holiday greetings to my recent colleagues on the Committee --

John P. Frank

JPF:cc
Enclosure

APP1AD74

**RESPONSE TO 1996 CIRCULATION OF
PROPOSED RULE 23 ON CLASS ACTIONS**

By John P. Frank

*Submitted to the Advisory Committee on Civil Rules
in Connection with the January 7, 1997
San Francisco Hearing*

APP1AD60

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**RESPONSE TO 1996 CIRCULATION OF
PROPOSED RULE 23 ON CLASS ACTIONS**

By John P. Frank

I. HISTORICAL ACCOUNT.

A. The Origin Of The Modern Rule.

Rule 23, on which the basic committee work was done in 1962 and 1963 and which was promulgated in 1966, must be seen as part of both its professional and its social times.

From the professional standpoint, the procedural world had enjoyed a rebirth. The great flush of creative activity which had led to the rules of 1938 had been under the leadership of a distinguished committee headed by Attorney General Mitchell and staffed by Judge Charles E. Clark and J.W. Moore. That committee had done its giant work and exhausted itself; there was no practice of membership rotation in the 1950s, and the Supreme Court simply abolished the committee. For a period of years there was none.

Then in 1960, Chief Justice Warren made the appointments to recreate the procedural structure. For chairman of the civil committee, he chose Mr. Dean Acheson, America's great elder statesman and yet a lawyer perfectly competent to lead discussion in procedural matters. In regular attendance was Judge Albert Maris of the Third Circuit Court of Appeals, chairman of the Standing Committee, and J.W. Moore, then at the height of his powers, and Charles Alan Wright, then very much a young comer in the procedural world. In the then style, the committee were dominantly members of the bar.

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The reporter was Professor Ben Kaplan of Harvard, later a justice of the Massachusetts Supreme Court; it is highly important that in the small circle of truly great reporters of various projects, Kaplan was preeminent and enormously effective. Rule 23 is, in the large sense, his rule. As we moved forward, he began to develop as his successor reporter Albert Sacks of Harvard, who undertook the later leadership role on Rule 23. Professor Kaplan was at the apogee of his academic career and Professor Sacks was on the way up, later to become dean of the Harvard Law School.

The new committee hit the deck running. It began with an emergency rule which has become 54(b) to solve the then very serious problem of when is a final judgment; and another emerging fix was substitution of public offices under Rule 25(d). The first big task was a complete review of the whole concept of party structure, with great expansion of joinder of parties. Rule 23 was one of those rules and was the summit in joinder.

One other vital element of this professional time: This was a committee which in every respect was prepared to think big. Rulemaking was a high policy and significant activity. All meetings of the committee were held in the Supreme Court building and Chief Justice Warren often dropped in for portions of the meetings. The dreary era of the 1980s, when the rule system was unable to respond effectively to Justice Powell's 1980 dissent on discovery problems and which resulted in Congress' virtually brushing aside the whole rules process by adopting the Civil Justice Reform Act of 1990 was a universe which was not even imagined in the 1960s. Chief Justice Warren's committee was there to do business.

Also important was the social setting, for this had a most direct bearing on this rule. Rule 23 was in work in direct parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b)(2) and without its high utility, in the spirit of the times, we might well have had no rule at all.

The other factor is that 1964 was also the apogee of the Great Society. President Johnson was elected with the most overwhelming vote ever, as of that time, achieved by anyone. A spirit of them versus us, of exploiters who must not exploit the whole population, of a fairly simplistic good guy--bad guy outlook on the world, had its consequences.

One other element of the time must be identified: This was a world to which the litigation explosion had not yet come. The problems which became overwhelming in the eighties were not anticipated in the sixties. 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.

Against that background, let me turn to the creation of the rule. In this brief statement I slide over the pre-1960 concepts of class action, the "true"

class action involving joint rights in which a class decision was res judicata; the hybrid category involving several rights relating to specific property; and the third, which is the parent of the major class actions of today, the "spurious" class actions involving several rights affected by common questions, as to which the result was res judicata only as to the parties actually joined.

Put at its simplest, what new Rule 23 did, first, was expand the true class action somewhat, (b)(1); second, make sure that suits against segregation, as well as other civil rights cases, would be within the class action rule and would be binding as to all members of the class liberally conceived, (b)(2); and third, the one time spurious class action which has been restricted to actual parties was turned into a binding res judicata procedure which could cover a universe as large as notice could reach. It is, I believe, true that (b)(3) was the most radical bit of rulemaking since the original rules created one cause of action and abolished key distinctions between law and equity. The committee repeatedly spoke of it as a "crowning accomplishment."

It was perfectly apparent to the rules-makers of the time that they were doing big things. The critical meeting was October 31 and November 2, 1963, and the most sharply disputed question was whether to have Rule (b)(3) at all.

There were two levels of concern over (b)(3), apart from details. Remember, the possibility of group securities actions, of RICO and of products liability were still in the future. The sharp practical concern was that major defendants charged with tort liability could readily rig what I will unkindly call a patsy class, arranged to have it sue, have the class take a dive, and thus let the

defendants avoid responsibility. It was perceived from the beginning that the class action had the potential of turning the courts into merchants of res judicata, selling that valuable asset at a manipulated price. That was the practical problem and it was more than hinted at from time to time. Remember that this was the era of the great society and "big business" has a very limited stock of trust.

So much for the underlying policy resistance. The legal form which this resistance took was that it was morally and constitutionally wrong to deprive people of their causes of action without their consent. Mind you, this is not long after such cases as *Sipuel v. Oklahoma* or other of the great civil rights cases which had heavily stressed that individual legal rights were personal, not fungible. There was an intense sensitivity to the fact that people should not be swept into a basket; that their rights were independent and personal to them.

Had this problem of individual rights not been solved in a fashion which satisfied that committee, I think there never would have been a (b)(3). There was great concern that in mass torts perhaps there should be no class actions at all. Professor J.W. Moore gave the illustration of the Ringling Bros. mass tort, the fire in the tent at Hartford. He said that any compulsory class action "goes against my grain of the right of the litigant to run his own lawsuit"; and he repeated a concern I had expressed earlier that "the Pennsylvania Railroad, or some other alleged tort feisor" might take "the initiative to force a concourse of plaintiffs in a particular jurisdiction. I can't think of anything nicer for the general counsel of the Pennsylvania Railroad in the Perth Amboy situation, than your class suit rule."

It was at that moment that committee member Judge Charles Wyzanski had his flash of genius. He responded to Professor Moore, "Would you be satisfied, Professor Moore, if the class could never include anybody who specifically protests within a given period?" Professor Moore responded, "That would be helpful" and the principal opponent of (b)(3) added, "If that were done, my problem would evaporate."

Thus, the opt-out concept was born and quickly adopted. Again, it must be perceived that this was not the conception of the "opt-out" of today because the really large class action had not yet been conceived of. Judge Wyzanski was thinking of relatively small classes, and he said of the individual claimant, "If he cares enough to conduct his own litigation," he should "be allowed to do it. He must affirmatively care." Again, it was here assumed that opt-out was an actual conscious choice of a person who had a meaningful alternative to bring his own action. It assumed that the interest of the individual was large enough so that the option of bringing one's own action was a meaningful option. The concept of thousands of notices going ceremonially to persons with such small interests that they could not conceivably bring their own action was still in the future. The committee thought that it was making a major policy decision and not that as a practical matter it was simply going to either subsidize or burden future branches of the United States postal system with superfluous mail.

I make this a little more innocent than it was. Professor Kaplan raised the possibility of very large numbers of claims. A couple of other

examples were given. But Judge Wyzanski was firm that all those people, even in a giant case, would have to have notice:

I think you also have to make a finding that the form of notice to be used would in all probability reach all persons in the proposed class. And I think it quite clear that in [an enormous case involving thousands] you could not make any such finding. I don't think that case is a class action except for those people who can be reached.

It is a great tribute to Judge Wyzanski's foresight that the Supreme Court has since held that notice and an opportunity to opt out is constitutionally required in class money claim cases. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Shareholder derivative actions were pulled out of former Rule 23 and made into Rule 23.1 in the belief that they were so different from class actions that they should be separated; the number 23.1 was used only to avoid renumbering other rules.

It is with that understanding that the rule was adopted and it was with that understanding that the notes contain the famous restriction that this rule would rarely, if ever, be used in mass tort cases. As a member of the committee, I dissented from the (b)(3) portion of the rule on the grounds that the classes would be too easy to rig and that if a pharmaceutical drug case were filed in state A, a user in state B should not be compelled to hire a lawyer to determine whether or not he should opt out.

B. Expansion And Successes.

We may safely assume that the number of class actions following immediately upon the adoption of the rule was small. That is no longer the case. The number filed in each of the past eight years, has ranged from the low of 647 to a high of 1,340. We haven't a clue as to the number of people or dollars involved. The burden on the courts has been ever larger. The number pending in 1988 was 1,370 and the number pending in 1993 was 2,131. Moreover, the number of cases closed has declined each year. The number closed in 1988 was 805 and the number closed in 1992 was 381.¹ Moreover, the cases get bigger, involving more and more people. We are now in the era of the billion dollar or several billion dollar aggregate actions; some big ones are Agent Orange, Dalkon Shield, and DES. Some of these big cases have been class actions, while others have been pulled together under the multi-district panel system. The common areas, in addition to some torts (for there remains resistance to this device for torts in some areas) are antitrust cases, securities cases, and RICO or consumer fraud cases.

With the expansion of the class actions, there have been successes, failures, and problems, and these will be briefly identified from the historical standpoint in the discussion following. There have clearly been successes in the almost thirty years of operation of Rule 23. A demonstration of this is that many of the commentators who have written to the Advisory Committee for

¹The Administrative Office for U.S. Courts did not keep pending case records for 1994 or 1995. It courteously shared its unpublished figures for 1994 and 1995, showing 991 class action filings in 1994 and 1,340 in 1995.

substantial groups of the bar or client blocs have indicated either general satisfaction with the rule as it functions or satisfaction with particular portions.

The most dramatic fact of all those letters, however, is that not a one of them names any particular success. For illustration of what is not there, in preparation for this meeting we have a paper from Judge Schwarzer and others on federal-state coordination in big cases which lists a whole series of illustrative successes. We have nothing of that sort on Rule 23 triumphs. To this large segment of the reporting bar, there are no specific cases to which they wish to give an hurrah. In the general literature, Judge Weinstein in the Agent Orange case is the rare sung hero. I have browsed through ten years of the Index to Legal Periodicals, and a fair number of articles cited. The number of noteworthy, successful class actions mentioned there is extremely small.

The point being made here is not that there are no successful class actions; of course there are. In my own region one can point to those one knows about; see, e.g., *Harmsen v. Smith*, 693 F.2d 932 (9th Cir. 1982), a bank security fraud case, or others I may mention. The point is that this is anecdotal knowledge; there is no serious history evaluating the pluses and minuses of this remedy.

Without doubt the vastly numerous claims in some situations, as asbestos or some product liability claims or others, must be aggregated somehow. A splendid general study of the various devices of aggregation is Professor Judith Resnik's *From "Cases" to "Litigation,"* 54 *Law and Contemporary Problems* 5 (Summer, 1991). In March, 1988, the Judicial Conference approved consolidation of multiple litigation in state and federal courts; in 1991, it approved

consolidated treatment for asbestos cases. The Federal Court Study Commission endorsed increased aggregation for trial as well as discovery. A variant method of aggregation is consolidation under Rule 42. The American Law Institute now has its own proposal. But history does not tell us the best method of aggregation; in 1966 the committee thought MDL preferable to class actions for mass accidents.

There are such cases. In the analogous MDL field, pretty clearly Judge Pointer's and Judge Higginbotham's current disposition of breast implant cases is an illustration of a gigantic success,² and the Hyatt Hotel fire is a multiple federal-state success.

C. Problems.

1. The Fix.³

Quite clearly the fear of some, of whom this writer was definitely one, was that the rule would invite trouble by giving prospective defendants an opportunity to rig classes which might be cheaply bought out. The 1963 specter has not, in fact, arisen to haunt the system. This phase of the federal district courts becoming merchants in the sale of res judicata has not occurred.⁴

²Alas, it did not hold.

³In this section I am reporting on the commercial and tort cases, not the "good cause" cases, such as the environmental actions.

⁴The Council of the American Law Institute, of which I am a member, and the Uniform Law Commissioners are currently considering revision of Article 2 (Sales) of the U.C.C.; and because of the rise of software as a new product, an Article 2B on software leases. I have suggested that perhaps instead of Rule 23 there should be an Article 2C on the sale of res judicata.

But its cousin has. Potential defendants have not had to create phony cases. The "take a dive" plaintiff class has instead been empowered by the attorney who purports to represent the class -- the attorney for the fair and adequate representative according to the rule -- who is prepared, in effect, to take a bribe in which he gets a lot and the members of the class get very little. Such arrangements are also called "'sweetheart' settlements with defendants, trading a portion of the compensation due victims for a premium on, or merely the certainty of, the fee recovery." D. Rosenberg, *Class Actions for Mass Torts*, 62 Ind. L.J. 561, 583 (1987).

For want of statistical evidence, one must become anecdotal, and I report from anecdote that this phenomenon exists. As § 30-42 of the Manual for Complex Litigation Second (sometimes called by the judges the Complex Manual for Litigation) recognizes, "counsel for the parties are the main source of information concerning the settlement." Of course the judge should review the settlement and of course there should be opportunity for protest, but with the backlog of over 2,000 class actions pending, with presumably all of them before very busy judges, and with judges bringing uneven levels of ability to the task -- not all of them are a Judge Pointer or Judge Weinstein or Judge Higginbotham - - settlements can be perfunctorily swept through.

A recent illustration of an extraordinarily meticulous fee study is that of Judge William Browning in a \$600 million matter, largely though not entirely affirmed after close thought in *Washington Pub. Power v. City of Seattle*, 1994 W.L. 90327 at 9 (9th Cir. Mar. 23, 1994). This was a seven-and-a-half-year case. It took a law clerk one year, full time, to analyze the fee claims and the judge

over three weeks to utilize the data and reach his result. As is observed in a very substantial Stanford Law Review article, judicial review of the records in a big case "seems a positively breathtaking waste of an article III judge's time," and this review usually results in "a few generalities about the uncertainty of recovery" and a contingency multiplier. J. Alexander, *Do the Merits Matter?*, 41 Stan. L. Rev. 497, 578-79 (1991). As has been said in a very constructive analysis, "Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiffs' attorneys rather than their clients." J. Coffee, *Plaintiffs' Attorneys in Class Actions*, 86 Col. L. Rev. 669, 677 (1986).

This does not, by any means, always happen. A splendid example is of a large securities fraud case pending in the district court in Louisiana. A settlement was negotiated in which the security holders would receive 1.7 cents return on each dollar invested, minus 25 percent for legal fees, essentially a penny on the dollar. The net return to the investors, in short, was slightly over one percent and counsel fees were proposed to be \$7 million.

This one was gross enough to raise a howl and a national television program highlighted it. This led to a protest. The judge did take steps to reject the proposal and a later, different and fairer settlement was worked out. But in most settlements, there is no television coverage and the sense of scandal is not large enough, nor the potential awards great enough, to engender an effective protest.

As this thought has been politely put, "Because the economic interests of the attorney and the class may conflict, the attorney may negotiate settlement terms that do not reflect the interests of the absentee class." Note, *Abuse in Plaintiff Class Action Settlements*, 84 Mich. L. Rev. 308 (1985). Without any venality, but simply as a matter of business judgment, as Judge Friendly has observed, the attorney may have an advantage in taking a smaller settlement bearing a higher ratio to the cost of work than a larger settlement obtained after extensive discovery, trial and appeal. *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972).

The hazard of this conduct was greatly increased by the United States Supreme Court decision in the matter of *Jeff D. v. Evans*, 475 U.S. 717 (1986). It had previously been the rule in some circuits -- the lead case was from the Third Circuit, *Pandrini v. National Tea Co.* 557 F.2d 1015, 1021 (3d Cir. 1977) -- that the settlement on the merits and the determination of legal fees must be truly separate episodes so that the merits would be determined at one time and the legal fees at another and later time. This reduced the bribery potential. But the Supreme Court in *Jeff D.* held that both of these matters could come on at once, so that the defendant could settle with the class and settle with the lawyer simultaneously.

This has not improved the returns to the classes. As Professor Kane has observed with respect to settlement proposals which "explicitly provide for large attorney's fees . . . the court cannot rely on opposing counsel to assure a full adversary presentation of the attorneys' fee application because, having reached a settlement, the class opponents have no interest in how the fee issue is

resolved." M.K. Kane, *Of Carrots and Sticks*, 66 Tex. L. Rev. 385, 398 (1987). Moreover, as the Ninth Circuit observed in March of this year, "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." *Washington Pub. Power v. City of Seattle*, *supra*. For another discussion of "the pressures on class lawyers to settle and obtain fees rather than maximize the benefits to the class," see L. Grosberg, *Class Actions and Client-Centered Decision Making*, 40 Syracuse L. Rev. 709, 776 (1989). Let me be very explicit. Nothing in this aspect of the fee problem makes the defense attorney look any better than the plaintiff's attorney.

D. Fees.

We have no clear cut analysis of the extent to which Rule 23 deserves the title occasionally given to it in casual talk among lawyers as the Lawyers Relief Act. The disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of this victory. This Relief Act aspect of course cuts in both directions because the defense bar must also be paid a sizeable sum for its efforts to keep the recovery down. As is developed elsewhere, "the paramount motivation for such litigation [is] counsel's desire to generate substantial fees." Note, *Attorneys' Fees in Class Action Shareholder Derivative Suits*, 9 Del. J. Corp. L. 671 (1984), citing *Zeffiro v. First Pennsylvania Bank*, 581 F. Supp. 811, 813 (E.D. Pa. 1983).

The result by the 1980s and the present time, by way of historical development, has been oft times to create a giant churn. The plaintiffs' lawyers

are busy, the defendants' lawyers are busy, the courts are busy, and the cream that should rise to the top from all of this churning is frequently only a drop or two for those whom Rule 23 was designed to benefit. For a strenuous attack on counsel fees, see J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991), giving one illustration of a thousand dollar an hour fee. The article also illustrates the use of special masters as judges try to take control of the detailed analysis of some of these claims.

The common argument in favor of allowing class actions to proceed with pittance returns to the beneficiaries is that this serves as a social regulatory mechanism and helps to avoid future abuses of the general public. Collateral to this is the argument that at least some of these cases are brought by organizations generally well regarded for good works in behalf of consumers or other beneficiaries and that the fees helped to sustain such organizations. However, there has never been a meditated analysis as to whether this form of social regulation for consumers or the environment is better handled by government agencies or by the courts, nor whether the burden on the court system over-balances the value of this indirect form of social legislation and administration.

A different solution to the minuscule recovery and the large fee is the concept of "fluid recovery." The development of this device, largely in the past ten years, is set out in J. Solovy and others, Class Action Controversies at 140-42 (1994). For example, when members of the class would get only two dollars a piece, the only winners are likely to be the attorney and, oddly enough, the

defendant because nobody applies for these small amounts and the defendant gets to keep the money. Under the developing notion of fluid recovery, there are other forms of charge without any effort to get anything to the individual plaintiffs. Illustrations are price rollbacks, escheat, and other devices; for discussion, see G. Hillebrand and D. Torrence, *Claims Procedure in Large Consumer Class Actions*, 28 Santa Clara L. Rev. 747 (1988).

E. The Class Representation.

1. Who is the representative?

The rule assumed that there would be an honest to God plaintiff or plaintiffs as true representatives of the class. That has become a fiction; the class representative "has been reduced a little more than an admission ticket to the courthouse and one anecdotal example of the class claim. Class counsel does all major planning and makes the critical litigation decisions." J. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 Hastings L.J. 165, 166 (1990).

The only close analysis in the literature strongly suggesting that no plaintiff is representing the class is the Alexander study in the Stanford Law Review, *supra*, analyzing nine settlements in securities cases. The stakes in those cases range from \$19 million to \$95 million. The percentage settlement in seven of those cases range from 20 percent of the stake to 27 percent and four of them are within a two-point spread. The merits of those claims had nothing whatsoever to do with the settlements; the merits could not be so interchangeable. These are cases in which officers and directors are named as

defendants and strongly suggest that settlements are made with corporations to get the insiders off the hook.

2. The race for the gold.

The most visibly distasteful aspect of class actions is the race by attorneys to grab the first class claims and thus get to be lead counsel or at least on the steering committee. The ashes from the great fire will not be cold and the corpses barely at the mortuary before someone will have filed a class action; having found one person, dazed but alive, or one widow, the attorney quickly files the action. There is no actual representation of a class at all.

From there on out, the case is churned to warrant more fees. There are cases where the defendant would settle immediately, but is not given the chance.

The development described here is anecdotal and not statistical, but the anecdotes come on high authority. To write this paragraph I have consulted four past presidents of the American Trial Lawyers Association, the number one group of plaintiffs' lawyers. They are unanimous that this practice exists and that it is disgusting; they refer to these speed artists as "The Parachutists." This historical development, they believe, brings shame to the Bar and particularly to their great division of it.

F. The Managerial Revolution.

A significant historical development in the 1980s has been the impulse to change major portions of the Rule 23 procedures. This must be seen in relation to the rise of the managerial revolution in the entire court system. As the courts have been inundated by the familiar explosion, the dominant impulse

has been to ask judges to take more and more charge of the cases. The development of the pretrial conference rule over the last fifteen years is an illustration.

The dominant motifs in this historical development have been, first, a feeling that the judges are a pretty capable lot, which probably would be stipulated; and second, that Big Brother will take care of you. The bar has a good deal more trouble accepting this second proposition. It has led to two developments of note in recent years. One has been the impulse to get rid of the notice system and, thus, totally abandon the original premise of the rule that every member of the class should have at least an opportunity to decide whether he wishes to be in it or not. As classes grow infinitely larger, there has been a strong impulse to save the money and the time and, hence, the development of proposals to give up notice.

As noted earlier, there is a constitutional limitation to scuttling notice. An alternative device to get to the same end is the abandonment in many instances in recent years of the express provision of the rule that the class, if there is to be one, is to be certified as early as possible. On the theory that Big Brother will take care of the public, and that counsel for the two sides can be expected to take care of their defendant clients and the class even before there is a class, the practice has arisen of negotiating the settlement first and certifying the class afterwards. This is accompanied by the practice of publicizing what the settlement recovery would be so that the members of the class can look at their share before they decide whether to opt out.

The original filing of the action tolls the statute of limitations. Under the system of settling before there is a lawsuit, a potential class member who peeks before he opts is thus free, if he wishes, to get into another class in some other part of the country in the hopes of doing better. This has led to the phenomenon of rival class recruiters urging opt-out on the grounds that "I can get you more."

G. Conclusion.

The major present alternative for dealing with aggregate litigation is the Multi-District System, which has the advantage of dealing with actual claims in being and dragoons no individuals into litigation, though all too often it clusters litigants who would prefer to be separate. The failures of the client representation and fees are similar in both types of aggregation.

Thirty years after the creation of the modern class action, it is apparent that the committee gave birth to a giant. Whether it is a good and kindly giant or an ogre or something in between is the issue. I believe that the giant has grown too fast; has become a legal mechanism out of control; and that fewer would be better than more.

II. COMMENT OF JUSTICE BLACK ON THE 1966 RULE 23.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

May 2, 1969

Mr. John P. Frank
114 West Adams Street
Phoenix, Arizona 85003

Dear John,

Thanks for sending me your dissent to Rule 23 (b)(3)
concerning which I wrote in my opinion in Snyder v. Harris.
I certainly agree with you that that rule is a very poor one and
I am glad to know that you agreed with me at the time it was
passed.

Best regards to you and the family.

Sincerely,


Hugo L. Black

hlf:fl

III. ILLUSTRATIONS, ANECDOTAL AND OTHERWISE, OF WHAT APPEAR TO BE ABUSES.

1. *Kamilewicz v. Bank of Boston*. Bank of Boston agreed to deposit \$8.76 in each class member's bank account and then deduct up to \$100 from each account for counsel fees.

2. Someone has brought a class action against New York Life Insurance Company. A settlement has been reached. I happen to be a policyholder and, hence, am in the class. What I get for my "victory" is that I can, if I wish, borrow some money from New York Life to pay my premium, and I can buy some more insurance if I care to at a favorable price. I don't need the money and don't want the insurance, so this doesn't do me a great deal of good. Counsel gets \$22 million.

3. *Barros and Naja v. GE Capital Mortgage Services, Inc.* The class each gets \$2.20 and counsel gets \$200,000.

4. See attached documentation of an eight cents victory.

5. *Rosenfeld and Hart v. Bear Stearns*. Plaintiffs get nothing; counsel gets \$500,000.

6. *Strommer v. GE Capital Mortgage Services, Inc.* Plaintiffs receive "less than \$1 and no more than \$2." Counsel fees "not to exceed \$500,000."

7. In a *Prudential* case report in the National Law Journal, December 4, 1995, 350,000 investors average \$200. Counsel gets \$34 million.

8. Knight Rider Papers, columnist Dave Barry, reports the *Orafix Denture* case. The named plaintiff got \$25,000. 650 people got \$7 each. 2,800 people got discount coupons for dental supplies. Counsel got \$54,934.57.

9. *In Kind Class Action Settlements, Comment on Fluid Recovery*, 109 Harvard Law Review 810 (1996).⁵

a. Airline price-fixing case: \$458 million award, of which \$50 million is cash, \$408 million is in discount certificates, and \$14 million in fees. The court found the economic value to the class "substantially less" than \$458 million but approved; p. 813.

b. *Nintendo*: \$25 million in \$5 coupons. Fees and administrative costs \$1.75 million; p. 813.

c. Fraudulent insurance case, a proposed \$47,215,400 in scrip for class members to buy life insurance and \$26 million in fees was rejected by the court; p. 814.

d. In the *General Motors* case in the Third Circuit, the district court approved, but the circuit court rejected, an award of \$2 billion (more or less) in coupons for new purchase of General Motors vehicles and \$9,500,000 in fees. The court found this to be simply a skilled merchandising mechanism by General Motors; p. 814-15.

e. Attached Wall Street Journal commentary of Professor John Coffee and Susan Koniak.

⁵A superb essay.



3100 Travis Street
Houston, Texas 77006



PAYMENT SUMMARY

ID NUMBER: 917-3101393103
VOUCHER NO: 0000257005

PHONE NUMBER:
VOUCHER DATE: 09/20/96

This check represents your rebate in final settlement of the DeBoer Vs. Mellon Mortgage Company lawsuit of which you were notified by notice dated December 23, 1993. The settlement in the suit has now been finalized. Should you have any questions, please contact the plaintiffs' attorneys, Zimmerman and Reed at (612) 344-0099.

(Detach Here)



Mellon Mortgage Company
3100 Travis Street
Houston, Texas 77006

60-160/433

CHECK DATE
09/20/96

CHECK NUMBER
0000257005

PAY...ZERO DOLLARS 08 CENTS

917-3101393103

VALID FOR 180 DAYS

\$*****0.08

TO
THE
ORDER
OF:

MELLON BANK, NA
PITTSBURGH, PA 15259-0001

[Signature]
AUTHORIZED SIGNATURE

⑈0000257005⑈ ⑆043301601⑆ 03111870⑈

The Latest Class Action Scam

An alarming new pattern is developing in class action litigation. More and more frequently, large nationwide class actions, sometimes involving millions of class members, are being settled in state courts—often in tiny towns far off the beaten track and often on terms that give the class members far less relief than they typically would obtain in individual lawsuits.

Two recent examples have received extensive publicity. This newspaper reported last month on the settlement of the largest property-damage class action in U.S. history, covering an estimated six million Americans who owned homes with

Rule of Law
By John C. Coffee Jr.
And Susan P. Koniak

defective polybutylene (PB) plumbing and an additional unknown number of persons who will someday own these homes. The case was settled in a state court in Union City, Tenn.—not usually the forum for major commercial litigation.

More revealing, however, was the settlement process: Virtually the same settlement had been submitted for approval to a state court in Texas. When the parties could not persuade the state court to approve their proposed deal, they refiled the action in a Texas federal court. After encountering difficulties there, also, they simply moved to Tennessee.

In the meantime, another group of plaintiff's attorneys filed an identical nationwide class action in Alabama. For a time, like dueling banjos, the two teams of plaintiff's attorneys competed for clients, trading accusations of misconduct and running rival newspaper and TV ads. The result was both to confuse eligible homeowners and to create a competi-

tion that defendants could exploit. Eventually, a state court judge in California negotiated a truce between the warring factions. But as the Journal's reporter concluded, the revised settlement on which the two factions agreed did little to improve benefits for the class. Rather, it mainly assured both groups of plaintiff's attorneys that they would receive court-awarded fees.

The day following the Journal's story, the New York Times reported an even more egregious example of class action abuse. Bank of Boston agreed to a settlement under which it would deposit up to \$8.76 in each class member's bank account (to compensate them for excessive escrow charges) and then deduct upward of \$100 from many of those accounts to pay the plaintiff's attorney fees. Although this left many class members poorer than if the action had not been brought, the settlement was nevertheless approved in an Alabama state court—far from Bank of Boston's home base.

What is happening here? Dubious "scrip" settlements in which class members receive coupons to buy a new and improved version of the defendant's formerly defective product, usually at only a modest discount off the retail value, are a well-known phenomenon. They are essentially a device to inflate the value of the settlement because the plaintiff's attorneys' fees typically are based on that inflated value (usually one-third). Recently, federal courts have shown a greater skepticism of nonpecuniary settlements that give little value to the class but award high fees to their attorneys. If a settlement is of doubtful value, the parties are increasingly apt to present it to a less sophisticated (or as the plaintiff's attorneys might put it, more "cooperative") state court.

The Supreme Court has just heard argument in a case that will test whether state courts can approve class action settlements even in cases that legally can be

date related actions before a single court. This procedure works reasonably well and could be extended to state courts by legislation giving the federal panel power to consolidate class actions brought in state courts that seek to represent a nationwide class of plaintiffs.

But this cannot be the entire answer. Collusive class settlements, in which the class members' interests are subordinated to those of their attorneys, occur in federal court as well. Individual trial judges simply have inadequate incentives to resist parties who want to settle and too little information to recognize when the settlement is collusive.

Thus, another part of the solution may be the traditional American one: Sue the so-and-sos! The bank customers who ended up worse off after their class settlement are now seeking to sue the bank and the attorneys for both sides who concocted this bizarre deal.

Another hope may be special monitors. Sen. William Cohen (R., Maine) has proposed that notice be given to state attorneys general in all consumer class actions settlements that seek to bind a nationwide class in the hope that they could intervene to resist a settlement. It has also been proposed that class members receive notice written in plain English. Again, these ideas have promise, but they fall short of a complete remedy.

In truth, there is no panacea. But the courts, the bar and the press must recognize the need for closer oversight of class actions. Many in the bar would like to view abusive settlements as exceptional and rare. They are not. A Creahams' Law is developing under which "bad" class actions—and bad plaintiff's attorneys—are driving out the good ones.

Mr. Coffee teaches law at Columbia University, and Ms. Koniak teaches law at Boston University.

The PB case was settled in a state court in Union City, Tenn.—not usually the forum for major commercial litigation

to oblige their desire to trade a small settlement for high attorneys fees.

Second, major corporate defendants are often sued in multiple forums. Once rival and overlapping class actions are pending in different courts, defendants can play plaintiff's attorneys off against each other, running what is in effect a reverse auction to gain the cheapest settlement. Paying the class's lawyers to sell out their clients is invariably cheaper for defendants than paying the class.

What, then, should be done? Some will say: Abolish class actions! But this would only cost corporations more because it is much more expensive to defend many individual actions than the class suit. Nor would it benefit victims.

A more sensible starting point is to recognize that the problem of competing class actions cannot arise on the federal level. In the federal system, a single judicial body—the Judicial Panel on Multidistrict Litigation—has the power to consoli-

IV. ILLUSTRATION OF CLAIMED SUCCESSES.

Very responsible groups do not share my views on (b)(F). One of those groups is the Alliance for Justice, of which I am a director and for which I have enormous respect. I, therefore, insert here as a balance to my own views -- though I am not myself persuaded -- the views of the Alliance for Justice on this point.

II. THE IMPORTANCE OF RULE 23 CLASS ACTIONS

While used somewhat sparingly, when invoked, Rule 23 class actions have played a critical role in protection of the environment, public health and safety and consumers rights. For example, they have proven especially appropriate where large numbers of citizens have suffered property damage or other environmental insult, requiring redress but often in circumstances where thousands of individual actions would be entirely impracticable. (See, e.g., In re Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980) (class action of individuals harmed by TMI occurrence); In re Asbestos School Litigation, 789 F.2d.2d.2d 996 (3d Cir.), cert. denied, 479 U.S. 852, 479 U.S. 915 (1986) (national class of school districts suing asbestos industry for asbestos cleanup); In re Agent Orange Litigation, 818 F.2d.2d.2d 145 (2d Cir. 1987) (class of veterans exposed to toxins in Agent Orange); Pruitt v. Allied Chemical Corp., 85 F.R.D. 100 (E.D. Va. 1980) (class action by workers in seafood industry); Cook v. Rockwell, 151 F.R.D. 378 (D.Co. 1993) (class action challenging discharge of radioactive substances from Rocky Flats); Cape May County Chapter of Izaak Walton League v. Macchia, 329 F.2d.2d. Supp. 504 (D.N.J. 1971) (class action challenging pollution of tidal areas from dredging from development project); Wehner v. Syntex Corp., 117 F.R.D. 641 (N.D. Cal. 1987) (class action certified to recover response costs for dioxin contamination).

The use of the class action device under Rule 23 has been essential not only in the so-called "mass tort" context, of which the asbestos litigation is the most prominent example, but also, and increasingly, where environmental incidents have caused damage to natural resources or property interests. The most recent and dramatic example, of course, involved the Exxon-Valdez oil spill resulting in enormous damage not only to natural ecosystems but also to real property, fishing rights, tourism and other economic interests. The availability of Rule 23 class certification was essential to obtaining necessary redress for the people of Alaska from this catastrophe. After several months of procedural wrangling by the parties, the defendant Exxon successfully moved for a mandatory punitive damages class which, over plaintiffs objections, was certified by the

District Court.

Had the proposed Rule 23 changes now under consideration been in place, it is doubtful whether any widespread relief would have been obtained for Alaska citizens, and it is likely that multiple individual actions would still be flooding the state and federal courts in Alaska. For example, the proposal that Rule 23 certification must be "necessary" rather than merely "superior", as discussed below, could be viewed as allowing class actions only where individual actions could not be brought. Since many individual suits were indeed filed in Alaska, it is questionable whether the necessity test under the proposed rule would have been satisfied even though a class action was a superior litigation tool. Without this option, many thousands of additional suits by injured Alaska residents would surely have overwhelmed the federal and state courts. Instead, the class action device was instrumental in achieving a \$5 billion jury verdict that is soon to be allocated among the numerous injured plaintiffs.

Class actions certified under Rule 23(b)(3) have not been frequently used, nor have they resulted in unreasonable awards. A comprehensive 1991 American Law Institute study of environmental injury litigation from 1983 through 1986 found that total awards were consistently reasonable and significantly less than the few monumental settlements achieved in prominent mass tort cases such as the Agent Orange litigation. (American Law Institute Reporter's Study, Enterprise Liability for Personal Responsibility at 319-21 citing Love Canal Actions, 145 Misc. 2d 1076, 547 N.Y.S. 2d 174 (1989) (\$20 million award to over 100 plaintiffs claiming Personal injury and property damage); Ayers v. Jackson Township, 106 N.J. 557, 525 A.2d 287 (1987) (compensation for loss of palatable water for twenty months and medical monitoring but no personal injury awards); In re Three Mile Island, *supra*, (initial settlement of \$24 Million for economic and property damage; second settlement of \$15 million for medical injuries; \$5 million for medical monitoring). In attempting to explain this phenomena, the ALI reporter urged that we "recall that even conservative estimates indicate that there are over 10,000 environmental carcinogen deaths each year, so it is evident that environmental injury victims have enjoyed very little tort success. . . . Why are there so few of these claims? The answer is that environmental injury tort cases are difficult to win." ALI Study at 321.

Since World War II American society has experienced enormous technological change conferring vast and incontrovertible improvements in our quality of life. However, new technologies like nuclear power, petro-chemicals and biotechnology often come with attendant risks and potential economic costs. And the federal courts, usually reluctantly, but ultimately have become the fora where the external costs of these new technologies can best be addressed. From Exxon-Valdez to Three Mile Island to Love Canal, when needed, class action remedies have worked effectively, and there is every likelihood they will be even more necessary in the future. Proposals that would make Rule 23 certification less available at the very time that the courts -- and the public -- are coming to terms with these dramatic changes in our science and economy would seem ill-considered at best.

Similarly, in the context of consumer cases, the claims themselves are often too small to

support individual litigation. Without class certification, there is no redress for vindication of these claims, no matter how widespread. The Supreme Court has said that class certification is an important tool for litigating small claims that would otherwise not be heard. Phillips Petroleum Co. V. Shutts, 472 U.S. 797, 809 (1985) ("Class actions may permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Without the important tool of Rule 23 class certification, consumers would have no weapon against unlawful conduct and the wrongdoer would be able to keep the proceeds of legal violations while having no deterrence from committing similar violations in the future.

V. RECOMMENDATIONS.

1. 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.
2. Settlement classes multiply and magnify the general abuses of class actions.
3. Fluid recovery (*i.e.* nothing to the class and some general bonanza to some public interest) should never be allowed. Nothing in the Constitution, the Code, or the rules makes the courts proxies for the appropriation committees of Congress. Nothing authorizes the courts to be specialized tax collectors for public purposes. Much as I would like to see more money in some of these causes, providing it is not the judges' job.
4. I strongly support proposed (b)(3)(F). This would eliminate cases in which class members get little or nothing; counsel gets a bundle; and some assumed social good is achieved. Typically, these are the slight overcharge cases.
 - a. As a matter of judicial administration, court time is too - precious to spend it on these cases.
 - b. But more seriously, this is not the judicial job. The social regulation sought by very decent and well-meaning people to be achieved by this means becomes necessary only because neither Congress nor any administrative agency has entered the field; they could, whether we are talking of milk prices, bank charges, or nuclear waste. These actions are not cases or controversies; they are usually price controls which more suited agencies have not seen fit to impose.

We need to be reminded of what Justice Stone said in *United States v. Butler*, 297 U.S. 1, 87 (1936): "Courts are not the only agency of government that must be assumed to have the capacity to govern."

5. I realize that good people disagree with me on the preceding argument. If they are persuasive with the Committee, then I warmly recommend that these become "opt in" cases instead of "opt out" cases. As my historical sketch shows, "opt out" is not some wisdom given from God. Notice is a constitutional requirement, but there is an option as to how and when it should be given. 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. Let notice be given first -- fair notice telling the class members what they can reasonably expect -- and then let them decide whether they wish to expend 32 cents for a stamp on their prospects. If Congress and the administrative agencies do not see fit to provide this regulation, and if the assumed beneficiaries don't want it enough to ask for it, then the court is really simply rewarding imaginative counsel. "Opt in" would determine whether this trip is really necessary.

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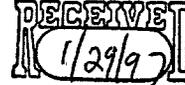
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MCI ID:
697-6314

Our File Number
31519-60004
Class Actions

MEMORANDUM



96-CV-
032

DATE: January 16, 1997
TO: Hon. Paul V. Niemeyer
Hon. Patrick E. Higginbotham
Professor Edward H. Cooper
FROM: John P. Frank
RE: Rule 23

In the document I sent the Committee as my comment on the rule, I included the suggestion that "opt in" might well be used in evaluating the lesser cases. At that time, I did not know and so did not include the fact (which I assume you did know) that there are opt-in statutes. I, therefore, ask that this note be regarded as an addendum. Specifically, 29 U.S.C. § 216 has an opt-in provision for class actions under the Fair Labor Standards Act and 29 U.S.C. § 625 by cross reference adopts those same opt-in procedures in the Age Discrimination Act.

Thanks.

John P. Frank

JPF:cc

APP1B07A

JAN 21 1997

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MCI ID:
697-6314

Our File Number
31519-60004
Rule 23

MEMORANDUM

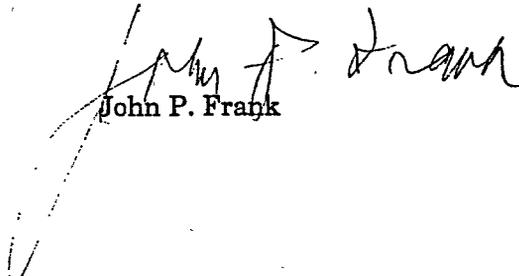
DATE: February 24, 1997
TO: Federal Advisory Committee on Civil Rules
FROM: John P. Frank
RE: Wells Fargo Comments on Proposed Rule 23

RECEIVED
2/26/97

You will get from Wells Fargo a supplemental comment on the rule. Of course I like it because it draws heavily on your aged sage, but passing that, it gives the best set of concrete materials on abuses of the rule I have seen. Class members have received infinitesimal benefits. Counsel have received millions. A variety of good causes have received something over \$3 million.

I like those good causes. I support the Arizona equivalents of some of them. But nobody gave any of us as members of the Rules Committee the authority to take other people's money and distribute it to charities of our choice; and yet this report is a vivid application that as rule-makers, we have become a kind of a substitute for the Congressional Ways and Means and Appropriations Committees.

I will hope to see you at Naples.


John P. Frank

JPF:cc

APP1B556

#2291



ALLIANCE FOR JUSTICE

RECEIVED
2/21/97

96-CV- 041

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COMMENTS OF DEBORAH LEWIS, ON BEHALF OF THE ALLIANCE FOR JUSTICE, REGARDING THE PROPOSED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 23

NAN ARON
President

JAMES D. WEILL
Chair

MEMBERS

American Arts Alliance
 Base on Center for Mental Health Law
 Business and Professional People for the
 Public Interest
 Center for Auto Safety
 Center for Law and Social Policy
 Center for Law in the Public Interest
 Center for Public Representation
 Center for Science in the Public Interest
 Center on Social Welfare Policy and Law
 Children's Defense Fund
 Consumers Union
 Disability Rights Education and Defense
 Fund
 Education Law Center
 Employment Law Center
 Equal Rights Advocates
 Food Research and Action Center
 Harmon Curran & Spielberg
 Institute for Public Representation
 Juvenile Law Center
 Mexican American Legal Defense and
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 New York Lawyers for the Public Interest
 Public Advocates, Inc
 Sierra Club Legal Defense Fund
 The Wilderness Society
 Women's Law Project
 Women's Legal Defense Fund

The Alliance for Justice is a coalition of public interest organizations that provides legal assistance to those individuals and groups that historically have lacked the financial resources to represent themselves. The Alliance is dedicated to promoting equal access to justice for the poor, people of color, consumers, women, children and the disabled. Since its inception, the Alliance has monitored developments in the Federal Rules of Civil Procedure to ensure that the rules will permit litigants without large resources equal access to the courts.

We have examined the proposed amendments to Rule 23 with this fundamental interest in mind. Two of the proposed amendments raise access to justice concerns. First, the proposal to add a test weighing relief to individual class members against the costs and burdens of certification to the requirements for Rule 23(b)(3) classes will render meritorious consumer claims without vindication. Second, the proposed rule allowing for certification of settlement classes could potentially lead to collusive settlements or settlements that fail to protect the interests of all class members, with the result that injured individuals will be barred by res judicata from bringing claims that would make them whole.

Proposed Rule 23(b)(3)(F)

The proposed amendment to add the test of whether "probable relief to individual class members justifies the costs and burdens of class certification," would prevent class certification of a whole category of litigation where the liability is large but the damage to each individual is small. The Supreme Court has recognized the importance of class actions in ensuring access to justice for these litigants with small claims: "Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." Phillips Petroleum v. Shutts, 472 U.S. 797, 809 (1984).

We have several reservations about this proposed rule. Our first concern is that people who have been injured will have no forum for correcting their injury. The heaviest burdens will fall on poor people, who will lose precious resources without recourse. For example, if a claim is brought against a bank for overcharging its customers, it would probably never be certified under this rule because the relief to the individual is small, even if the bank's illegal profits are large. Without class certification, it is not economical to file a lawsuit. Consequently, victims will abandon their claims, and the illegal conduct will continue without a remedy.

Secondly, the proposed amendments undermine the punishment and deterrence of illegal conduct. As a result of the abandoned claims discussed above, large institutions such as banks or utility companies will no longer be deterred from overcharging their customers. Once again, the poorest customers will be the hardest hit. Class action lawsuits are often the only method for correcting violations of the law that are too small to generate individual lawsuits. While government agencies investigate and punish violations against consumers, these agencies have never constituted the entire enforcement scheme. Our consumer rights enforcement scheme relies instead upon substantial private enforcement. Without this private enforcement system, the public agencies cannot enforce the laws alone. In light of this need for private enforcement, the rules should be amended with the idea of increasing, not decreasing, access to the courts for private litigants.

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. Such a result will not only lead to increased violations of the law, but also increased public cynicism because of the perception that the laws on the books mean little to ordinary Americans.

The rule, as currently written, does provide relief to class members even if the relief is small. If a utility company or a bank overcharges individuals the remedy is relatively straightforward: the institution will credit the aggrieved individuals' accounts. In the rare case where the remedy to the individual is too small to justify an actual payment, cy pres or fluid recoveries -- which should be employed only as a last resort and carefully scrutinized -- offer the "next best" way to compensate an injured class.

Concerns over abuses of cy pres recoveries tend to center around settlements in which attorneys exploit the cases for their own fees. For example, there has been criticism of the "coupon settlements" in which class members get a coupon of little value while the attorneys get large fees. If the concern is that class members are being taken advantage of, these class members should not bear the brunt of the "solution." A solution to this problem should involve court scrutiny of attorneys' fees and of settlements and not an elimination of the ability of cheated consumers to have their day in court.

Proposed Rule 23(b)(4)

The proposed rule to allow certification of settlement classes, even if the requirements of

(b)(3) are not met for purposes of trial, poses dangers for people who will be swept into a class inappropriately and then bound by settlements and therefore barred from pursuing their own claims. The absentee class members may have their interests shut out from the settlement because of conflicts of interest within the class and because of the danger of collusive settlements.

For example, if a corporation illegally dumps toxins in a poor neighborhood, there may be a variety of injuries. There may be injuries to property. Some victims might become very ill while some people might be exposed but not suffer any illness for many years, if they suffer an illness at all. If all of these victims are lumped within one settlement class there is the danger that a settlement that meets some of their needs, such as compensation for current illnesses, will not meet all of their needs, such as a fund large enough to compensate future illnesses. The only way for all of the disparate class members to protect their needs is to hire their own lawyers to advise them, an option that is prohibitively expensive for poor people.

This proposal departs from one of the most important elements of Rule 23: ensuring that the interests of absentee class members are well represented by the named class members. There may be times when it is appropriate to certify a class solely for purposes of settlement. However, this must be done in such a way that every plaintiff's interests are protected. Otherwise, absentee class members -- who will get notice of certification and of settlement at the same time -- will either have to hire their own lawyer to fight the settlement or will be barred from ever pursuing their own claims.

A settlement class that cannot meet the (b)(3) requirements for purposes of trial will, by definition, include members who are not similarly situated. The asbestos victims in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), illustrate this situation. Some had died or were suffering from a terminal illness, others had chronic conditions, while others were healthy but had the potential for becoming seriously ill in the future. As the Third Circuit found, common questions of fact and law could not possibly predominate in such a disparate class and resulting conflicts within the class undermined the ability of attorneys to adequately represent all class members. Even if the settlement is appropriate for some members of the class, it may not be for others. Those other members of the class will not have an advocate for their particular position. In the end, they may be bound by a settlement that fails to make them whole.

Of course, class members have the option of opting out. This option, however, is often only an abstract right. Few class members will have the resources to hire counsel to help them protect their own interests. In some cases, class members may not yet have a full awareness of their injuries. For example, in the Georgine case, the people who had been exposed to asbestos but were not experiencing any symptoms would have no reason to devote their attention and resources to the fairness of the settlement. As the Third Circuit concluded in Georgine:

[I]t is obvious that if this class action were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action. It is equally obvious that this situation raises serious fairness concerns.

83 F.3d at 634. In the future, when these class members either manifest their injuries or realize that their award under the settlement does not fully compensate them for their injuries, they will be barred from bringing a claim.

This proposal would also increase the danger of collusive settlements. The vast majority of plaintiffs' lawyers conscientiously represent their clients. This rule would make their job more difficult by removing any credible threat of turning down a settlement and going to trial because the case could not be tried. As a result, the plaintiffs' attorney has no leverage over her opponent. If a settlement is inadequate she must either accept it anyway or move to have the class decertified and reconstituted for trial -- an option that would put her fees at risk. Defense counsel will know this and seek the cheapest route to settlement and res judicata on future claims. As a result, even lawyers with the best of intentions may end up in a collusive relationship, settling for the best they can get, which may not be the best they should get. The losers are the injured members of the class who do not receive an adequate remedy for their injuries.

Certification and settlements are monitored by courts. However, judges cannot be the only safeguard in a process where there are pressures preventing plaintiffs' lawyers from zealously representing all their clients' interests. Judges must rely on the parties for notice of flaws in a settlement. If the adversarial system breaks down, the major parties will have no incentive to inform the court of problems with the settlement. Absentee class members are unlikely to have the knowledge and resources to raise their concerns with the court.

These settlement class certifications will occur in the context of what the Third Circuit referred to as "natural hydraulic pressure to settle." In Re General Motors Corp., 55 F.3d 768, 790 (1995). Judges have pressures to clear their dockets, especially in large, complicated cases. Thus, if a judge is faced with the choice between (1) decertifying (or refusing to certify) a large, complicated class and then restructuring the class for purposes of trial and finally holding a lengthy, expensive trial; or (2) approving a settlement agreed to by both sides, she will be under considerable pressure to choose the second option.

A rule that requires settlement classes to meet the conditions of 23(b)(3) for purposes of trial would avoid these problems. Since plaintiffs would have the credible threat of going to trial, there would be an even playing field with the defense. The requirement that class members have common questions of fact and law for purposes of trial would protect against conflicts within classes.

There are unusual cases, like the asbestos cases, where the enormity, diversity and sheer messiness of the number of victims makes a global settlement class a tempting solution that would offer an orderly resolution. But because of the enormity, diversity and sheer messiness of the number of victims, a global settlement cannot fairly represent the interests of all class members. These kinds of 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.

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COMMITTEE ON FEDERAL COURTS

Received 11/19/96

96-CV-053

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Revised Submission
November 15, 1996

Via Fax & Overnight Mail

Mr. Peter G. McCabe
Secretary
Committee on Rules and Practice and Procedures
of the
Judicial Conference of the United States
Washington, D.C. 20544

Re: *Public Hearings on Proposed Rules Amendments
to Rule 23, Federal Rules of Civil Procedure*

Dear Mr. McCabe:

The Federal Courts Committee of the Association of the Bar of the City of New York¹ respectfully submits that while the proposed amendments to Rule 23 were designed principally to address issues that have arisen in mass tort class actions, the unintended consequences of some of these revisions will be to unduly complicate, if not undermine, certification of claims that courts have consistently found amenable to class action treatment, e.g

¹ The Association is an organization of approximately 20,000 attorneys centered in New York City and devoted to continued enhancement of the legal profession and improvement of the justice system. The Committee on Federal Courts is charged with monitoring developments affecting the federal justice system and assisting in the maintenance and improvement of the federal system. Both the Committee and the Association reflect a cross section of the profession and include lawyers working in private practice, government, public interest, business, and academia.

securities and antitrust claims. We therefore urge the rejection, or significant modification, of proposed Rules 23(b)(3)(A) and (F), which would curtail certification of individual claims that are either "too large" or "too small". We also recommend rejection of 23(f), which would effectively invite motions to appeal every grant or denial of certification.

Finally, we would also recommend that Rule 23(e) be clarified to dispense with notice requirements for situations where dismissal of class claims would not result in prejudice to class members claims and no consideration has been provided for such dismissal.

Rule 23(b)(3)(A): "The practical ability of individual class members to pursue their claims without class certification."

Recommendation: Rejection

This proposal appears directed at situations where a significant number of class members have claims large enough to support individual rather than class-wide prosecution. We respectfully submit though that this provision 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. This is not necessarily the case. Indeed, implicit in the absence of any requirement that claimants "opt-in" to a class action is the recognition that class members need not do anything to pursue their claims until a class wide recovery has been established. Moreover, Rule 23(b)(3)(B) [currently Rule 23(b)(3)(A)] already provides that courts should consider "class members' interests in maintaining... separate actions". Thus, if a sufficient number of class members

manifest not just an ability to pursue individual claims, but a desire to do so, the court will have a basis for, and means to, restrict certification under that latter provision.

Moreover, this proposal could adversely impact claims that otherwise warrant certification. For instance, in antitrust and securities class actions, the class generally consists of some corporate or institutional entities which may generally have the "practical ability" to pursue large claims. At the same time, members of the class also include smaller individual claimants. The proposed Rule, and particularly the Notes in their present form, create potential confusion for handling such a class.²

Further risk of confusion occurs from the confluence of Rules 23(b)(3)(A) and (F). The former may restrict certification of claims that are too large, whereas the latter may restrict certification of claims that are too small. In a class where there is a wide range in the size of claims, stripping large claims from the class may result in the remaining claims simply being too small to warrant certification or prosecution.

We therefore urge rejection of this provision as potentially confusing and unduly restrictive of certification of

² The Notes to this proposal as presently drafted appear to invite a court to carve out of such a class those entities with claims large enough to support individual prosecution. "The victims [of a securities fraud] who could afford to sue alone may be ... easily able to protect their interests in a separate litigation if a (b)(3) class is certified." (emphasis supplied). We fail to see the purpose of inviting such a carve out where the case warrants certification as to other claimants. Individual investors who desire to pursue their own claims can always opt-out of the lawsuit.

claims that otherwise warrant class treatment. The proposed revision is also unnecessary given Rule 23(b)(3)(B) and the opt-out choice which otherwise afford protection to those entities interested in individually pursuing their own claims.

Rule 23(b)(3)(F): "Whether the probable relief to individual class members justifies the costs and burdens of class litigation."

Recommendation: Rejection

We respectfully submit that the cost/benefit analysis proposed by this amendment, with its focus exclusively on the size of "individual" claims, is antithetical to the mission of class actions, i.e., to afford access to the courthouse for those who otherwise would be barred by overwhelming costs. Furthermore, as framed, this provision could lead to unwarranted and premature inquiries into the merits of class claims under the pretext of determining the "probable relief" sought by the lawsuit.

The rights of small claimants have traditionally been championed by class actions. As noted in Green v. Wolf Corporation, 406 F.2d 291, 301(1968);

We recognize that [class certification] might, in cases such as this, place additional burdens on judges, but the alternatives are either no recourse for thousands of stockholders to whom the courthouse would thus be out of bounds or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.

This rationale was echoed by the Supreme Court in Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980), where claims for usurious interest charges were brought on behalf of 90,000 credit card customers. "When it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small

individual suits for damages, [class members] .. may be without an effective remedy ..." in the absence of class certification. Id. at 339.

The thrust of the proposed amendment 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.³ Consideration of policy concerns that might otherwise justify the aggregation of small claims into a class action, e.g. deterrence of wrongdoing or disgorgement of ill-gotten gains, is effectively eliminated. In essence, so long as the wrongdoer inflicts only a small injury upon a large number of people, it may not be subjected to a class action and thus can keep its windfall regardless of the cumulative benefit to the perpetrator. Thus, whereas a lawsuit seeking a recovery of \$1 million on behalf of 1000 claimants could be suitable for certification, a lawsuit seeking recovery of \$2 million for 100,000 claimants might fail.

Courts have recognized the role of class actions in promoting policy concerns of deterrence and disgorgement. In In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 2828-83 (S.D.N.Y.)

³ As the proposed Note to the Rule states, "Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims....."

"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 certification fails." (emphasis supplied).

amended, 333 F. Supp. 291 (S.D.N.Y.), mandamus denied, 449 F.2d 119 (2d Cir. 1971), the Court addressed certification of a class of consumers who overpaid for prescription drugs:

The Court would be hesitant to conclude that conspiring defendants may freely engage in [price fixing]... to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.⁴

The proposed amendment could also sound the death knell for many actions expressly authorized by Congress regardless of the size of the claim, thereby undermining the legislature's judgement that such lawsuits serve public policy interests. The amendment may undermine class claims for violations of the *Truth In Lending Act*, 15 U.S.C. § 1640(a)(2)(B), which authorizes class actions for violations of the act, and explicitly provides that "as to each member of the class no minimum recovery shall be applicable....". Similarly, the *Social Security Act*, 41 U.S.C. § 405(g) provides

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As an alternative to the present Notes to this rule, we would suggest the following language be added: Policy concerns of deterrence and disgorgement should support certification regardless of the size of individual claims so long as the aggregate relief sought is significant relative to the costs and burdens of class litigation.

that any recipient can bring a civil action "irrespective of the amount in controversy".⁵ The Magnuson Moss Warranty Act 15 U.S.C. § 2301(d)(3), permits federal court actions so long as individual claims total \$25.⁶

Furthermore, while this provision is ostensibly aimed at eliminating certification of "trivial claims", its vagueness regarding the types or size of claims that would warrant certification opens the floodgates to attacks upon certification of all claims so long as costs associated with their defense would be significant. Indeed, the Note effectively invites such attacks: "Higher [levels of probable individual relief] should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits...". Yet courts have consistently recognized the "complexity" of class actions as a reason supporting their settlement.⁷ Thus, the "sliding scale" approach for measuring the appropriateness of class certification envisioned by

⁵ The Supreme Court upheld certification of a class action for wrongful denial of social security benefits in Califano v. Yamasaki, 61 L.Ed. 2d 176 (1979).

⁶ By placing Rule 23 on a collision course with such statutes, the proposed amendment arguably violates the *Rules Enabling Act*, 28 U.S.C. § 2072, which expressly prohibits enactment of rules of "practice and procedure" which would "abridge, enlarge or modify any substantive right". Since Congress provided that claims under these, and other statutes, should proceed regardless of their size, it is not the province of the Courts to eliminate those claims because of the potential costs of litigation.

⁷ Armstrong v. Board of School Directors of Milwaukee, 616 F.2d 305, 313 (7th Cir. 1980). Accord, In re Saxon Securities Litigation, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,414 at 92,525 (S.D.N.Y. 1985)

this amendment will only result in significantly burdening class motion practice. Adroit counsel will undoubtedly urge that losses sustained by small class members are "trivial" relative to the significant costs that will be incurred in defending the claim.⁸

A second major criticism of this proposed change is its use of the term "probable relief". Skillful counsel will undoubtedly argue that a Court must consider the merits of a claim to determine its likely size, particularly in the face of arguments that no relief is "probable" since the claims are meritless. While the Minutes to the Advisory Committee insist that "'probable relief' in the (b)(3) context is damages", there is no explanation why the Committee rejected use of the terms "requested relief" or "demanded relief" instead of "probable relief". The first two iterations would focus any inquiry on the size of the damages, not on the merits or likelihood of their recovery.⁹

⁸ Nor is there any demonstrated empirical justification for this modification of the Rule. As the Minutes to the Advisory Committee Meetings acknowledge, "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". The myth that companies are besieged by such claims should not propel an ill-advised change to the Rule.

Indeed, much of the attack on "trivial" claims appears directed at consumer actions that were settled for "coupons". It should be noted though that in most of those cases, certification arose in the context of settlement, which the Rules committee has endorsed in connection with adoption of proposed Rule 23(b)(4).

⁹ Placing the burden on plaintiffs to establish the "probable" relief for class certification purposes is also inconsistent with the standards for establishing the requisite threshold of \$50,000 damages for diversity jurisdiction. As noted in Wright, *The Law of Federal Courts* 184 (4th ed 1983, "[u]nless it appears to a legal certainty that plaintiff cannot recover the sum

The Federal Courts Committee of the City Bar Association previously voiced opposition to consideration of the merits in the context of class certification, as was expressly envisaged by the prior draft of the Rule. This back door reintroduction of merits consideration is equally unwarranted.¹⁰

In closing, we would respectfully submit that there is no evidence of Courts being deluged by trivial claims for class certification, and that this provision would not only unnecessarily restrict the discretion already available to Courts in determining certification, but would significantly burden courts by requiring an assessment of likely recovery at the class certification stage.

Rule 23(e): Hearings and notice prior to dismissal or compromise

Recommendation: Approval

Proposed addition to the Notes: The amendment is not intended to restrict a court's ability to dispense with the notice or hearing requirement in appropriate cases. See, e.g., Jones v. Caddo Parish School, 704 F.2d 206, 214 (5th Cir. 1983); Gomez v. O'Connell, 1996 U.S. Dist. LEXIS 1285 (N.D. Ill. 1996).

The Committee believes that the Advisory Note to the proposed amendment should be clarified to preserve a court's ability to dispense with Rule 23(e)'s requirements in appropriate cases. Courts have previously held that notice under Rule 23(e) is unnecessary in cases where dismissal would not result in prejudice

for which he prays, how can it be held that his claim for that sum is not in good faith?" (quoted in Ochoa v. Interbrew America Inc. 999 F.2d 626, 629 (2d Cir. 1993)).

¹⁰ As an alternative to the present proposal, we would suggest at least modifying Rule 23 (b)(3)(F) as follows: Whether the aggregate relief requested justifies the cost and burden of class litigation.

to absent class members and where no consideration has been provided in connection with the dismissal. See, e.g., Jones v. Caddo Parish School, 704 F.2d 206, 214 (5th Cir. 1983) (notice not required where action was dismissed prior to class certification and rights of putative class members were not prejudiced); Gomez v. O'Connell, 1996 U.S. Dist. LEXIS 1285, *23-*24 (N.D. Ill. 1996) (no notice required where dismissal would not prejudice absent class members); Hockert Pressman & Flohr Money Purchase Plan v. Amerian President Companies, Ltd., 1995 U.S. Dist. LEXIS 17608 (N.D. Cal. 1995) (no notice required where no class had been certified, plaintiffs received no consideration, claims were not being settled and potential class members had not refrained from filing suit in reliance upon pendency of the action).

As the Advisory Note indicates that the amendment is designed to "confirm" the current practice under Rule 23, the Committee suggests that the proposed Advisory Notes be clarified in the manner set forth above.

Rule 23(f): Appealability of class certification rulings

Recommendation: Rejection

Proposed Rule 23(f) provides for interlocutory appeals of class certification rulings, if application is made within ten days following entry of the ruling.

The Committee opposes the amendment. The proposal appears intended to increase the frequency of appeals of class certification rulings, which would conflict with the longstanding federal policy against piecemeal appellate review. See Switzerland

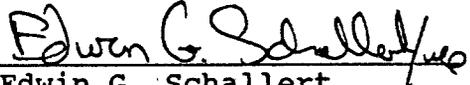
Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966). While appellate review of class certification rulings may be appropriate in the unusual case, the Committee believes that currently available devices for obtaining such review are adequate. Appellate courts have increasingly exercised their discretion -- particularly in the mass tort area -- to issue writs of mandamus directing district courts to decertify plaintiff classes. See, e.g., In re American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). Courts have also permitted interlocutory review of class certification rulings under 28 U.S.C. § 1292(b). See, e.g., Valentino v. Carter-Wallace, Inc., ___ F.3d ___, 1996 U.S. App. LEXIS 26300 (9th Cir. Oct. 7, 1996); Andrews v. American Tel. & Tel. Co., ___ F.3d ___, 1996 U.S. App. LEXIS 24472 (6th Cir. Sept. 19, 1996); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). The availability of mandamus or interlocutory review thus renders the proposed amendment unnecessary.

The Committee is concerned that adoption of the amendment would encourage routine motions for interlocutory appeals by defendants whenever a class is certified or by plaintiffs whenever a class is not certified (requiring briefing on both the appropriateness of an appeal and the merits of class certification), thereby increasing the litigation costs to the litigants and taxing judicial resources. See Shelter Realty Corp.

v. Allied Maintenance Corp., 574 F.2d 656, 657 n.1 (2d Cir. 1978).¹¹ Given the current availability of appellate review in appropriate cases (whether by mandamus or interlocutory appeals), the imposition of such costs upon the litigants and the judicial system, along with the concomitant delays inevitably caused by appeals, would be extremely wasteful and potentially prejudicial to the litigants.

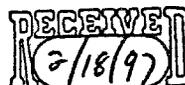
We note, finally, that the proposed amendment sets forth no guidelines concerning when an appeal should be permitted, or when a stay of district court proceedings pending an appeal should be imposed. We believe that, if the amendment is approved, then the Advisory Notes should be worded to insure that the grant of appeals is limited to exceptional cases, and stays of proceedings are discouraged.

Respectfully submitted,


Edwin G. Schallert
Chairman,
Federal Courts Committee,
Association of the Bar of
the City of New York

¹¹ According to statistics compiled by the Administrative Office of the United States Courts, 1,351 class action cases were commenced in U.S. district courts during the twelve-month period ended June 30, 1996.

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February 14, 1997

Via Fax & Overnight Mail

Mr. Peter G. McCabe
Secretary
Committee on Rules and Practice
and Procedures of the Judicial Conference
of the United States
One Columbus Circle, N.E.
Washington, DC 20002

96-CV-053
Supp

Re: *Public Hearings on Proposed Rules Amendments
to Rule 23, Federal Rules of Civil Procedure*

Dear Mr. McCabe:

The Federal Courts Committee of the Association of the Bar of the City of New York¹ respectfully submits these views in support of the proposed addition of Subdivision (b) (4) to Rule 23. The rationale for our view is described immediately below. In addition, for the sake of completeness, we have incorporated herein our comments on other aspects of the proposed amendments to Rule 23

¹ The Association is an organization of approximately 20,000 attorneys centered in New York City and devoted to continued enhancement of the legal profession and improvement of the justice system. The Committee on Federal Courts is charged with monitoring developments affecting the federal justice system and assisting in the maintenance and improvement of the federal system. Both the Committee and the Association reflect a cross section of the profession and include lawyers working in private practice, government, public interest, business, and academia.

that were contained in our prior submission dated November 15, 1996.

Rule 23(b)(4): Settlement Classes

Recommendation: Approval

The "settlement class" device has emerged as an important method for achieving many of the core purposes for which the class action mechanism of Rule 23 was fashioned. The proposed change to Rule 23 would give formal recognition to the settlement class mechanism by adding a new subsection to the Rule providing that a class action may be maintained if:

- (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.

The salutary purposes served by the settlement class device include, from the plaintiff class perspective, the speedy and efficient resolution of the class claims and the economical provision of benefits for class members. In addition, the device can overcome barriers that would make trial of a class action very difficult, such as varying choice of law requirements, proof problems and the very scope of certain kinds of cases. Indeed, without the settlement class device there may be significant hurdles in particular instances, such as tort/defective product

cases, in which different state laws may be applicable to the class that militate against nationwide class certification. See, Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). Thus consumers would be consigned to pursuing essentially similar claims in 50 different state court forums.

From a defendant's perspective, the settlement class enables it to resolve the claims in a certain and least costly fashion and to accord res judicata protection against almost all actual or potential class member claimants. From the court's perspective, the device affords the opportunity for a resolution of a significant matter on its docket with a minimal amount of inquiry and consideration. For society's benefit, wrongdoing can be deterred and punished and victims or their stand-ins can be compensated.

This proposal codifies the practice that many courts have adopted in employing the settlement class device, and rejects the position of those courts, most notably, the Third Circuit, which 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 (3rd Cir.), cert. granted ____ U.S. ____ (1996); In Re General Motors

Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3rd Cir. 1995), cert. denied, ____ U.S. ____.

Opposition to this provision appears largely based upon a concern that there may be unexamined and even collusive settlements entered into by willing plaintiff and defendant counsel and easily approved by a compliant or busy court. We submit that this risk is considerably overdramatized to serve as a basis for jettisoning a device that, if utilized appropriately, can provide significant societal benefits. Moreover, we fail to see how the so-called risk of collusion is triggered by the settlement class device. That risk is present regardless of whether the class has been certified. (Indeed, the parties could first stipulate to a class which would then be so ordered, and then proceed to engage in settlement discussions). The presence of the risk of collusion though is no reason to erect barriers to class actions or the settlements thereof; rather it is reason to make sure that the courts avail themselves of all the procedural protections afforded by the Rule. As the Advisory Committee Note ("Note") observes, the competing forces of the risks and benefits of settlement classes

"are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members."²

There are a number of protections available under Rule 23 that should preclude many potential abuses. First, there are the requirements set forth in Rule 23(a) that the plaintiffs be adequate representatives and typical of the class. The court must still be satisfied that these criteria are met. See Note at 11. Second, the Note also states that (b)(3) considerations of superiority and manageability must also be met (though this may not be crystal clear from the text of the proposed amendment). The requirement of satisfying these traditional class action prerequisites - modified to the context of settlement rather than litigation - should be made explicit rather than implicit in the Rule itself, and not merely mentioned in the Note.³

² We note that the settlement class device in Georgine could hardly be considered collusive since the Court was actively involved in hammering out the terms of the settlement. A primary objection to that case was handling of future class claimants for whom injuries had not yet been manifested, and who could not determine whether to opt out of the class. However, this problem again is not unique to the settlement class device, but would be present even if the class had been certified in the first instance.

³ We also urge the Committee to make clear in the Note that this amendment is not intended to impact cases which have been routinely certified for litigation or settlement class purposes, e.g. securities fraud and antitrust cases, and thus could readily satisfy the requirements of (b)(3).

Third, as the Note further points out, any class certified under subdivision (b) (4) must have "all of the incidents of a (b) (3) class, including the subdivision (c) (2) rights to notice and the request for exclusion from the class." "Notice and the right to opt out provide the central means of protecting settlement class members," particularly if the court takes extra steps to ensure that notice of settlement "fairly describes the litigation and the terms of the settlement." Courts are cautioned to take "particular care" to ensure that disabling conflicts of interests among members of a common class be avoided and that cases presenting unsettled factual or legal issues likely to be litigated in other cases not be prematurely or improperly settled until individual actions yield a data base as to the appropriate parameters of settlement.

Moreover, courts always have inherent power to monitor settlement negotiations. In situations where a Court perceives the potential for collusion, it can always establish protocols for the conduct of negotiations, including utilization of special masters or appointment of different counsel representing conflicting interests of the class.

One final, important prophylactic safeguard to minimize the potential for abuse potential in the settlement class device is

the explicit requirement of a court hearing in connection with any settlement contained in the revised version of subdivision (e).⁴ Because the parties to the settlement and class certification agreement have ceased to be adversaries and have a common interest in having the agreement approved and the class certified, the court's obligation to the Class members can only be met by a full and fair hearing inquiring into the propriety of settlement.

We think that these various procedural protections provided for in the revised Rule or included in the Note will be effective safeguards against claimed abuses, especially in light of the fact that the potential for abuse varies with the kind of litigation and class action posture for each case presents. With safeguards such as these in place, we firmly believe that benefits of the settlement class device outweigh the risks entailed in such a modification of the Rule. We share some of these concerns raised

⁴ Section (e) on dismissal or compromise has been amended to require that a class action shall not be dismissed or compromised without hearing and court approval, after notice has been given:

"(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 . . ."

by the academics and others, but conclude that, on balance, the protective features of the current Rule 23 structure, plus the new requirement of a hearing before settlement classes can be certified and settlements approved, in the hands of vigilant and responsible federal judges, provides sufficient safeguards against the improper and unwarranted approval of collusive or unwise settlements.⁵

⁵ The Consumer Affairs Committee of this Association opposes proposed subdivision (b)(4). First, the Committee is concerned that the proposed rule would infringe individuals' due process rights by creating a regime in which plaintiffs' lawyers are encouraged to compromise the claims of class members in order to gain a defendant's acquiescence to a settlement. Second, the Committee believes that the rule contains insufficient guidelines to help trial judges minimize the problems inherent in such cases and decide when a settlement class is desirable and what form it should take. If a rule permitting settlement classes is adopted, it should, at the very least, provide specific guidelines for courts to apply in reviewing such settlements. The Committee agrees that, at a minimum, any rule should provide the right to opt out. However, the Committee believes that the right to opt out alone is an insufficient safeguard for the average consumer who is unlikely to read class notices, to understand what action is required to avoid becoming part of the court proceeding or to have the information necessary to challenge inadequate settlements. Where a settlement affects the rights of future claimants who may not even be aware that they have claims, the right to opt out must be provided at a meaningful point in time. In addition, the rule should require courts to determine whether the notice to class members fully, fairly and comprehensibly represents the essential terms of the settlement. The rule should further require courts to determine whether persons with similar claims receive similar treatment and whether the class representation is adequate, taking into account possible conflicts of interest between counsels' non-class and class clients and among class members who may have competing claims.

Rule 23(b)(3)(A): "The practical ability of individual class members to pursue their claims without class certification."

Recommendation: Rejection

This proposal appears directed at situations where a significant number of class members have claims large enough to support individual rather than class-wide prosecution. We respectfully submit though that this provision 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. This is not necessarily the case. Indeed, implicit in the absence of any requirement that claimants "opt-in" to a class action is the recognition that class members need not do anything to pursue their claims until a class wide recovery has been established. Moreover, Rule 23(b)(3)(B) [currently Rule 23(b)(3)(A)] already provides that courts should consider "class members' interests in maintaining... separate actions". Thus, if a sufficient number of class members manifest not just an ability to pursue individual claims, but a desire to do so, the court will have a basis for, and means to, restrict certification under that latter provision.

Moreover, this proposal could adversely impact claims that otherwise warrant certification. For instance, in antitrust and securities class actions, the class generally consists of some

corporate or institutional entities which may generally have the "practical ability" to pursue large claims. At the same time, members of the class also include smaller individual claimants. The proposed Rule, and particularly the Notes in their present form, create potential confusion for handling such a class.⁶

Further risk of confusion occurs from the confluence of Rules 23(b)(3)(A) and (F). The former may restrict certification of claims that are too large, whereas the latter may restrict certification of claims that are too small. In a class where there is a wide range in the size of claims, stripping large claims from the class may result in the remaining claims simply being too small to warrant certification or prosecution.

We therefore urge rejection of this provision as potentially confusing and unduly restrictive of certification of claims that otherwise warrant class treatment. The proposed revision is also unnecessary given Rule 23(b)(3)(B) and the opt-out

⁶ The Notes to this proposal as presently drafted appear to invite a court to carve out of such a class those entities with claims large enough to support individual prosecution. "The victims [of a securities fraud] who could afford to sue alone may be ... easily able to protect their interests in a separate litigation if a (b)(3) class is certified." (emphasis supplied). We fail to see the purpose of inviting such a carve out where the case warrants certification as to other claimants. Individual investors who desire to pursue their own claims can always opt-out of the lawsuit.

choice which otherwise afford protection to those entities interested in individually pursuing their own claims.

Rule 23(b)(3)(F): "Whether the probable relief to individual class members justifies the costs and burdens of class litigation."

Recommendation: Rejection

We respectfully submit that the cost/benefit analysis proposed by this amendment, with its focus exclusively on the size of "individual" claims, is antithetical to the mission of class actions, i.e., to afford access to the courthouse for those who otherwise would be barred by overwhelming costs. Furthermore, as framed, this provision could lead to unwarranted and premature inquiries into the merits of class claims under the pretext of determining the "probable relief" sought by the lawsuit.

The rights of small claimants have traditionally been championed by class actions. As noted in Green v. Wolf Corporation, 406 F.2d 291, 301(1968);

We recognize that [class certification] might, in cases such as this, place additional burdens on judges, but the alternatives are either no recourse for thousands of stockholders to whom the courthouse would thus be out of bounds or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.

This rationale was echoed by the Supreme Court in Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980), where claims for

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The thrust of the proposed amendment 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.⁷ Consideration of policy concerns that might otherwise justify the aggregation of small claims into a class action, e.g. deterrence of wrongdoing or disgorgement of ill-gotten gains, is effectively eliminated. In essence, so long as the wrongdoer inflicts only a small injury upon a large number of people, it may not be subjected to a class action and thus can keep

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⁸ Deterrence and disgorgement were clearly factors in the Second Circuit's recent approval of the settlement of a *parens patriae* lawsuit for alleged price fixing in the sale of 1.7 million sneakers. The settlement called for distribution of the \$8 million recovery "in such manner as the district court in its discretion may authorize". State of New York v. Reebok, (CCH) 1996-2 Trade Cas. ¶71,558 at 77,967 (2d Cir. 9/19/96). In that case, the district court had recommended distribution to community athletic facilities.

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¹⁰ By placing Rule 23 on a collision course with such statutes, the proposed amendment arguably violates the *Rules Enabling Act*, 28 U.S.C. § 2072, which expressly prohibits enactment of rules of "practice and procedure" which would "abridge, enlarge or modify any substantive right". Since Congress provided that

Furthermore, while this provision is ostensibly aimed at eliminating certification of "trivial claims", its vagueness regarding the types or size of claims that would warrant certification opens the floodgates to attacks upon certification of all claims so long as costs associated with their defense would be significant. Indeed, the Note effectively invites such attacks: "Higher [levels of probable individual relief] should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits...". Yet courts have consistently recognized the "complexity" of class actions as a reason supporting their settlement.¹¹ Thus, the "sliding scale" approach for measuring the appropriateness of class certification envisioned by this amendment will only result in significantly burdening class motion practice. Adroit counsel will undoubtedly urge that losses sustained by small class members are "trivial" relative to the

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¹¹ *Armstrong v. Board of School Directors of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980). Accord, *In re Saxon Securities Litigation*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,414 at 92,525 (S.D.N.Y. 1985)

significant costs that will be incurred in defending the claim.¹²

A second major criticism of this proposed change is its use of the term "probable relief". Skillful counsel will undoubtedly argue that a Court must consider the merits of a claim to determine its likely size, particularly in the face of arguments that no relief is "probable" since the claims are meritless. While the Minutes to the Advisory Committee insist that "'probable relief' in the (b) (3) context is damages", there is no explanation why the Committee rejected use of the terms "requested relief" or "demanded relief" instead of "probable relief". The first two iterations would focus any inquiry on the size of the damages, not on the merits or likelihood of their recovery.¹³

¹² Nor is there any demonstrated empirical justification for this modification of the Rule. As the Minutes to the Advisory Committee Meetings acknowledge, "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". The myth that companies are besieged by such claims should not propel an ill-advised change to the Rule.

Indeed, much of the attack on "trivial" claims appears directed at consumer actions that were settled for "coupons". It should be noted though that in most of those cases, certification arose in the context of settlement, which the Rules committee has endorsed in connection with adoption of proposed Rule 23(b)(4).

¹³ Placing the burden on plaintiffs to establish the "probable" relief for class certification purposes is also inconsistent with the standards for establishing the requisite

The Federal Courts Committee of the City Bar Association previously voiced opposition to consideration of the merits in the context of class certification, as was expressly envisaged by the prior draft of the Rule. This back door reintroduction of merits consideration is equally unwarranted.¹⁴

In closing, we would respectfully submit that there is no evidence of Courts being deluged by trivial claims for class certification, and that this provision would not only unnecessarily restrict the discretion already available to Courts in determining certification, but would significantly burden courts by requiring an assessment of likely recovery at the class certification stage.

Rule 23(e): Hearings and notice prior to dismissal or compromise

Recommendation: Approval

Proposed addition to the Notes: The amendment is not intended to restrict a court's ability to dispense with the notice or hearing requirement in appropriate cases. See, e.g., Jones v. Caddo Parish

threshold of \$50,000 damages for diversity jurisdiction. As noted in Wright, The Law of Federal Courts 184 (4th ed 1983, "[u]nless it appears to a legal certainty that plaintiff cannot recover the sum for which he prays, how can it be held that his claim for that sum is not in good faith?" (quoted in Ochoa v. Interbrew America Inc. 999 F.2d 626, 629 (2d Cir. 1993)).

¹⁴ As an alternative to the present proposal, we would suggest at least modifying Rule 23 (b) (3) (F) as follows: Whether the aggregate relief requested justifies the cost and burden of class litigation.

School, 704 F.2d 206, 214 (5th Cir. 1983); Gomez v. O'Connell, 1996 U.S. Dist. LEXIS 1285 (N.D. Ill. 1996).

The Committee believes that the Advisory Note to the proposed amendment should be clarified to preserve a court's ability to dispense with Rule 23(e)'s requirements in appropriate cases. Courts have previously held that notice under Rule 23(e) is unnecessary in cases where dismissal would not result in prejudice to absent class members and where no consideration has been provided in connection with the dismissal. See, e.g., Jones v. Caddo Parish School, 704 F.2d 206, 214 (5th Cir. 1983) (notice not required where action was dismissed prior to class certification and rights of putative class members were not prejudiced); Gomez v. O'Connell, 1996 U.S. Dist. LEXIS 1285, *23-*24 (N.D. Ill. 1996) (no notice required where dismissal would not prejudice absent class members); Hockert Pressman & Flohr Money Purchase Plan v. American President Companies, Ltd., 1995 U.S. Dist. LEXIS 17608 (N.D. Cal. 1995) (no notice required where no class had been certified, plaintiffs received no consideration, claims were not being settled and potential class members had not refrained from filing suit in reliance upon pendency of the action).

As the Advisory Note indicates that the amendment is designed to "confirm" the current practice under Rule 23, the

Committee suggests that the proposed Advisory Notes be clarified in the manner set forth above.

Rule 23(f): Appealability of class certification rulings

Recommendation: Rejection

Proposed Rule 23(f) provides for interlocutory appeals of class certification rulings, if application is made within ten days following entry of the ruling.

The Committee opposes the amendment. The proposal appears intended to increase the frequency of appeals of class certification rulings, which would conflict with the longstanding federal policy against piecemeal appellate review. See Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966). While appellate review of class certification rulings may be appropriate in the unusual case, the Committee believes that currently available devices for obtaining such review are adequate. Appellate courts have increasingly exercised their discretion -- particularly in the mass tort area -- to issue writs of mandamus directing district courts to decertify plaintiff classes. See, e.g., In re American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). Court have also permitted interlocutory

review of class certification rulings under 28 U.S.C. § 1292(b). See, e.g., Valentino v. Carter-Wallace, Inc., ___ F.3d ___, 1996 U.S. App. LEXIS 26300 (9th Cir. Oct. 7, 1996); Andrews v. American Tel. & Tel. Co., ___ F.3d ___, 1996 U.S. App. LEXIS 24472 (6th Cir. Sept. 19, 1996); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). The availability of mandamus or interlocutory review thus renders the proposed amendment unnecessary.

The Committee is concerned that adoption of the amendment would encourage routine motions for interlocutory appeals by defendants whenever a class is certified or by plaintiffs whenever a class is not certified (requiring briefing on both the appropriateness of an appeal and the merits of class certification), thereby increasing the litigation costs to the litigants and taxing judicial resources. See Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 657 n.1 (2d Cir. 1978).¹⁵ Given the current availability of appellate review in appropriate cases (whether by mandamus or interlocutory appeals), the imposition of such costs upon the litigants and the judicial

¹⁵ According to statistics compiled by the Administrative Office of the United States Courts, 1,351 class action cases were commenced in U.S. district courts during the twelve-month period ended June 30, 1996.

system, along with the concomitant delays inevitably caused by appeals, would be extremely wasteful and potentially prejudicial to the litigants.¹⁶

We note, finally, that the proposed amendment sets forth no guidelines concerning when an appeal should be permitted, or when a stay of district court proceedings pending an appeal should be imposed. We believe that, if the amendment is approved, then the Advisory Notes should be worded to insure that the grant of appeals is limited to exceptional cases, and stays of proceedings are discouraged.

Respectfully submitted,



Edwin G. Schallert
Chairman
Federal Courts Committee,
Association of the Bar of
the City of New York

¹⁶ The Committee on Corporate Law Departments of this Association believes that denial or grant of class action certification is such a significant event in the course of many class action litigations that some reference to the availability of an appeal should be made in Rule 23.

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96-CV-054

November 12, 1996

VIA FACSIMILE

Peter G. McCabe, Esquire, Secretary
Standing Committee on the Rules of
Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Public Hearing on Proposed Amendments to Class Action Rule 23,
Federal Rules of Civil Procedure
Philadelphia, Pennsylvania, November 22, 1996

Dear Mr. McCabe:

I respectfully refer you to the letter dated October 22, 1996, directed to you and referenced as above by Robert S. Campbell, Jr., Chairman, American College of Trial Lawyers Committee on Federal Rules of Civil Procedure. In that letter, Bob Campbell designates me as the member of the American College of Trial Lawyers Committee who will appear at the public hearing on November 22.

In response to Bob's letter to you, you wrote me a letter dated October 24, 1996, stating that you have arranged for me to testify in behalf of the American College of Trial Lawyers at the November 22 public hearing in Philadelphia. You then state that the Advisory Committee on the Federal Rules of Civil Procedure request that a copy of my statement be received by your office no later than Friday, November 8, 1996 (today), and it will then be circulated to the Committee members before the hearing.

Since receiving your letter of October 24, 1996, I have had numerous interchanges with the Chairman of the American College of Trial Lawyers Committee and others on the Committee in preparation for my appearance before the Advisory Committee.

On November 5, 1996, I received a memorandum from John K. Rabiej setting forth further details regarding the public hearing on November 22, including two lists of

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witnesses, the first to be heard between 10:00 a.m. and 1:00 p.m. and the second to be heard between 2:15 p.m. and 5:30 p.m. I am listed as number 15 of 17 on the morning list, with the admonition by Mr. Rabiej that the order of witnesses testifying in each session is in the discretion of the Chair and that I may be called at any time during my designated morning session.

At this juncture, Chairman Robert S. Campbell, Jr. and others on the Board of the American College of Trial Lawyers Federal Civil Procedure Committee have concluded that a number of matters raised by the Advisory Committee's proposed amendment to Rule 23 require further consideration, and the College Committee intends to submit its complete recommendations and position, both written and oral, to the Standing Committee on the Rules of Practice and Procedure at its scheduled hearing in San Francisco on January 17, 1997. However, there is one aspect of the Advisory Committee's proposed revisions of Rule 23 that the College Committee strongly supports, and that is the provision on interlocutory appeal from an order on class certification under proposed Rule 23(f). I am authorized to and will address that issue in this letter and further orally at the November 22, 1996, public hearing.

Proposed Federal Rule of Civil Procedure 23(f). Proposed Rule 23(f) authorizes for the first time, a discretionary interlocutory appeal to the court of appeals from a district court order granting or denying class certification. At present, an interlocutory appeal from an order granting or denying class certification is subject to 28 U.S.C. § 1292(b), which requires a written opinion of the trial judge that the order involves controlling issues of law, that there is substantial ground for difference of opinion and that an immediate appeal may materially advance the litigation. Given the complexity and dynamics of typical class action procedure, appellate review of class certification by the trial court is, as a matter of pragmatic fact, a genuine remedy only if the appeal is taken at or shortly after certification.

The proposed Rule 23(f) would permit discretionary interlocutory appeal outside of and without the potentially limiting requirements of 28 U.S.C. § 1292(b). The authority for the Supreme Court to adopt proposed Rule 23(f) should not be in doubt viewed in light of 28 U.S.C. § 1292(e). The trial court ruling on class certification is so pivotal to the development and destiny of a case, that if there is a genuine question of law as to the order granting or denying certification, an aggrieved party should have the right to petition the court of appeals for interlocutory review at or shortly after the time of the order.

It appears to our Committee that the discretion of the court of appeals is certainly as broad as it would be under 28 U.S.C. § 1292(b) and may involve unsettled or novel questions of law or other considerations, in addition to the issues under § 1292(b) review.

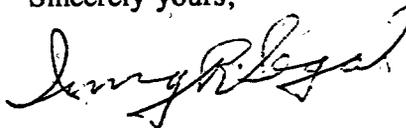
Peter G. McCabe, Esquire, Secretary
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It is our Committee's understanding that the 10-day period for filing a petition for interlocutory appeal under proposed Rule 23(f) would be governed by Federal Appellate Rule 5. That rule, itself, is proposed to be amended and is the subject of current public hearing and comment. As proposed F.R.A.P. 5 is drafted, the proposed Rule 23(f) should fit within the time frame set out in proposed F.R.A.P. 5(a)(2).

In summary, the American College Federal Rules of Civil Procedure Committee strongly supports the adoption by the Judicial Conference and the Supreme Court of the proposed amendment to Rule 23 subsection (f) as substantially assisting in the resolution of the fundamental question of class action certification in Rule 23 proceedings.

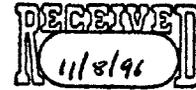
In behalf of the Federal Rules of Civil Procedure Committee, I will be prepared to supplement this written statement at your November 22, 1996, hearing.

Sincerely yours,



Irving R. Segal
Member, American College of Trial Lawyers
Federal Rules of Civil Procedure Committee

cc: Honorable Alicemarie H. Stotler
John K. Rabiej
Robert S. Campbell, Jr.



**NASCAT REPORT ON PROPOSED
REVISIONS TO RULE 23**

96-CV-059

INTRODUCTION

The National Association of Securities and Commercial Attorneys ("NASCAT") submits this Report to the Advisory Committee on Civil Rules of the Judicial Conference (the "Civil Rules Committee"). This Report presents NASCAT's views on certain of the proposed changes to Rule 23 of the Federal Rules of Civil Procedure.

NASCAT is the National Association of Securities and Commercial Law Attorneys, which is an association of nearly 500 lawyers who litigate securities fraud, consumer fraud, commercial and antitrust cases in the United States District Courts throughout the country. Among our members are many prominent attorneys with extensive complex litigation experience and nationwide reputations for excellence, including several who are fellows of the American College of Trial Lawyers.

NASCAT members generally, but not always, represent victims of fraud and other wrongdoing in both class and individual actions. These cases frequently advance the state of the law, educate the public, improve corporate responsibility and enhance the access of victims to justice and compensate for the wrongs that have been inflicted upon them. Our principal concern with respect to the proposed changes to Rule 23 is the extent to which they either advance or threaten to undermine these benefits.

In April 1996, NASCAT submitted a report on the then current draft of certain of the proposed revisions, specifically those that would have added required

determinations of the merits of the action and the "necessity" of class certification under Rule 23(b)(3) and, as an additional consideration pursuant to that rule, whether the "public interest in and the private benefit of the probable relief to individual class members justify the burdens of litigation". We opposed all three proposals and stated in detail why we believed they would significantly impair both the purpose and utility of class actions and would prove unworkable.

The proposed amendments to the rule have now been modified. However, while the three proposals we commented upon do not appear in the current draft, certain elements of those proposals persist in forms which still create the potential for many problems. On the other hand, there are certain revisions in the draft which we either fully support or support with certain reservations and suggested modifications.

We strongly oppose an amendment to Rule 23(b)(3) which would require a determination by the court as to whether the probable relief to individual class members justifies the costs and burdens of class litigation. We believe the proposal would: (1) undermine the well-recognized benefit of the class action device as a vehicle providing access to the courts on behalf of victims with small injuries; (2) vitiate the important deterrent value of class actions, and (3), because of the ambiguous phrasing of the provision, lead to a merits consideration which, for all the reasons we noted in our prior report, would create enormous inefficiencies and unfair prejudice to one or more parties. We suggest a more modest revision in which the requested

aggregate relief is compared to the costs directly associated with class litigation. See, pp. 5-10, infra.

We oppose adding, as another consideration under Rule 23(b)(3), the practical ability of individual class members to pursue their claims without class certification. We believe this provision would overemphasize a factor to which courts already give consideration to the detriment of other important values supporting the class action device. Moreover, this provision, taken in tandem with proposed Rule 23(b)(3)(A), will result in arbitrary and unwarranted decisions by which certification will be reserved exclusively for only a narrow band of claims that are deemed neither too large nor too small. See, pp. 10-16, infra.

We support the proposed settlement class provision as a means of permitting courts to preserve the benefits of settlement while at the same time maintaining those standards under Rule 23 which are intended to safeguard the due process rights of absent class members. See, pp. 16-21, infra.

We oppose the provision broadening the opportunity to appeal class certification decisions. It is rare that such decisions raise issues that are not routine and familiar. In those instances where it is appropriate, there are other avenues for appellate review that have proven to be available. See, pp. 21-23, infra.

With a caveat, we support the adding, as another consideration to Rule 23(b)(3), the factor of maturity of related litigation. We believe this addition makes sense with respect to mass torts involving new medical devices. However, we believe

that the Advisory Notes should expressly limit application of the rule to those circumstances. See, pp. 23-24, infra.

We support adding the requirement of a court hearing and notice to class members prior to the dismissal or compromise of a class action. However, we believe the Advisory Committee should make clear that these requirements do not apply when the interests that Rule 23(e) are designed to protect are not threatened. Examples include voluntary dismissal without any consideration passing to plaintiffs and without prejudice to class members and involuntary dismissal. See, pp. 24-26, infra.

Finally, we support the provision changing the timing of class certification decisions to "when practicable". Such a change would conform to current practice in allowing delay of the class decision until the court has decided a dispositive motion. See, p. 26, infra.

"Probable Relief" Considerations -- Proposed Rule 23(b)(3)(F)

Under proposed Rule 23(b)(3)(F), courts would be required to determine "whether the probable relief to individual class members justifies the costs and burdens of class litigation." We recommend rejection of this provision for two reasons: First, it undermines the very purpose of class actions, permitting those with claims for damages in amounts that are vastly overshadowed by the cost of litigation an opportunity to obtain redress. Second, given the ambiguous language of the provision, it may lead to an inquiry into the merits of the underlying claim, despite the lack of any consensus within the Judicial Conference for such a far-reaching change. We

suggest limiting any reform in which the "relief" provided by a class action is considered a factor in determining whether to grant certification 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.

The importance of the class action device as a gateway to the court for ordinary citizens, regardless of how small their individual claims, is well described by former Chief Justice Burger in Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980). The plaintiffs in Deposit Guarantee brought their action on behalf of 90,000 credit card customers who, they alleged, were victimized by usurious interest charges. Former Chief Justice Burger noted:

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.

* * *

For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Id. at 339.

However, in contrast to this recognition of the need for class-wide litigation when damages are small, the proposed amendment would permit a wrongdoer who inflicts only a small injury upon a large number of people to escape liability, regardless of the aggregate size of the perpetrator's ill-gotten windfall. As the proposed Note to the Rule states:

Subparagraph (F) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims

The prospect of significant benefits 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 certification fails. (Emphasis supplied).

Thus, under the proposed rule courts would be barred from considering the deterrent effect of class litigation, an important value that is difficult to measure.

Courts in the past have emphasized this value in their decisions granting certification. The court in Dolgow v. Anderson, 43 F.R.D. 472 (1968), writing specifically about securities fraud cases, but in language applicable to all class actions that seek to remedy misconduct, held:

The Rule 23 class action has much the same prophylactic function in the field of securities regulation that the shareholder derivative suit has in the area of general corporate law. In addition to seeking to compensate those directly injured, the federal securities laws are designed to deter corporate officials and insiders from engaging in the kind of machinations alleged to have taken place here.

* * *

By making real the threat of exposure and civil liability, the class action also serves to effectuate this objective.

Id. at 487 (citations omitted)¹

Further, the provision is likely to create confusing and often contradictory standards for determining when certification is proper. Under the provision, whether a claim is sufficiently "trivial" to bar certification depends on the "costs and burdens of class certification". The Note, in turn, apparently defines that term to include the costs and burdens of the litigation itself, even absent certification. Indeed, the Note explains that "higher [levels of individual relief] should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits. . . ." Thus, defense counsel are provided with the perverse incentive to argue in almost every case that one of the reasons justifying resort to the class action device -- the disequilibrium between the cost and complexity of prosecuting the litigation and the expected benefit for each individual -- actually provides a basis for denying certification.

Significantly, the empirical evidence demonstrates no need for this modification of the Rule. As the Minutes to the Advisory Committee Meetings acknowledge, "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

¹ See also Newberg on Class Actions, Third Edition § 4.36 at 4-159, which noted that class actions are designed "not only to compensate victimized members of groups" who are similarly situated, "but also to deter violations of the law, especially when small individual claims are involved." (citations omitted)

than \$100; only 3 of them involved individual recoveries less than \$25, with the lowest figure \$16." The myth that companies are besieged by such claims should not propel an ill-advised change to the Rule.

The proposed rule is also defective because of its use of the term "probable relief." This ambiguous phrase would provide counsel opposing certification with the opportunity to argue that the provision sanctions consideration of the merits on a certification motion since no relief is "probable" if the claims are "meritless." While the Minutes to the Advisory Committee insist that "'probable relief' in the (b)(3) context is damages," there is no explanation of why the Committee rejected use of the terms "requested relief" or "demanded relief."

In our prior submission relating to the prior draft of the proposed revisions, we explained at length why we opposed any consideration of the merits on a class certification motion. Many of these reasons are set forth in the Advisory Committee Minutes, including the difficulty of limiting discovery, the difficulty of determining standards different than those used on dispositive motions, the empirical evidence demonstrating that such motions already provide ample protection against frivolous class actions and the fear that a merits determination would affect all subsequent stages of litigation. None of these reasons lose any of their salience if such a consideration is made part of a "probable relief" determination. The Minutes make clear that at this time there is no consensus for a merits consideration. For that reason alone, the Advisory Committee should not keep the door open for the courts to adopt such a consideration.

With respect to the prior formulation of this provision, the draft notes stated that one of the reasons giving rise to its consideration was concern over instances in which the administrative and distribution costs are so large when compared to the amount recovered that courts have decided that it made better sense to order cy pres relief rather than direct relief to class members. The concern was that such decisions may exceed the power granted under the Rules Enabling Act. Such a concern can be met with more modest revisions relating to consideration of aggregate requested recoveries.

The practical ability of individual class members to pursue their claims without class certification -- Proposed Rule 23(b)(3)(A)

This proposed rule seeks to "sharpen" the distinction between claims as to which individual litigation is feasible and those as to which it is not. We oppose this provision as one that unnecessarily overemphasizes a factor to which courts already give consideration. Indeed, it does so to an extent that will likely play havoc in well-developed areas of class litigation.

First, the Note does not claim, and in fact cannot claim, that courts do not already consider the feasibility of individual litigation in their certification decisions. See, e.g., Steinmetz v. Bache & Co., 71 F.R.D. 202, 205 (S.D.N.Y. 1976) (court found twenty individual suits had been brought by class members, some for as little as \$5,000. Thus, the court held that it was likely that each class member could bring an individual suit and had a strong interest in controlling prosecution of separate actions); Zimmerman v. Thomson McKinnon Securities, Inc., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,733 at 93,961 (S.D.N.Y. 1989) (court denied

Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,733 at 93,961 (S.D.N.Y. 1989) (court denied certification after finding that each potential class member had damages of over \$75,000 and that 71 of those individuals had "indicated that they are interested in joining as plaintiffs and being represented by plaintiff's counsel"); Stoudt v. E.F. Hutton & Co., Inc., 121 F.R.D. 36, 38 (S.D.N.Y. 1988) (court found that each class member had claims of at least \$60,000 each and denied the request for certification on the basis that "each proposed class member . . . possesses the ability to assert an individual claim").

However, seeking to "sharpen" or emphasize this factor, and differentiating it from the interest of individual class members in maintaining separate litigation (a factor set forth in current Rule 23(b)(3)(A) and proposed Rule 23(b)(3)(B)), threatens to undermine other important values supporting the use of the class action device. As the court held in duPont Glove Forgan, Inc. v. American Telephone & T. Co., 69 F.R.D. 481 (S.D.N.Y. 1975):

Superiority under Rule 23(b)(3), while primarily concerned with the economic feasibility of individual actions by small claimants, is not limited to this consideration. Rather, as the Advisory Committee on Civil Rules indicated at the time of revision of Rule 23 [in 1966]:

"Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

Id. at 489. See also Epitano v. Boardroom Business Products Inc., 130 F.R.D. 295, 299 (S.D.N.Y. 1990); Fulco v. Continental Cablevision, Inc., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,346 at 96,678 (D. Mass. 1990).

One aspect of the danger posed by this emphasis on feasibility is demonstrated in the discussion in the Note as to the possible effect of the proposed rule in an area in which Rule 23 has worked well to efficiently litigate actions that are often complex and expensive, securities fraud. The Note states:

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.

As an initial matter, since the proposed rule is an amendment to Rule 23(b)(3), it should have no effect, if adopted, on the court's consideration of 23(b)(1) or (2) certification issues. Moreover, exclusion of class members with potentially large damages from the definition of a Rule 23(b)(1) or (2) class would render difficult if not impossible the resolution of many (b)(1) and (b)(2) claims, as well as create a likely adverse effect on the interests of both plaintiffs and defendants.² There is no

² Rule 23(b)(1) relates to claims as to which "inconsistent or varying adjudications . . . would establish incompatible standards of conduct for the party opposing the class" or as to which adjudication of an individual's claim will in effect be dispositive of the interests of all class members. Rule 23(b)(2) relates to claims seeking

(continued...)

basis to invite such a result, particularly when "victims who could afford to sue alone" have chosen not to do so.

Both the rule and the Note are ambiguous as to (b)(3) classes. While the Note states that large-damage victims "may be easily able to protect their interests in separate litigation if a (b)(3) class is certified", it also concedes, in line with the provisions of the recently enacted Private Securities Litigation Reform Act of 1995, that such individuals would make "ideal representatives".³ However, the Note does not state whether a court should ever carve such victims out of the class definition on a (b)(3) claim (at least where such victims do not act as class representatives). Arguably, the answer is yes since the Note expressly demands consideration of the practical ability to prosecute an individual action, separate from that given to other factors such as the interest shown by class members in maintaining individual actions. However, such a result would render settlement of the action difficult and undermine the efficiencies brought to bear by class litigation. Also, it would be wholly unnecessary since a victim who is easily able to prosecute a separate action can also easily opt-out if he or she wishes to do so.

² (...continued)
injunctive or other equitable relief which would also practically affect the interests of all class members.

³ The implications of this statement remain unexplored. It certainly appears inconsistent to say, on the one hand, that large-damage victims are the best representatives of a class of similarly injured individuals but, on the other hand, a class of such victims should not be certified.

Significantly, the example provided in the Note of the type of problem the proposed rule is intended to remedy is one that is unlikely to be caused by insufficient focus upon feasibility of individual litigation. The Note refers to mass tort cases that "sweep into a class" many small property claims and a smaller number of high damage personal injury claims. This is a problem, however, only to the extent that the separate interests of the personal injury claimants are not properly recognized by the use of sub-classes under Rule 23(c)(4) and are not represented by a plaintiff or plaintiffs who is or are able to satisfy the typicality and adequacy standards set forth under Rule 23(a). In other words, the concerns of the Advisory Committee relate to issues of representation, not superiority. If each group of claimants have sufficient and proper representation, then there is no reason to deny them the opportunity to have at least their common claims efficiently decided in one forum.

Finally, the addition of both proposed Rule 23(b)(3)(A) and Rule 23(b)(3)(F) risks confusion and denial of the ability to achieve class-wide recoveries. The former restricts certification of claims that are too large, whereas the latter restricts certification of claims that are too small. In a class where there is a wide range in the size of claims, stripping large claims from the class may result in the remaining claims simply being too small to warrant certification or prosecution under proposed Rule 23(b)(3)(F).

We therefore urge rejection of this proposal as unnecessary and likely to cause significant confusion and problems in well-developed areas of class litigation.

**SETTLEMENT CLASSES --
PROPOSED RULE 23(b)(4)**

Overview

Proposed Rule 23(b)(4) would allow a court to certify for settlement purposes a (b)(3) claim "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." On balance, this appears to be an appropriate modification, particularly in light of the Third Circuit's decisions in In re General Motors Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) ("the GM decision"), and Georgine v. Amchen Products, Inc., 83 F.3d 610 (3d Cir. 1996), cert. granted, ___ U.S. ___, 1996 U.S. LEXIS 6586 (Nov. 1, 1996), holding that settlement classes are precluded unless all criteria for Rule 23 were satisfied. However, the rule itself should expressly state, as does the Draft Note, that members of a (b)(4) class have the right to opt-out of the class.

Background for the Proposed Change

As observed in the GM decision, many courts have applied a "liberalized criteria for settlement classes", effectively assuming that "lower standards apply in settlement class cases." Id. at 798. Such courts have generally shifted the thrust of the certification inquiry to "whether the settlement was negotiated at arms's length", "whether the negotiations were long, thorough and deliberative" and whether there was any "antagonism" between the interests of plaintiffs and the class. Id. See, Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982) cert. denied, 464 U.S. 818 (higher judicial scrutiny of the

negotiations and circumstances of the settlement warranted, including any differences in treatment of claimants).

Citing the potential "danger of a premature, even a collusive, settlement", earlier noted by Judge Posner in Mars Steel v. Continental Ill. Nat'l Bank and Trust, 834 F.2d 677, 680 (7th Cir. 1987), the Third Circuit in GM departed from this approach, holding that "'a class is a class is a class' and a settlement class, if it is to qualify under Rule 23, must meet all of its requirements." *Id.* at 799-800. The court's decision focused upon the Rule 23(a) criteria, stating that they "constitute a multipart attempt to safeguard the due process rights of absentees." 55 F.3d at 796.

Indeed, the court stated that it was not deciding whether it was impermissible in the context of settlement to focus the (b)(3) superiority inquiry into a "question of whether the settlement is a more desirable outcome for the class than individualized litigation, and [whether] the settlement has not grossly undervalued plaintiffs' interests." *Id.* However, in Georgine, the Third Circuit took that next step by holding that "the Rule 23(b)(3) criteria must also be applied as if the case were to be litigated. While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception." 83 F.3d at 618.

Analysis

Proposed Rule 23(b)(4) represents the Advisory Committee's acceptance of the Third Circuit's invitation for reform. The proposal makes sense for all areas of class litigation. If the court must make a definitive ruling in the context of passing on

a settlement as to whether the Rule 23 issues of predominance and superiority have been satisfied for purposes of trial, defendants would face the prospect of a binding decision on these issues (for the case in question and for related cases) regardless of the outcome of the settlement approval process. This would create a impediment to defendants' willingness to settle cases unless there was first a ruling on a contested class motion, which would only result in prolonging the matter. Such a result would not only adversely affect the courts, whose resources would be further taxed, but the parties as well, including all class members. As the proposed Draft Note aptly notes:

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.

The Advisory Committee has sought to preserve this benefit by liberalizing certification standards for settlement classes while maintaining those standards that directly relate to what the GM court called the "representational elements". The revised Rule 23 would permit settlement classes "even though the requirements of subdivision (b)(3) might not be met for purposes of trial" (emphasis added). This choice of language is a direct response to some of the issues raised by the Third Circuit. The Draft Note makes clear that: (1) the pre-requisites of Rule

23(a), including typicality and adequacy of representation must still be met,⁴ and (2) the pre-requisites of Rule 23(b)(3) requirements are also preserved, though they are to be interpreted in the context of settlement rather than litigation (citing, by way of example, the ability of a court to settle cases on a class wide basis despite the presence of choice of law problems which, if the case went to trial, would preclude certification).

Settlement classes, and the proposed rule permitting such classes, have been criticized because of the possibility of collusion and disabling conflicts of interest. Many of these concerns relate to "futures classes"; i.e. groups of individuals who may have been exposed to a toxic or faulty product but do not yet show signs of injury. More particularly, the concern is that the interests of members of such groups may be easily compromised since they may not have sufficient motive or information to monitor the litigation, receive and review the class notice, or opt-out. However, 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. In particular circumstances, courts have appointed steering committees of attorneys to represent the interests of sub-classes, appointed guardians ad litem for the class, permitted limited discovery by objectors, extended opt-out periods, provided for administrative determination of settlement pay-outs into the future at the time of injury, etc.

⁴ As the Draft Minutes state, "[a]s 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."

Requiring any one or more of these remedies to be applied as to all settlement classes does not make sense; enactment of proposed Rule 23(b)(4) would continue to permit the courts to use their own judgment as to what specific methods are required to protect class members in a particular case.

Interlocutory Appeals -- Proposed Rule 23(f)

Proposed Rule 23(f) provides for an expanded opportunity to obtain interlocutory appellate review of class certification rulings. The appellate court would have complete discretion as to whether to grant an application for such an appeal.

We oppose the amendment. As the proposed Note states, 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". In those small number of situations when appellate review is appropriate, alternative remedies are already available.

Indeed, particularly in the least-developed area of class litigation, mass torts, where there is a greater likelihood of novel questions arising, appellate courts have increasingly permitted interlocutory review of certification decisions. They have done so by granting petitions under 28 U.S.C. § 1292(b), where appropriate, see, e.g., Andrews v. American Tel. & Tel. Co., ___ F.3d ___, 1996 U.S. App. LEXIS 24472 (6th Cir. Sept. 19, 1996); Valentino v. Carter-Wallace, Inc., ___ F.3d ___, 1996 U.S. App. LEXIS 26300 (9th Cir. Oct. 7, 1996); Castano v. American Tobacco Co., 979 F.2d 1014 (5th Cir. 1996), and by issuing writs of mandamus directing district courts to reverse improperly granted certification orders. See, e.g., In re Rhone-Poulenc

Rorer Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); In re American Medical Svs., Inc., 75 F.3d 1069 (6th Cir. 1996); In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990).

No standards are set forth in the proposed rule. As a consequence, its adoption would encourage the automatic filing of a petition for appeal by every party that loses a certification motion. Thus, in virtually every case there would be a duplication of briefing on and court consideration of the merits of a certification motion, thereby materially increasing the cost of litigation, causing unnecessary delays and potential prejudice to litigants and taxing judicial resources. See Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 657 n.1 (2d Cir. 1978). It makes little sense to impose additional layers of litigation routinely in class litigation when appellate review is available in the few cases where it is appropriate.

Finally, the proposed rule provides that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders". We oppose this portion of the provision as well, even if we were prepared to support some form of liberalized appellate review of certification decisions. Giving discretion to the courts to order that the litigation be stayed pending the appeal would result in serious delay and piecemeal litigation. There should be no basis for any stay since the certification decision does not relate to the merits of the claims. Discovery will be necessary regardless of whether the class certification order withstands appeal.⁵

⁵ Indeed, a development in the record on the merits favorable to one of the parties may counter any practical effect on that party of an adverse decision on the certification appeal.

**The Maturity of Related Litigation --
Proposed Rule 23(b)(3)(c)**

The proposed rule adds "maturity" of related litigation as a factor to consider in determining certification. The Draft Note makes it clear that this suggested additional consideration arises from experience in mass tort litigation involving "highly uncertain facts", particularly those relating to "medical device[s]" that "may not be fully understood for many years after the first injuries are claimed".

We support this amendment with reservations. We believe any application of this proposal outside the area of mass torts and the specific problem noted by the Advisory Committee may have unforeseen adverse consequences. While we believe that there is only a remote possibility that a court would deny certification under the revised rule in an action involving, for example, a novel and complicated fraud requiring expert testimony, we believe that the Advisory Note should expressly state that the rule is limited to claims where the element of causation is susceptible to empirical proof of a scientific nature.

Dismissal -- Proposed Rule 23(e)

The proposed revisions to Rule 23(e) add a requirement that courts approve the dismissal or compromise of a class action only after a hearing by the court. Further, the proposal makes clear that the current requirement of sending notice to class members of the dismissal or compromise of the action is an event that must precede such disposition.

We support these revisions with the caveat that the Draft Advisory Note should make equally clear that, in accordance with current practice, the requirements

of a hearing and notice are not necessary when the purposes of Rule 23(e) are not implicated.

Rule 23(e) is intended to protect absent class members from the risk that the plaintiff class representatives may use the class action device to further their own interests to the detriment of the class. Thus, as courts have held:

Rule 23(e) does not require notice of precertification dismissal except where the court concludes that such notice is necessary for one or more of the following reasons: (1) to protect defendants by preventing plaintiffs from appending class allegations merely to obtain a more favorable settlement; (2) to protect the class from objectionable structural relief or depletion of funds available to pay class claim, e.g., through collusive settlement; (3) to protect the class from prejudice based on their reliance on the filing or pendency of the action. Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408-09 (9th Cir. 1989).

Tepper v. Western Investment Real Estate Trust, 1993 U.S. Dist. LEXIS 2148 (N.D. Cal. February 23, 1993) at *2.

Tepper involved a voluntary dismissal by stipulation pursuant to which no consideration was paid, the dismissal was without prejudice, and no notice of the action had been disseminated. Notice in that context was held to be an unnecessary burden. For the same reasons, a court faced with similar facts should have the discretion to determine that it can enter a dismissal based on adequate submissions without the need for a hearing.

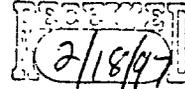
There are other circumstances in which the requirements of Rule 23(e) should not be imposed. For example, as one commentator has noted, when dismissal is involuntary, it "could not involve collusion or benefit the representative plaintiffs at

the expense of the remaining class members, [and thus] the protection afforded by giving notice to the absentees is not required". 7B C. Wright & A. Miller, Federal Practice and Procedure: Civil, § 1797 at 345 (1986). See also Laventhall v. General Dynamics Corp., 911 F.R.D. 208, 210 (E.D. Mo. 1981).

**Timing of Class Certification Decision --
Proposed Rule 23(c)(1)**

Proposed Rule 23(c)(1) changes the required time within which a certification decision must be made from "as soon as practicable after the commencement of an action brought as a class action" to "when practicable" after such commencement. The effect of this change will make it clear, to the extent there was some doubt, that courts may delay the certification decision to after its determination of a motion to dismiss or one for summary judgment.

In our report on the prior draft of the proposed revisions, we supported a similar amendment on the ground that it would conform to the practice by the overwhelming majority of the circuits. It would also obviate any need for a merits consideration on a class certification motion. We reiterate our support for this proposal.



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February 13, 1997

VIA FEDERAL EXPRESS

Peter G. McCabe, Esq.
Committee on Rules of Practice
and Procedures of the Judicial
Conference of the United States
Washington, DC 20544

Re: Proposed Amendments to Rule 23

Dear Mr. McCabe:

Please find enclosed a copy of a supplemental report by
The National Association of Securities and Commercial Attorneys
with respect to proposals to amend Rule 23. We request that you
kindly distribute the report to all members of the Committee.

Very truly yours,

Ira A. Schochet

IAS:mt
Enclosures

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NASCAT COMMENT ON OPT-IN CLASSES

The National Association of Securities and Commercial Attorneys ("NASCAT") submits this comment to the Committee on Rules of Practice and Procedures of the Judicial Conference (the "Rules Committee"). NASCAT is an association of nearly 500 lawyers who litigate securities fraud, consumer fraud, commercial and antitrust cases in the United States District Courts through the country. NASCAT members generally, but not always, represent victims of fraud and other wrongdoing in both class and individual actions. Among our members are many prominent attorneys with extensive complex litigation experience and nationwide reputations for excellence.

NASCAT understands that the Rules Committee may consider a proposal to add an opt-in class action mechanism to Rule 23 of the Federal Rules of Civil Procedure. NASCAT opposes such an addition to Rule 23 for the reasons stated in this comment.

As will be described, an opt-in mechanism offers no advantages over existing Rule 23 practice. On the other hand, an opt-in class procedure would undermine the "principal purpose" of the Rule -- "the efficiency and economy of litigation" *General Telephone Co. v. Falcon*, 457 U.S. 147, 159, 102 S.Ct. 2364, 2371 (1982), quoting *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 766 (1974). An opt-in class would deny defendants finality of resolution of the claims litigated, and deny plaintiffs access to judicial relief made economically feasible by the cost-spreading class actions facilitate. The historical experience with opt-in classes, which existed before Rule 23 achieved its present form in 1966, amply confirms that opt-in is a procedure which offers no benefits to courts or litigants.

As the United States Supreme Court has noted, "the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 808, 105 S.Ct. 2965, 2973 (1985). See *Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118 (1940). "The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, e.g., Advisory Committee Notes on Fed. Rule Civ. Proc. 23, U.S.C. App. pp. 427-429; Note, Developments in the Law, Class Actions, 89 Harv.L.Rev. 1318, 1321-1323, 1329-1330 (1976)." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402-03, 100 S.Ct. 1202, 1212 (1980).

The Supreme Court has shown particular sensitivity to the beneficial role class actions perform in affording individual claimants with small claims access to the legal system. For example, in *Deposit Guarantee National Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174 (1980), the Supreme Court emphasized:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons

may be without any effective redress unless they may employ the class action device.

That an opt-in class mechanism would undermine this important function of Rule 23 cannot be disputed. In expressly rejecting the contention that constitutional due process requirements mandated opt-in classes, the Supreme Court relied on the reasoning and statement of policy set forth by the Reporter to the Advisory Committee on Civil Rules at the time it adopted the present Rule 23, Professor (later Massachusetts Supreme Judicial Court Justice) Benjamin Kaplan. The Supreme Court held:

Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those claims involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. ... The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.

Phillips Petroleum Co. v. Shutts, 472 U.S. at 812-813, 105 S.Ct. at 2975, citing, in footnote 4, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv.L.Rev. 356, 397-398 (1967).¹

In the sentence following that quote, the Supreme Court demonstrated that an opt-in procedure would add nothing to existing Rule 23 practice:

If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought

¹ See also Federal Courts Committee of the Association of the Bar of the City of New York, *Class Actions - Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements*, 28 The Record 897, 904-5 (December 1973).

about filing suit, and should be fully capable of exercising his right to 'opt-out.'²

Consequently, with an opt-in procedure, the judicial system would likely lose the litigation efficiency that the current (b)(3) practice provides. Cost spreading would be minimized and the class action mechanism would be deprived of the ability to provide conclusive effect to claims resolution, because claimants who do not opt-in would retain the right to institute separate lawsuits. Indeed, an opt-in procedure is not a class action in any meaningful sense at all. See Hamburger, *State Class Actions and the Federal Rule*, 71 Colum.L.Rev. 609, 645 (1974). ("It is the very essence of class treatment to make it unnecessary for each member to appear and be heard."); Kaplan, *supra*, 81 Harv.L.Rev. at 398.

Historical experience confirms that conclusion. Prior to the 1966 amendments to the federal rules, former Rule 23(a)(3) functioned as an opt-in mechanism. Conventionally characterized by the term "spurious" class action, former Rule 23(a)(3) was actually a permissive joinder device that was little more than an invitation to interested parties to participate in the litigation. *All American Airways v. Eldred*, 209 F.2d 247, 248 (2d Cir. 1954); *Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp.*, 23 F.R.D. 155, 162 (S.D. NY 1959); *Escott v. BarChris Construction Corp.*, 340 F.2d 731 (2d Cir. 1965); 59 Am Jur. 2d Parties §47, pp. 447-8; *Newberg on Class Actions* (3d ed.) §1.09, pp. 1-25 - 1-26. It worked oddly at best. Pre-trial notice was often

² Other alternatives available to such a class member are appearing in the class action through counsel, Fed. R. Civ. P. 23(c)(2), or seeking intervention pursuant to Fed. R. Civ. P. 24.

denied, on grounds such as the plaintiff was not his brother's keeper, *Hormel v. United States*, 17 F.R.D. 303, 305 (1955), and/or that notice constituted solicitation of potential clients. *E.g.*, *Cherner v. Transitron Electronic Corporation*, 201 F.Supp 934, 936 (D. Mass. 1962). On the other hand, courts on several occasions directed post-judgment notice where the result had been favorable to the plaintiff, so as to afford potential class members the opportunity to collect. *E.g.*, *Union Carbide and Carbon Corporation v. Nisley*, 300 F.2d 516 (10th Cir. 1961), pet. cert. dismissed, 371 U.S. 801 (1963); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). See *Developments In The Law - Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 935 n. 442 (1958). This practice was criticized for denying defendants *res judicata* protection on success, but exposing them to enhanced liability on unfavorable results. See Amendments, 39 F.R.D. at 105; Developments, 71 Harv.L.Rev. at 936; Kaplan, 81 Harv.L.Rev. at 385-6. In short, the opt-in "spurious" class action of pre-1966 Rule 23 "was not really a class action at all" Wright, *Class Actions*, 47 F.R.D. 169, 178 (1969). See Comment, *Spurious Class Actions Based Upon Securities Frauds Under the Revised Federal Rules of Civil Procedure*, 35 Ford.L.Rev. 295, 295-6 (1966). Elimination of one-way intervention and extending the binding effect of class action judgments were among the "central purposes" for the replacement of pre-1966 Rule 23 by the existing rule. See *Developments in the Law - Class Actions*, 89 Harv.L.Rev. 1318, 1394 (1976); Amendments, 39 F.R.D. at 98-99, 105.

We understand that some members of the Rules Committee regard an opt-in mechanism as desirable because it would permit a class member's participation in litigation only with that individual's "consent." There are several responses to this argument.

First, the class action has long been regarded as "an exception to the rule that one could not be bound by a judgment *in personam* unless one was made fully a party in the traditional sense." *Phillips Petroleum Company v. Shutts*, 472 U.S. 808, 105 S.Ct. 2972-73, citing *Hansberry v. Lee*, 311 U.S. at 40-41, 61 S.Ct. at 117-118, and *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1878).³ The adjudication of the rights of absent class members is premised not on consent, but rather on adequacy of representation and similarity of claims. See *Hansberry v. Lee*, 311 U.S. at 41-43, 61 S.Ct. at 117-119. As one commentator stated:

The basic philosophy of class actions has remained unchanged through the centuries. Self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so helps himself -- particularly if only by helping others will he be able to protect and promote his own interests. Building on that simple premise, the device provides for the use of man's natural instinct to act in his own best interest in order to achieve justice and procedural efficiency in mass litigation. Our system of justice tolerates and at times favors litigation through champions who stand or fall with the whole group.

³ Indeed, both the representative action, instituted without prior consent of the unnamed parties on whose behalf the action is brought, and the reasoning justifying its application, are of ancient origin in English common law. One commentator has recently traced evidence of their existence as far back as 1199. Stephen C. Yeazell, *The Past and Future of Defendant Classes in Collective Litigation*, ___ U. Ariz. L. Rev. ___ (to be published in 1997, cited with permission).

A few self-chosen representatives of a class of plaintiffs or plaintiff-chosen representatives of a class of defendants may conduct litigation on behalf of themselves and all others similarly situated if the class is so numerous that it would be impracticable to bring all members into court if the prosecution of separate actions by or against the class members would not be feasible for legal or practical reasons. The judgment, whether favorable or unfavorable to the class, binds all members, provided, of course, that the representation of the class interests was fair and adequate.

Hamburger, *supra*, 71 Colum.L.Rev. at 610. Indeed, consistent with historical equity practice, class actions certified under present rule 23(b)(1) and (b)(2) do not require notice to class members, i.e. there is no requirement for any form of consent.

More fundamentally, the Supreme Court has held an absent class member's failure to "opt-out" in response to a notice of pendency of a Rule 23(b)(3) class action to constitute a consent to jurisdiction, and held that form of consent sufficient for constitutional due process purposes. *Phillips Petroleum Company v. Shutts*, 472 U.S. at 812-815, 105 S.Ct. at 2974-75. Indeed, the Supreme Court virtually ridiculed the notion that an opt-in procedure is required for effective consent: the Court characterized as a "*rara avis*" a class member "who is unwilling to execute an 'opt-out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Id.*, 472 at U.S. 813-14, 105 S.Ct. at 2975.

Finally, an opt-in procedure cannot be justified on policy grounds. Professor Kaplan, in his article describing the need for the 1996 amendments to Rule 23, noted that many individuals with meritorious small claims would by reason of ignorance or

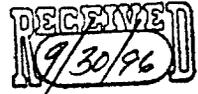
timidity be denied access to judicial resolution of their claims by an opt-in procedure. He continued: "The moral justification for treating such people as null quantities is questionable. For them, the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3) [of Rule 23], it seems fair for the silent to be considered as part of the class. Otherwise, the (b)(3) type would become a class action which was not that at all -- a prime point of discontent with the spurious action from which the Advisory Committee started its review of rule 23." Kaplan, *supra*, 81 Harv.L.Rev. at 398. His words have no less force today.⁴

As can be seen, the historical experience of an opt-in class procedure demonstrates its inefficacy. An opt-in mechanism offers no practical advantages. To the contrary, it would negate the very purposes Rule 23 serves and result in lawsuits that may be denominated as class actions but are not that in any meaningful sense. An opt-in procedure cannot be justified on notions of "consent." In short, there is no rationale for adding an opt-in mechanism to Rule 23.

⁴ See *McEwan v. Digitran Systems Inc.*, [1995-96] Fed. Sec. L. Rep. (CCH) ¶98,990 (D. Utah 1994) at p. 93,824. (requiring class members to opt-in by filing proofs of claim prior to judgment constitutes a "type of taking advantage of class members' ignorance [that] is repugnant to the class action vehicle.")

#1446

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



CHAMBERS OF
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~~96-AP-1111~~

96-CV-065

September 27, 1996

Mr. Peter G. McCabe
Administrative Office
of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendments to Appellate Rule 23(e)

Dear Mr. McCabe:

I have not had an opportunity to really study in detail all of the proposed amendments, but one of the amendments caught my eye immediately. Not being certain as to whether the Committee has given thought to the following matter, I thought it advisable to write to you at once because I believe a problem lurks in the amendment as it is proposed. The draft amendment reads as follows:

Rule 23 Class Actions

* * *

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

My concern has to do particularly with pro se prisoner complaints. A great majority of the pro se complaints filed in our court and concerned with prison conditions of confinement include a class action allegation, i.e., "this complaint is brought on my behalf and on behalf of all prisoners who are exposed to second-hand smoke; subject to unsanitary conditions; fed improper diets; denied access to libraries, etc., etc."

Mr. Peter G. McCabe
September 27, 1996
Page Two

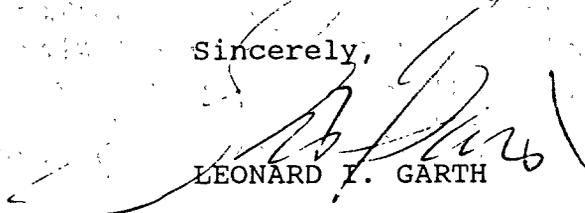
Under this proposed rule, a district court judge would be required in every instance to hold a hearing which, I suppose, would either have to be held at the prison or have the prisoner/plaintiff and/or representative brought to the courthouse. Moreover, I would assume that direct notice would have to be given to all members of the class in the prison and possibly (depending upon how the class allegations were framed), in other Federal institutions of correction.

I cannot believe that this is what the framers of the proposed amendment had in mind, but rest assured our "prison lawyers" will be sure to seize on and use the proposed 23(e) (if it is ever enacted as it is presently drawn) for a field trip out of prison.

Could I suggest that the Committee review this proposed rule with an eye toward modifying the rule to accommodate the problem I have outlined above? Perhaps the addition of the words "A class action that has been certified . . ." would go a long way toward satisfying my concern. If, of course, the Committee has considered this problem and has nevertheless proposed the amendment, I would take exception to it in its present form because of the ramifications that it undoubtedly has in the prisoner pro se area.

I will be interested in the Committee's reaction.

Sincerely,



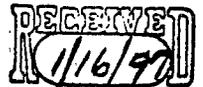
LEONARD I. GARTH

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cc Honorable Patrick E. Higginbotham
Honorable Anthony J. Scirica

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96-CV-
067

January 15, 1997

Honorable Paul V. Niemeyer
United States Circuit Judge
Chair, Advisory Committee on Civil Rules
Committee on Rules of Practice
and Procedures of the Judicial
Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rule of Civil Procedure 23

Dear Judge Niemeyer:

This firm represents Owens-Illinois, Inc. in connection with the new subsection (b)(4) that the Advisory Committee has proposed be added to Rule 23. As you may recall, I provided comment at the Dallas hearing regarding the Advisory Committee's "Change 2," which would add a new section (b)(4) to Rule 23, providing for settlement class actions. For the reasons I stated at the hearing and set forth in a letter to you dated December 11, 1996, Owens-Illinois adheres to its position that the Advisory Committee should suspend consideration of Change 2 to provide the public with the benefit of the Supreme Court's view on this issue.

In our view, public hearings before Georgine is handed down do not provide a meaningful opportunity to be heard on Change 2. The views of the Supreme Court on these important and difficult issues will be too important not to be taken into account in commenting on Change 2.

We also believe your Committee should consider adding two sentences to Change 2 in order to ensure that district courts, in considering (b)(4) settlements, have the benefits of the adversarial process. One problem with the process as it stands is that the district court is faced with parties who, by definition, are no longer adverse, and the legal status of 'objectors' is very unclear. See Richard B. Schmitt, *Objecting to Class-Action Pacts Can Be Lucrative for Attorneys*, Wall St. J. B1 (Friday, January 10, 1997).

Here is the (b)(4) we propose that your Committee consider:

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

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Page 369

Hon Paul V. Niemeyer
January 15, 1997
Page 2

with an interest in the settlement may object to its approval by the court without intervening or becoming a party, and the court shall accord objectors rights to discovery, to present evidence, and to cross-examine witnesses. Objectors may share in any settlement only to the same extent as any similarly situated class member, and the court shall award attorneys fees and litigation expenses to objectors but only if, as a direct result of the objector's participation, the settlement is disapproved, or approved after the terms of the settlement are fundamentally changed to the benefit of the class, the fees and expenses in either event to be paid by the class representatives and the non-class parties to the settlement.

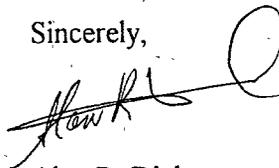
The first sentence above is Change 2 as proposed by the Advisory Committee without modification. The following two sentences, which are our proposal, would ensure that the district court considers any (b)(4) settlement with the benefit of the adversarial process. This would mitigate what Mr. Fred Baron, at the Committee's hearing in Dallas, described as the "low-bidder" problem with Change 2.

Our proposal would apply only to (b)(4) class actions. The settlement of class action previously certified under (b)(3) as a litigation class would be subject to the existing Rule 23(e) standards.

Owens-Illinois continues to have serious concerns with Change 2, even with our proposed addition, and as noted above we request that the Committee defer public hearings on Change 2 until after the Georgine decision. We also request, however, that the Advisory Committee consider adding the two sentences set out above to Change 2 before any affirmative action on Change 2.

We are sending copies of this letter to the witnesses scheduled to appear in San Francisco, and we hope that this proposal will be discussed at that hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan R. Dial", with a large, stylized flourish at the end.

Alan R. Dial

RECEIVED
11/15/96

CARR, TABB & POPE

ATTORNEYS AT LAW

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96-CV-069

November 13, 1996

Peter G. McCabe
Secretary of the Committee
on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

Thank you for your letter of October 30, inviting me to the hearing on November 22 in Philadelphia. Having received the list of participants and my time slot, it occurs to me that there is likely little I could add at that late point in the day that would be of interest to the panel that had not already been exhaustively presented by others. Thus, I will rely on this written submission and not plan to attend the hearing.

My primary concern relates to the addition of (b)(3)(F). This provision would allow the court to deny class status to a case in which the plaintiff could not adequately demonstrate on the front end that the "probable relief" justifies the cost, etc. Frequently, neither the class representative or class counsel has sufficient information at the outset of a case to determine the scope of recoverable damages. The actual damage calculation usually follows extensive discovery and deliberation with appropriate experts and others. We believe that the imposition of this requirement will have the effect of eliminating meritorious cases that should be allowed to proceed.

A recent example will illustrate this point. We have just concluded Richard Farrington and Robert Farrington, Individually and on Behalf of All Others Similarly Situated v. ConAgra, Inc. d/b/a Graham Grain Company, Vigo Superior Court, State of Indiana, Civil Action File No. 84D01 9210 CP1535. While the case was litigated under Indiana law, their Rule is modeled on the federal rule. This is a case in which it was shown that grain elevators were intentionally using an illegal screen so to artificially inflate the foreign material in loads of soybeans delivered to the grain facility. This illegal and nastily outrageous act generated minuscule losses to the impacted farmers on a transaction by transaction basis and even a relatively small impact (several hundred thousand dollars in provable damages) to the class as a

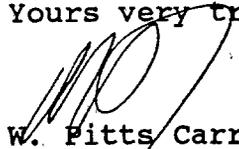
Mr. Peter G. McCabe
November 13, 1996
Page 2

whole. We were, however, able to obtain a recovery of approximately ten times actual damages because of the potential punitive considerations. However, had we been put to the task at the front end of the case of describing with reasonable specificity the "probable relief", we may very well have failed to muster up under that standard, the case would not have proceeded and an egregious and dastardly wrong would remain unredressed.

This proposed amendment would provide a strong tool to those seeking to avoid liability for acts that all people of good will would be of a mind needed to be redressed, even though the ultimate recovery remains small.

Thank you for allowing our participation in the deliberations of the Committee.

Yours very truly,



W. Pitts Carr

WPC:srp

#1619

BRIAN G. RUSCHEL

ATTORNEY AT LAW • CERTIFIED PUBLIC ACCOUNTANT

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96-CV-070

October 26, 1996

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Judicial Conference of the U.S.
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Dear Mr. McCabe:

I am writing to oppose any change to Civil Rule 23 that would let judges decide cases are not suitable as class actions because claims are too small to be worth it.

I am representing plaintiffs in some local-court class actions alleging large numbers of people are routinely overcharged amounts as small as \$30.00. Overcharges are actually much higher, but judges like to grant defendants' summary judgment motions, so cases have to be limited to only the most absolute and indisputable of overcharges.

In a low-margin business, a defendant can make large profits just overcharging tens of thousands of people \$30.00 each. One benefit of class actions is their deterrent effect.

It is almost impossible to get even simple and straightforward class actions certified. Giving judges another easy, subjective and potentially intellectually dishonest reason not to certify, removes risk for defendants. Defendants have little risk the way it is, because few suits are brought compared with the frauds occurring every day. As for class certification, defendants have almost no risk, and their lawyers have low-stress jobs, because it is so easy to convince judges not to certify class actions.

Please do not add yet another obstacle for plaintiffs.

Sincerely,

A handwritten signature in cursive script that reads "Brian G. Ruschel".

Brian G. Ruschel

#1808



Law Offices
of
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96-CV-075

James E. Deakyne, Jr., P.A.
A. Wade James, P.A.
Kathleen S. Ford**

Please correspond to:
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*Not a Partnership

**Also licensed in Texas and D.C.

November 6, 1996

96-CR-009

Peter G. McCabe
Secretary
Committee on Rules of Practice &
Procedure of the Judicial Conference
of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 10544

RE: Purposed Changes in Federal Rules

Dear Mr. McCabe:

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.

Sincerely,

KATHLEEN SWEENEY FORD

KSF:gb



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November 11, 1996

E-mail: SILBERML@TURING.LAW.NYU.EDU

Linda Silberman
Professor of Law

96-CV-079

Via Federal Express

Peter McCabe, Esq.
Committee of Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

Re: Comments on Proposed Rule 23

Dear Members of the Rules Committee:

We have recently written an article discussing settlement class actions in the context of securities litigation, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, which is forthcoming in the next issue of the Supreme Court Review. Most of our paper discusses the particular problem of the diminished bargaining power of the state class in advancing federal claims for litigation and the related power of defendants to seek out plaintiff representatives who will offer the most favorable settlement and global release of all claims, state and federal. We propose procedures for state courts to adopt to ameliorate some of these problems. In our conclusion, we note that many of the problems we identify in class settlement practice, such as plaintiff-shopping, forum-shopping, and the conflicts of interest between class counsel and class members permeate class settlements more generally, and that more detailed procedures for class settlements ought to be included as part of the agenda in reforming the provisions of Rule 23. In criticizing the present proposal, we comment that "no specific guidelines for the approval of class action settlements are set forth", and citing specifically to Judge Schwarzer's earlier article, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Corn. L. Rev. 837 (1995), we urge that more particularized criteria be established.

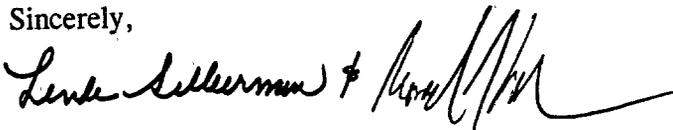
We are aware that different species of class actions may call for specialized procedures and the proposals we urge for state courts that approve global settlements releasing exclusive federal claims do not necessarily address the issues around class action settlements in federal courts. Indeed, some of our suggestions might be more suitable for *state* class action reform in light of the problems of other types of parallel state/federal class litigation. Also, Congressional action may be needed to address some recent examples of state courts' interference with proper federal class action jurisdiction.

Nonetheless, we believe that some of our suggestions may be useful in thinking about whether and how to permit settlement class actions. Among the suggestions we make that we believe are adaptable for federal class action treatment are:

- 1) that the court hold a preliminary fairness hearing on the settlement before notice is sent to class members;
- 2) as part of the preliminary hearing, disclosure be required from the settling parties about any parallel litigation, and plaintiffs in these litigation be invited to appear and comment on the proposed settlement; counsel fees arising from the settlement may be required to be shared with other counsel if other counsel has contributed to developing the value of other claims;
- 3) that the benefits of a global settlement should be explicitly weighed against the risks that arise from plaintiff shopping and forum shopping for "collusive" settlements;
- 4) that the court approving the settlement have a substantial nexus with the claims or parties so as to avoid the possibility of forum-shopping to find a favorable court willing to approve settlement;
- 5) that the scope of claims within the settlement be "transactionally related" so as to assure proper investigation of the claims and to reduce the possibility of collusive settlements.

We attach the last five pages of our article as an Appendix to this letter, and also enclose a draft of our complete article. We hope you find these comments useful as part of the public comment on the Rule 23 proposals.

Sincerely,



Linda Silberman and Marcel Kahan
Professors of Law

**Matsushita and Beyond: The Role of State Courts
in Class Actions Involving Exclusive Federal Claims**

by

Marcel Kahan* and Linda Silberman**

* Professor of Law, New York University School of Law
** Professor of Law, New York University School of Law

Our thanks to Stephen Burbank, John Coates, Rochelle Dreyfuss, Fred Dunbar, Eleanor Fox, Ronald Gilson, Victor Goldberg, Helen Hershkoff, Reinier Kraakman, Andreas Lowenfeld, Larry Kramer, Geoffrey Miller, Alan Morrison, Judith Resnik, Helen Scott and the participants at the George Washington Law Center faculty workshop for their helpful comments. A special debt of gratitude to Stephen Burbank and Ronald Gilson, who carefully reviewed the article and provided extensive comments, and to Chancellor William Allen and Judge Edward Becker, who offered us the benefit of their practical experience. Counsel for both sides provided us with briefs, documents, and background information from the Matsushita litigation and shared their views of the case with us. Steven Cottreau, a second-year student at NYU, provided valuable research assistance and became in effect a third collaborator. The Filomen D'Agostino and Max E. Greenberg Research Fund provided generous financial support.

I. THE MATSUSHITA DECISION

Towards the start of 1996, two independent developments occurred that profoundly affect the litigation of securities class actions. One was the enactment of the Private Securities Litigation Reform Act in December 1995;¹ the other -- two months later -- was the Supreme Court's decision in *Matsushita Electric Industrial Co. v Epstein*.²

The Act represented the temporary resolution of a bitter debate over the role of securities class litigation.³ While securities class litigation has been recognized as an important private enforcement device, class lawyers have been accused of bringing non-meritorious claims in order to extort a settlement and of selling out meritorious claims for low settlements and high attorneys' fees. Passage of the Private Securities Litigation Reform Act was an attempt to remedy these perceived

¹ Pub L No 104-67, 109 Stat 737 (to be codified in scattered sections of 15 USC).

² 116 S Ct 873, 134 L Ed 2d 6 (1996).

³ For press accounts discussing the need for reform, see, e.g., Ed McCracken, *The New Threat to High-Tech Firms*, San Francisco Chronicle A19 (June 28, 1995); George F. McGunnigle & Michael J. Wurzer, *Reform Needed to Limit Securities Fraud Suits*, Minneapolis Star Tribune 3D (Apr 24, 1995); Andrew E. Serwer, *What to Do about Legal Blackmail*, Fortune 136 (Nov 15, 1993); *Shareholder Suits: Class Acts*, The Economist 95 (Mar 19, 1994, US ed). Other accounts, however, cautioned against reform. See Penni Crabtree, *Look Out, Little Guy: Demons Abound in Battle over Shareholder Suits*, San Diego Union-Tribune I-1 (Oct 29, 1995); Frank Lalli, *Congress Aims at Lawyers and Ends up Shooting Small Investors in the Back*, Money 9 (Sep, 1995); Gene Marlowe, *Securities Fraud Victims out of Luck?*, Tampa Tribune 1 (Aug 6, 1995); Anne Kates Smith, *Some Call It Securities Reform*, U.S. News & World Report 117 (Nov 13, 1995).

abuses.⁴ The Act contains a number of provisions making it more difficult for plaintiffs' lawyers to bring securities class actions.⁵ Most importantly for our purposes, the Act creates a presumption that the class member with the greatest financial stake in a securities class action be appointed "lead plaintiff"⁶ and gives the lead plaintiff the right to select class counsel.⁷

⁴ See Private Securities Litigation Reform Act of 1995, S Rep No 104-98, 104th Cong., 1st Sess (1995); Securities Litigation Reform, HR Rep No 104-369, 104th Cong, 1st Sess (1995).

⁵ The Private Securities Litigation Reform Act amended the Securities Act and the Securities Exchange Act by raising the pleading burden for fraud (Pub L No 104-67 at sec 101(b) §21D(b)), imposing mandatory sanctions for frivolous pleadings and motions (id at sec 101(a) §27(c); id at sec 101(b) §21D(c)), creating a "safe-harbor" from securities fraud liability for certain projections and forecasts (id at sec 102), and cutting back on joint and several liability for violations of the securities laws (id at sec 201). The state of affairs that these provisions seek to remedy has been characterized as one where actions are brought by "figurehead plaintiffs who are essentially hired by class action lawyers." *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361, *31 (ND Cal).

⁶ "Lead plaintiff" is a term used by the act to refer to the class member that is the most adequate plaintiff under the criteria established by the Act and that is entitled to select class counsel. See, e.g., id at sec 110(a) §27(a)(3)(B)(i) ("the court . . . shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members").

⁷ Id at sec 101(a) §27(a)(3); id at sec 101(b) §21D(a)(3). There are some initial indications that the lead plaintiff provisions of the Act are effective. See, e.g., Karen Donovan, *New Securities Law May Squeeze Out Milberg Weiss*, *The Natl L J* A7 (Aug 12, 1996) (discussing *Gluck v Cellstar Corp.*, a federal securities action, and attempt by Wisconsin Investment Board, holder of 1.6 million shares, to be appointed lead plaintiff). Indeed, the Act may have also influenced state practice regarding derivative suits. See Bill Alden, *Intervenors Given Role in*

Unwittingly, the Supreme Court's holding in *Matsushita* -- that state court class action settlements can release exclusive federal claims -- has the potential to undermine some of these reforms. As we will show, the ability to settle exclusive federal claims in state courts may exacerbate the very conflicts of interest between class lawyers and class members that the lead plaintiff provision of the Private Securities Litigation Reform Act was meant to eliminate.

The *Matsushita* case grew out of the 1990 acquisition of MCA, Inc., a Delaware corporation, by Matsushita. State plaintiffs filed a shareholder class action against MCA and its directors in Delaware Chancery Court on September 26, 1990, one day after the announcement that MCA and Matsushita were negotiating a possible acquisition.⁸ They alleged that MCA and its directors had breached their fiduciary duties to MCA shareholders in failing to maximize shareholder value.⁹ Matsushita was not named as a

Derivative Suit, NY L J 1, (Sept 11, 1996) (describing addition of CalPERS as co-counsel in New York state derivative action after CalPERS successfully argued that previous settlement agreement negotiated by individual investors was inadequate). But see *Greebel v FTP Software, Inc.*, 1996 US Dist LEXIS 13510, *24 (D Mass) (appointing moving parties as lead plaintiff as no other persons have sought such appointment and approving appointment of Milberg, Weiss as lead counsel).

⁸ *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873, 885 (1996).

⁹ *Id.* at 876. To succeed on such a claim, plaintiff would have to show either (i) that MCA's directors failed to take steps reasonably designed to maximize the price at which MCA would be acquired, e.g., by exclusively dealing with Matsushita without a basis for concluding that no other party would be willing to pay more for MCA (see, e.g., *Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173 (Del 1986)), or (ii) that the

defendant in the initial complaint.¹⁰

With the state claim pending, MCA and Matsushita proceeded to negotiate the terms and structure of MCA's acquisition. On November 26, Matsushita commenced a tender offer for MCA stock, offering MCA shareholders \$66 in cash and \$5 worth of stock in WWOR-TV per share of MCA stock.¹¹ Lew Wasserman, MCA's chairman and CEO and owner of about 5 million shares (approximately 5%) of MCA's stock, did not participate in the tender offer.¹² Instead, on the morning of November 26, he and Matsushita agreed to exchange his shares of MCA for preferred stock in a Matsushita subsidiary.¹³ Whether Wasserman and Matsushita were obligated to perform this exchange and how many shares of preferred stock Wasserman would receive depended on whether Matsushita's public tender offer was successful and whether Matsushita raised the

directors were "grossly negligent" in determining that the price Matsushita was willing to pay was a beneficial price (see, e.g., *Smith v Van Gorkom*, 488 A2d 858 (Del 1985)). Obviously, any such claims were premature at the time they were brought since MCA had just started negotiations. Even at the time negotiations had been concluded, the claims were highly unlikely to succeed. As to the first showing, no second party interested in acquiring MCA ever came forward -- a fact that usually dooms claims under *Revlon*. As to the second showing, the negotiations lasted two months; and even once a merger agreement was entered into, MCA preserved its right to accept a higher offer should one be made before the merger was consummated. The length of the negotiations and the presence of the market check made it extremely unlikely that a court would find that the directors were "grossly negligent."

¹⁰ 116 S Ct at 876.

¹¹ See *Epstein v MCA, Inc.*, 50 F3d 644, 647 (9th Cir 1993).

¹² *Id.*

¹³ *Id.* at 653.

tender offer price.¹⁴ The transaction with Wasserman was designed to help him avoid the payment of capital gains tax on his shares. (Wasserman's basis in the MCA shares was 3 cents per share and his capital gains would have been about \$350 million.)¹⁵

On December 3, 1990, a second set of plaintiffs (the Epstein plaintiffs) filed suit in federal court in California against Matsushita and certain other defendants.¹⁶ The Epstein plaintiffs alleged violations of the Securities Exchange Act of 1934 -- over which the federal courts have exclusive jurisdiction -- and sought class certification. The thrust of the federal claims was that Matsushita had given Wasserman preferential treatment in its tender offer for MCA stock contrary to the SEC's "all-holder best-price" rule.¹⁷ If successful, these claims

¹⁴ Id.

¹⁵ Id at 647.

¹⁶ *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873, 885 (1996).

¹⁷ Id at 885-86. The Epstein plaintiffs also asserted that Matsushita gave preferential treatment to Sheinberg, MCA's chief operating officer. Sheinberg tendered his shares in the public tender offer, but also received \$21 million in cash. Plaintiffs claimed that cash payment was part of the consideration for his shares while defendants claimed it was given in exchange for unexercised MCA stock options. See *Epstein v MCA, Inc.*, 50 F3d 644, 657 (9th Cir 1993).

Rule 14d-10(a)(2) requires that "the consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any security holder during such tender offer"; Rule 14(d)-10(c) provides that the previous section does "not prohibit" the payment of more than one type of consideration "provided that security holders are afforded equal rights to elect . . ."

The main issues with respect to the federal claims were (i)

would expose Matsushita to potentially staggering liability in the several hundred million dollars range.¹⁸

Eight days after the federal claims were filed, on December 11, 1990, the parties in the Delaware action announced a settlement in principle which released all federal and state claims arising out of the tender offer, provided for a modification of a "poison pill" in the corporate charter of an MCA subsidiary to be spun off to MCA shareholders, and granted the state class counsel \$1 million in attorneys' fees.¹⁹ With the settlement terms negotiated, the state plaintiffs, on

whether there was a private right of action (with two circuits having found one to exist); (ii) whether the consideration paid to Wasserman was paid during the tender offer and whether \$21 million paid to Sheinberg was paid for the tendered shares; and (regarding Wasserman) (iii) whether that consideration was higher than the consideration paid to public shareholders or, in any case, whether the mere failure to permit the public shareholders to elect such consideration violated Rule 14d-10.

¹⁸ We are not aware of any reported decision on the proper measure of damages for violations of Rule 14d-10. One possible measure of damages would be the value of the preferential treatment to Wasserman who avoided payment of \$20 capital gains tax (at a 28% rate) per share of MCA stock. At \$20 a share, damages to MCA shareholders would amount to \$1.7 billion. Alternative, damages could be measured by the additional value MCA shareholders would have received had they been given the opportunity to receive preferred stock (and not pay capital gains tax) rather than cash (and pay capital gains tax). In this case, damages would be substantially lower than \$1.7 billion (since most MCA shareholders presumably had a higher basis in MCA shares than did Wasserman and would thus have benefitted less by avoiding capital gains tax). But even assuming that the average basis in MCA stock was \$34 (MCA's September share price before negotiations with Matsushita were announced) and average capital gains thus \$10 per share, damages would exceed \$700 million.

¹⁹ *Epstein v MCA, Inc.*, 50 F3d 644, 660 (9th Cir 1993).

December 14, 1990,²⁰ amended their complaint by alleging that the preferential treatment of Wasserman created a conflict of interest that had not been properly disclosed and adding Matsushita as a defendant for aiding and abetting the breach of fiduciary duty involved in the preferential treatment of Wasserman.²¹

On April 22, 1991, the Delaware Chancery Court rejected the settlement. Though he characterized the state-law claims as "at best extremely weak," he found that the federal claims had "substantial merit."²² The proposed settlement, however, offered only "illusory" value to class members and conveyed "no real monetary benefit," whereas the proposed attorneys' fees amounted to a "generous payment."²³ Despite these hints as to the Chancery Court's view of the state claims, defendants did not seek to have these claims dismissed. Nor was there any other litigation activity in the state court for the next eighteen months.²⁴

The federal district court, after rejecting the Epstein plaintiffs' motions for class certification and summary judgment,

²⁰ The chronology supports the contention of the federal plaintiffs that the second state complaint was written for settlement purposes. (See Resp Br at 4, 116 S Ct 873).

²¹ In re MCA, Inc. Shareholders Litig., 598 A2d 687, 690 (Del Ch 1991).

²² Id at 694, 696.

²³ Id at 695-96.

²⁴ Epstein v MCA, Inc., 50 F3d 644, 660 (9th Cir 1993).

granted summary judgment in favor of Matsushita and the other defendants on February 10, 1992.²⁵ The Epstein plaintiffs appealed to the Ninth Circuit.

In October, 1992, while the dismissal of the federal claims was on appeal, a second settlement agreement was submitted to the Delaware court. The settlement called for a \$2 million fund that would afford MCA's shareholders 2 to 3 cents per share in exchange for release of all federal and state claims and provided for an opt-out for class members who wanted to reject the settlement.²⁶ A fairness hearing was held in January 1993.²⁷ On February 16, 1993, the Chancery Court approved the settlement as being in the best interest of the class. Though the recovery provided to class members was "meager," the federal claims -- having been dismissed by the federal district court -- now had "minimal economic value" and the state claims remained "extremely weak."²⁸ Responding to several objectors to the settlement, the court ruled that there was "no evidence of any collusion" even though "suspicions abound."²⁹ (The Epstein plaintiffs did not object or opt out in the Delaware proceeding.) The court also

²⁵ *In re MCA, Inc. Shareholders Litig.*, 1993 WL 43024, *2 (Del Ch), reprinted in 18 Del J Corp L 1053, 1059, aff'd, 633 A2d 370 (Del 1993).

²⁶ *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873, 886 (1996).

²⁷ 598 A2d at 692.

²⁸ 1993 WL 43024 at *1, *4.

²⁹ *Id* at *5.

reduced counsel fees from the requested \$691,000 to \$250,000.³⁰ The Delaware Supreme Court affirmed the Chancery Court's ruling in September 1993.³¹

Following the Delaware settlement, proceedings in the dismissed federal securities case reached the Court of Appeals for the Ninth Circuit.³² There, in addition to pressing for an affirmance on the merits, Matsushita argued that the Delaware settlement barred litigation of claims by all shareholders who had failed to opt out of the Delaware class settlement.³³ The Court of Appeals first found that the Epstein plaintiffs had asserted valid Exchange Act claims and were entitled to summary judgment on the issue of liability.³⁴ It also instructed the district court to certify the case as a class action, finding

³⁰ Id at *5-6.

³¹ 633 A2d. 370.

³² The appeal was argued on August 2, 1993. It was reargued on October 12, 1993.

³³ *Epstein v MCA, Inc.*, 50 F3d 644, 659 (9th Cir 1993). Certain plaintiffs did opt out and their claims were obviously not barred by the Delaware release. See id at 659, n.22. Of course, it may not be worthwhile for these few individual plaintiffs to proceed with the federal litigation. See, e.g., *De Angelis v Salton/Maxim Housewares*, 641 A2d 834, 839-840 (Del Ch) (recognizing that the benefits of opt-out protection may be "uneconomically feasible"), rev'd on other grounds, *Prezant v De Angelis*, 636 A2d 915 (Del 1993).

³⁴ 50 F3d at 648. Summary judgment on liability was granted with respect to the claim that Wasserman's treatment violated Rule 14d-10 and the case was remanded for the determination of damages. As to the treatment of Sheinberg, the Court of Appeals remanded to the district court for determination of the purpose of the \$21 million fee.

that the suit fits the requirements of Rule 23 "like a glove."³⁵ On the preclusion point, the court held that a state settlement could release exclusive federal claims only if the claims rested on an "identical factual predicate," where issue preclusion could operate as a bar if the state case were litigated.³⁶ In the case at bar, the state and federal claims turned on different facts (though they arose from the same transaction). The court therefore ruled that the Delaware settlement did not bar the federal claims.³⁷

The Supreme Court reversed the Ninth Circuit on the preclusive effect of a state court settlement and continued a trend of having state law dictate federal preclusion doctrine.³⁸

³⁵ Id at 668. The Court also described the performance of the Epstein plaintiffs and their counsel in pursuing this litigation as "exemplary." Id at 669.

³⁶ Id at 664-665.

³⁷ Id at 665-666. State court global settlements encompassing exclusive federal claims can arise in two circumstances. One, the same alleged wrongdoing by the defendant is the basis of the state and the federal claim. For example, a materially false statement in a proxy statement would give rise to an exclusive federal claim (for violation of Rule 14d-9) and to a state law claim (for breach of the duty of candor). In such cases, the Ninth Circuit test would presumably permit a state court to release exclusive federal claims in a global settlement. Second, different alleged wrongdoings are the bases of the state and the federal claims (as in *Matsushita*, where the federal claim was based on an alleged violation of the "all-holder best-price" rule and the initial state claim was based on a breach of fiduciary duties based on different activities). In such cases, the Ninth Circuit test would ordinarily not permit a state court to release exclusive federal claims in a global settlement.

³⁸ The trend can be seen in *Allen v McCurry*, 440 US 90 (1980); *Kremer v Chemical Constr. Corp.*, 456 US 461 (1982); *Migra v Warren City School District Board of Education*, 465 US 75 (1984); *Marrese v American Academy of Orthopaedic Surgeons*, 470

Relying on the Court's earlier decision in *Marrese v American Academy of Orthopaedic Surgeons*,³⁹ Justice Thomas, in an opinion unanimous on this point, wrote that the Full Faith and Credit statute (28 USC §1738) applied to class actions (just as to individual actions) and to settlements (just as to litigated actions). As the product of a "judicial proceeding" within the meaning of 28 USC §1738, a state class action settlement is entitled to the same effect that it would have under the law of that state.

What effect that might be is not always clear. As the Supreme Court itself pointed out in *Marrese*, "a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court."⁴⁰ The

US 373 (1985). These cases interpret 28 U.S.C. §1738 (implementing the Full Faith and Credit Clause of the Constitution) as requiring a federal court adjudicating a matter of federal substantive law to apply the preclusion law of the state whose judgment is claimed to have preclusive effect. That approach has been criticized by Professor Stephen Burbank, who argues that federal preclusion law is the more appropriate source for determining whether federal claims can be brought. See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L Rev 733, 797-816 (1986).

³⁹ 470 US 373 (1985).

⁴⁰ 470 US at 381-82. On remand, the district court in *Marrese* characterized its task of ascertaining state law on the question as "nearly metaphysical" and an "exercise in extrapolation." 628 F Supp 918, 919 (ND Ill 1986). Professor Burbank is particularly critical of the Supreme Court's approach to §1738 in the context of exclusive federal claims. See Stephen B. Burbank, *Interjurisdictional Preclusion: Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L Rev 733, 822-29 (1986).

Delaware Supreme Court, however, had previously indicated that state courts had power to approve a global settlement that encompassed exclusive federal claims⁴¹ (although the Delaware courts have never focused on the problems of state settlements that release exclusive federal claims pending as a federal class action).⁴²

⁴¹ See, e.g., *Nottingham Partners v Dana*, 564 A2d 1089 (Del 1989) (asserting that a state has power through a non-opt-out class action settlement to release individual shareholder's claim within federal court's exclusive jurisdiction).

In explaining the scope of its settlement power, the Delaware Supreme Court in *Nottingham* opined that a state settlement could release exclusively federal claims so long as the state and federal actions "arose under the same set of operative facts." *Id.* at 1107. The Delaware Supreme Court relied on *TBK Partners, Ltd. v Western Union Corp.*, 675 F2d 456, 461-62 (2d Cir 1982), an early case which upheld the power of a federal court to settle a class action releasing state appraisal claims (previously dismissed without prejudice in New York state court) where the released claims were said to be based on the "identical factual predicate as that underlying the claims in the settled class action."

Extending this holding to reach exclusive federal claims in *Nottingham*, the Delaware Supreme Court observed that it was simply ratifying a practice already adopted by the Delaware Chancery Courts, citing to *Shingala v Becor Western, Inc.*, 1988 WL 7390 (Del Ch), reprinted in 13 Del J Corp L 1232 (Delaware class action settlement releasing later-filed federal action alleging state and exclusive federal claims); and *Tabas v Crosby*, 1982 WL 17835 (Del Ch), *aff'd sub nom. Geller v Tabas*, 462 A2d 1078 (Del 1983) (Delaware court approving settlement in derivative and class action that contained general release despite pending derivative action in state court and unspecified claim in federal court and permitting individual plaintiffs in the other actions to opt out).

⁴² The problem of releasing federal class action claims is that even when an opt-out right is afforded in the state action, it is unlikely to produce a viable federal class. Thus the federal class action is, as a practical matter, destroyed. When the released federal claim is an individual one, an opt-out right in the state action protects the ability of the opt-out plaintiff to pursue the claim. Delaware courts, however, have also approved settlements releasing exclusive federal claims for monetary damages without affording opt-out rights, thus

Having determined that 28 USC §1738 controlled under the Marrese analysis, the Court turned to the question of whether the exclusive jurisdiction provisions of the Securities Exchange Act operated as a repeal of the full faith and credit requirement. In accordance with prior decisions,⁴³ the Court found no Congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of 28 USC §1738. The Court drew a distinction between the jurisdictional provisions of the Exchange Act, which provide for exclusive jurisdiction to "enforce" rights or obligations under the action and approval of a settlement which merely "released" those claims.⁴⁴

precluding individual claims. See, e.g., *Nottingham Partners v Trans-Lux Corp.*, 564 A2d 1089 (Del 1989) (non opt-out state settlement released individual securities claim action pending in federal court); for the application of this settlement as a bar to later asserted exclusive federal claims, see *Nottingham Partners v Trans-Lux Corp.*, 925 F2d 29 (1st Cir 1991); and *In re Vitalink Communications Corp. Shareholders Litig.*, 1991 WL 238816 (Del Ch), aff'd *Grimes v John P. McCarthy Profit Sharing Plan*, 610 A2d 725 (Del 1992) (approving non opt-out state settlement that released unasserted federal claims); for the application of this settlement as a bar to later asserted exclusive federal claims, see *Grimes v Vitalink Communication Corp.*, 17 F3d 1553 (3d Cir 1994)).

⁴³ The "implied repeal" argument has been made and rejected in numerous cases. See, e.g., *Allen v McCurry*, 440 US 90 (1980); *Migra v Warren City School District Board of Education*, 465 US 75 (1984).

⁴⁴ *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873, 881-82 (1996). The Court held: "While § 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction, i.e., suits arising under state law or under federal law for which there is concurrent jurisdiction. In this case, for example, the Delaware action was

Justice Ginsburg, joined by Justice Stevens, dissented on the issue of Delaware law, arguing that the content of Delaware preclusion law was for the Ninth Circuit on remand and not for the Supreme Court to decide.⁴⁵ The dissenters (joined on this

not 'brought to enforce' any rights or obligations under the Act. The Delaware court asserted judicial power over a complaint asserting purely state law causes of action . . ." Id at 881.

⁴⁵ Id at 887-88. As Justice Ginsburg points out, the majority may have overestimated the breadth of Delaware preclusion law. See id at 888, n.4 (observing that "the Court appears to have blended the 'identical factual predicate' test applied by the Delaware Supreme Court in *Nottingham Partners v Dana* with the broader 'same transaction' test advanced by *Matsushita*." (citation omitted)).

The *Nottingham* opinion is difficult to decipher on this point. Most of the textual references to the scope of preclusion accorded settlement releases refer to "identical operative factual predicate," "same factual predicate," or "same set of operative facts." See 564 A2d at 1105-1107. The Delaware Supreme Court, however, left open the door of doubts in two footnotes. In the first, the court, citing a case in support of approving general releases, noted that the released litigation was based on the "same transaction." Id at 1105, n.35. Later, the court supported its conclusion that the released claims "arose under the same set of operative facts" by citing to the settlement hearing transcript in which the counsel for the objectors admitted that the claims were based on the "same transaction." Id at 1107, n.37.

The court may have failed to fully understand the import of its language on this matter. See *infra* note __, for the differing results produced by the two formulations. Or the Delaware court may have consciously adopted the "identical factual predicate" language in the belief that the Second Circuit in *TBK Partners* had set forth a federal test for when federal claims that were part of a state court's general release would be precluded. See *supra* note 41. Interestingly, although the Supreme Court in *Matsushita* quotes language from the Delaware Chancery opinion approving the *MCA* settlement which refers to a release of claims "which arise out of the challenged transaction," it does not expressly delineate what limits there are on a state court release for preclusion to attach. Looking to state law under §1738, preclusion would not normally attach to a claim that did not, at minimum, meet a "transactional" nexus. As for Delaware law in particular on the scope of a release, confusion abounds in the rulings following *Nottingham*. See *In re Union Square Associates Securities Litig.*, 1993 WL 220528, *3-5

point by Justice Souter) also maintained that the Ninth Circuit remained free to consider the due process issue of whether the Delaware courts fully and fairly litigated the adequacy of class representation.⁴⁶

Both *Marrese* and *Matsushita* can be criticized for undermining the "exclusivity" policies of federal jurisdiction by allowing state law to determine the preclusive effect of state court litigation and settlement of claims within the federal courts' exclusive jurisdiction.⁴⁷ However, the impact of *Marrese* is mitigated by state preclusion law's recognition of a "prior jurisdictional competency" standard; under that standard, state preclusion law does not purport to bar a later-filed federal court claim over which the state court did not have

(Del Ch) (citing *Nottingham* and Second Circuit cases and then holding that "same factual predicate" test was met by factual finding that the "claim arises (at least partially) out of the same transaction").

⁴⁶ 116 S Ct at 888-890. Justice Thomas's majority opinion did not address the due process claim, observing in a footnote that "[w]e need not address the due process claim, however, because it is outside the scope of the question presented in this Court. While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below." 116 S Ct at 880, n.5 (citation omitted).

In the same footnote, Justice Thomas also made the following observation about the due process contention, possibly suggesting his predisposition on the issue: "Respondents make this claim in spite of the Chancery Court's express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class." *Id.*

⁴⁷ See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L Rev 733, 797-816 (1986).

jurisdiction.⁴⁸ In *Marrese*, the Supreme Court left open the possibility that a grant of exclusive jurisdiction to federal courts could justify an exception to §1738 if state preclusion law did not incorporate such a prior jurisdictional competency standard.⁴⁹ Since *Marrese*, this "prior competency" standard appears to operate in most courts as a limit on the preclusive effect of their judgements.

The "prior jurisdictional competency" standard in litigated cases serves to accommodate federal interests: because an exclusive federal claim could not be brought as part of a state proceeding, the interest in finality is outweighed by the federal interest in having such a claim proceed in federal court. Similar accommodation may occur in determining whether factual findings by state courts are entitled to preclusive effect in federal litigation of exclusive federal claims.⁵⁰ Section 86 of the Restatement of Judgments 2d indicates that determination of an issue by a state court will usually preclude relitigation of that issue in federal court, unless preclusion is "incompatible

⁴⁸ 470 US at 382, citing Restatement (Second) of Judgments § 26(1)(c) (1982).

⁴⁹ "Only if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to § 1738 should apply." 470 US at 386. Compare *Kremer v Chemical Constr. Corp.*, 456 US 461 (1982) (finding no exception to §1738 in Title VII) with *Brown v Felsen*, 442 US 127 (1979) (making no reference to §1738 and finding congressional intent that state judgments should not have claim preclusive effect on dischargeability issue in bankruptcy.)

⁵⁰ See, e.g., *Becher v Contoure Laboratories, Inc.*, 279 US 388 (1929). See also Restatement 2d of Judgments §86.

with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question."⁵¹ The Restatement Comments suggest that relitigation may be appropriate where the determination of the federal issue depends on a legal frame of reference which involves federal law.⁵²

Imposition of a prior jurisdictional competency requirement in the settlement context of *Matsushita* would, of course, negate the ability to engage in any global settlement in state court.⁵³ This raises the issue of how to balance state and federal

⁵¹ See Restatement of the Law, Judgments 2d §86(2). This distinction is made more concrete by illustrations in the Restatement Comments: A finding in a state contract action, *P. v D*, that D's agent made certain statements would bind D in a subsequent federal antitrust action between the parties. But a determination in D's favor that the contract was not part of a scheme to violate the federal antitrust laws might not be given preclusive effect.

(The issue arises because state courts, although without jurisdiction over antitrust claims, do have jurisdiction to hear a defense based on the antitrust laws.)

⁵² Likewise, arbitration of exclusive federal claims has also been upheld by the Supreme Court. See, e.g., *Shearson v McMahon*, 482 US 220 (1987) (permitting arbitration of Securities Exchange Act claims); *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985) (permitting arbitration of exclusive federal antitrust claims in Japan under Swiss law). Arbitration awards which turn out to violate public policy, however, may not be enforced. See *Mitsubishi Motors Corp.*, 473 US 614.

⁵³ Indeed, the Epstein plaintiffs had conceded as much in their brief before the Supreme Court when they agreed that, outside the class action context, jurisdictional allocations would not impede a state court settlement that released both state and federal claims. They argued, however, that the jurisdictional limitations should play a more significant role with respect to settlements in the class context. Brief for Petitioner at 67-71, *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873 (1996).

interests in the global settlement context. By permitting state courts to approve global settlements, the Supreme Court in *Matsushita* decided, in our view correctly, to enable states to settle exclusive federal claims. Missing at this stage, however, is a mechanism for accommodating the federal interests connected to the Congressional grant of exclusive jurisdiction to federal courts⁵⁴ and, perhaps more significantly, Congress' recent judgment -- in the Private Securities Litigation Reform Act -- that the class member with the largest financial stake should be presumptively entitled to act as class representatives and to appoint class counsel in federal securities actions.⁵⁵

Two possibilities exist. State courts themselves can supply this missing element by taking account of federal interests in their own settlement techniques and procedures. Alternatively, an independent federal check may operate by way of a federal collateral attack, as suggested in the opinion of Justice Ginsburg. Whether, on the facts of *Matsushita*, the Delaware court made a sufficient inquiry into the adequacy of

⁵⁴ In light of the grant of concurrent jurisdiction to federal and state court over claims under the 1933 Securities Act, one may wonder about the rationale for exclusive jurisdiction by federal courts over claims under the 1934 Securities Exchange Act. See *Murphy v Gallagher*, 761 F2d 878 (2d Cir 1985). Of course, if exclusive jurisdiction under the Securities Exchange Act does not make sense here, it is for Congress to change it.

⁵⁵ The provisions dealing with the appointment of class counsel are found at Pub L No 104-67 at sec 101(a) (appending §27(a)(3) to Title I of the Securities Act of 1933 (15 USC 77a et seq.)) and sec 101(b) (adding §21D(a)(3) to the Securities Exchange Act of 1934 (15 USC 78a et seq.)). For a discussion of these provisions, see text accompanying notes 77 to 80.

representation, and whether an affirmative finding by the state court is binding on the federal court,⁵⁶ are issues now before the Ninth Circuit on remand.

The remainder of the paper explores these two options in greater detail. Part II presents an analysis of the problems and benefits of state court global settlements encompassing exclusive federal claims. Part III offers a prescription for how state courts can balance these deficiencies and benefits in determining the scope of their settlements. Part IV examines, in general and specifically with respect to the *Matsushita* remand, when collateral attack on state court settlements should be permitted. Part V discusses the implications of our proposal for other types of class action settlements.

⁵⁶ In *Nottingham Partners v Trans-Lux Corp.*, 925 F2d 29 (1st Cir 1991), the First Circuit Court of Appeals held that a release contained in settlement as part of a non-opt-out Delaware class and derivative action precluded a previously-filed individual action by shareholders for equitable relief and money damages under the Securities Exchange Act where the claims were "rooted in the same transaction." The precluded parties' attempt to have the federal court review the propriety of the class certification and their inability to opt out was rejected: "If having objected and been overruled, appellants were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief." 925 F2d at 29.

Unlike in *Nottingham Partners*, the federal plaintiffs in *Matsushita* did not formally raise objections in the Delaware state action. But in *Grimes v Vitalink Corp.*, 17 F3d 1553 (3d Cir 1994), the Third Circuit Court of Appeals precluded plaintiffs exclusive federal claims on the basis of a state class global settlement where at least one of the federal plaintiffs had not participated in the state action and where no opt-out rights were provided.

II. AN ANALYSIS OF STATE COURT GLOBAL SETTLEMENTS

ENCOMPASSING EXCLUSIVE FEDERAL CLAIMS

Now that *Matsushita* requires, as a matter of full faith and credit, that preclusive effect be given to state court settlements that release exclusive federal claims and gives to states broad latitude in defining the scope of such settlements, state courts need to take special care in structuring standards and procedures for achieving global settlements. Special precautions are necessary because state court class action settlements of exclusive federal claims raise issues of fairness and process that go beyond the concerns present in ordinary class action settlements. Safeguards are also necessary to take account of the federal interests in the proper handling of federal claims subject to the exclusive jurisdiction of federal courts. We first briefly review the process concerns with respect to ordinary class action settlements. We then address state court settlements encompassing exclusive federal claims.

A. Class Action Settlements in General

Even ordinary class action settlements can be disconcerting from a process perspective.⁵⁷ The rights of absent members of

⁵⁷ The benefits of the class action have been extolled elsewhere. See, e.g., Kenneth Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 45 J Legal Stud 47 (1975); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U Chi L Rev 684 (1941). In short, by consolidating the claims of similarly situated parties in one proceeding, they can result in reduced litigation expenditures and help avoid inconsistent verdicts. The concerns resulting from the fact that class attorneys, rather

the class may be compromised without their consent by agents whom they have not selected. The class action attorney -- not the class members whose rights are at stake -- makes all important decisions: whether to file a claim, how much time and effort to invest in pursuing it, what litigation strategy to employ, and finally whether and on what terms to settle.⁵⁸ This discrepancy in power and information creates the danger that unscrupulous class counsel will settle a class claim for a generous attorney fee, but a paltry recovery to class members.⁵⁹

than the class members, control the litigation are alleviated through a variety of mechanisms: controlling the types of cases that may be brought as class actions, ensuring adequate representation, and providing class members with rights to receive notice and, in claims for monetary damages, to opt-out of the class. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 Harv L Rev 664 (1979). Nonetheless, criticisms of class actions have been legion. See, e.g., Samuel Estreicher, *Federal Class Actions after 30 Years*, 71 NYU L Rev 1, 3 (1996) (summarizing contemporary criticisms of class actions); see generally Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §5. (3d ed 1992) (describing benefits and drawbacks of class actions).

⁵⁸ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum L Rev 669 (1986); 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 (1991). For a discussion of ethical problems facing class action attorneys, see Nancy Morawetz, *Bargaining, Class Representation and Fairness*, 54 Ohio St J J 1 (1993).

⁵⁹ See *Mars Steel v Continental Illinois Natl Bank & Trust*, 834 F2d 677, 681-82 (7th Cir 1987, Posner, J) ("Ordinarily the named plaintiffs are nominees, indeed pawns, of the lawyer, and ordinarily the unnamed class members have individually too little stake to spend time monitoring the lawyer--and their only coordination is through him. The danger of collusive settlements . . . make it imperative that the district judge conduct a careful inquiry into the fairness of a settlement to the class

These process deficiencies require an enhanced role for the court in ensuring that the class representatives, and the class attorney, adequately represent the class, and that any settlement is "fair" to all class members. Specifically, class action settlements trigger special procedural safeguards not present in ordinary litigation. The court must approve all settlements of class actions,⁶⁰ and a practice has evolved of holding "fairness hearings" on the propriety of proposed settlements. In these hearings, courts make an independent evaluation of the fairness of the settlement to class members, including an assessment of the relationship between the recovery obtained by class plaintiffs and the fees for the class attorney. Class actions certified for litigation and followed by a settlement will necessarily have been found to meet the numerosity, commonality

members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of class members who do not opt out of the settlement."). See also John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 Law & Contem Probs 5 (Summer 1985).

⁶⁰ See, e.g., FRCP 23(e); *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361, *12 (ND Cal) ("courts have developed monitoring techniques designed to make themselves 'surrogate clients'"). Surprising as it seems, Federal Rule 23 (and state class actions analogues) provide no standards to govern judicial approval of class action settlements. See William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L Rev 837, 841-42 (1995). For example, Rule 23(e) provides "[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." Rule 23(d) authorizes the court to "make appropriate orders" in the conduct of class action. State and federal courts have developed a variety of procedures in supervising class action settlements. See *Manual for Complex Litigation, Third* §30.4 (1995).

typicality and adequacy requirements imposed by class action rules.⁶¹ In "settlement class actions," however, the settlement is tentatively approved at the same time the class is conditionally certified for settlement purposes.⁶² Because inadequate prosecution, attorney inexperience, and collusion are "paramount concerns" in pre-certification settlements,⁶³ the need for a judicial determination of adequacy of representation

⁶¹ See FRCP 23. Many states, including Delaware, have adopted class action rules based on FRCP 23. See Note, *Due Process and Equitable Relief in State Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 68 Tex L Rev 415, 425 n.84 (1989) ("Thirty-eight states have adopted a class action rule modeled on amended federal rule 23"); Del Ch Ct R 23.

⁶² See *Manual for Complex Litigation, Third* §30.212, §30.45 (1995). For a discussion of "settlement classes" of this type, see *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig.*, 55 F3d 768 (3d Cir 1995), cert. denied sub nom *General Motors v French*, 116 S Ct 88 (1995); *Mars Steel v Continental Illinois National Bank & Trust*, 834 F2d 677, 681-82 (7th Cir 1987).

The Federal Judicial Center's study of class action litigation (based on activity in four federal judicial districts between July 1, 1992 and June 30, 1994) showed that in several districts, at least a quarter of the certified class actions settled within two months after certification; a large number of those actions were settlement classes which were certified simultaneously with the preliminary approval of a proposed settlement. See Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges* [hereinafter *FJC Study*], 71 NYU L Rev 74, 146 (1996).

⁶³ See 55 F3d at 795. See also *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361 (ND Cal) (Walker, J). The *Manual for Complex Litigation, Third* §30.45 (1995) recognizes a role for settlement classes, but expressly notes some of their troubling aspects, including conflicts between class counsel and class members and the release of other claims.

finding in this context is "particularly acute."⁶⁴ Finally, class action settlement practice provides class members with notice of the settlement terms, a right to object to the settlement, and in most actions involving money damages, the right to opt out of the class.⁶⁵ With these safeguards properly employed, class action settlements are, for certain types of cases, a tolerably fair and efficient way to resolve claims.

To be sure, even in ordinary class action settlements, these protections are far from foolproof. In many instances, substantial conflicts of interests between class counsel and class members remain,⁶⁶ opt-out rights may not afford effective

⁶⁴ See 55 F3d at 795. Some courts have made formal findings of adequacy of representation, recognizing the Rule 23(a) and (b) requirements as the source of legitimacy for settlement classes, while other courts appear to collapse the "adequacy of representation" finding into one which evaluates the fairness of the settlement. *Id.* Judge Becker criticized the latter approach as inadequate to assure that the named plaintiffs and their counsel are suitable representatives of the absentees' claims. *Id.* at 795-96.

In *Prezant v De Angelis*, 636 A2d 915 (1994), the Delaware Supreme Court held that mere evaluation of the settlement merits is insufficient and that state trial courts are "required to make an explicit determination on the record of the propriety of the class action according to the requisites of Rule 23(a) and (b)." *Id.* at 925 (Del Ch Ct R 23 is modeled on FRCP 23).

⁶⁵ See *Manual for Complex Litigation, Third* §§30.212, 30.4 (1995). In settlement class actions where certification is conditioned on settlement, certification and settlement notices are often combined. *Id.*

⁶⁶ See *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361, *11-12 ("This danger of class counsel self-dealing . . . is present in every situation where class counsel is allowed to prosecute an action and negotiate settlement terms without meaningful oversight by the class representative."); *Mars Steel*, 834 F2d at 681 ("the negotiator on the plaintiffs' side, that is the lawyer for the class, is potentially an unreliable agent of the principles").

protection to class members, and a court's evaluation of the substantive fairness of the settlement may be insufficiently informed and excessively deferential.⁶⁷ To address these concerns, both courts and commentators have advocated reform of the class action mechanism in general⁶⁸ and of settlement class actions in particular.⁶⁹ But, however effective the procedures

⁶⁷ Curiously, while judges appear to have played an active role in assessing the fairness of settlements in mass tort cases, judicial investigation in securities cases seems substantially more passive. For a counter-example in the securities field, see *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361 (refusing to approve proposed settlement of securities class action because it was negotiated under "quasi-collusive circumstances" and because putative class representatives in failing to monitor adequately class counsel were unable "fairly and adequately" to represent the interests of the class).

⁶⁸ An overwhelming literature on class actions exists. Two recent symposiums canvassed a myriad of issues, including the scope of the rules, notice and opt-out provisions, attorney-class conflicts, fees, and parallel actions. See *Symposium, The Institute of Judicial Administration Research Conference on Class Actions*, 71 NYU L Rev 1 (1996); *Symposium, Mass Torts: Serving Up Just Deserts*, 80 Cornell L Rev 811 (1995). See also Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 Rev Litig 79 (1994); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U Chi L Rev 877 (1987); 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 (1991); Elliot 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 (1995).

⁶⁹ See Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L Rev 811 (1995); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L Rev 837 (1995); *In re Wells Fargo Securities Litig.*, 156 FRD 223 (ND Cal 1994) (describing court use of competitive bid to select class counsel); *In re California Micro Devices Securities Litig.*, 1996 US DIST LEXIS 1361 (criticizing settlement class action in securities case).

For a view that present Rule 23, properly construed, does

for settlement class actions are as a general matter (and however effective they may become if some of the proposed reforms are adopted), they work less well when a state court settlement also purports to release exclusive federal claims. In Section B, we discuss why and how the class action settlement process is impaired in these situations. In Section C, we examine the benefits of state court settlements of exclusive federal claims.

B. Problems in State Court Global Settlements

1. Reduced State Class Attorney Bargaining Power

By definition, state court settlements of exclusive federal claims involve claims that could not have been tried in the state court had they not been settled. Thus, the options of the state class attorney with respect to these claims are fundamentally different from the options with respect to state or non-exclusive federal claims. The latter claims can be either settled or tried in the state court. Exclusive federal claims can only be settled in state court (though the state class attorney could try to assert them in a parallel federal class action).

The fact that the state class attorney may lack the power to litigate the exclusive federal claims can substantially reduce her bargaining power relative to a state class attorney with the

not authorize settlement classes, see Note, *Back to the Drawing Board: The Settlement Class Action and Limits of Rule 23*, 109 Harv L Rev 828 (1996).

power to litigate state and federal claims in state court.⁷⁰ To see why, assume for the moment that the state class attorney could not assert the federal claims in a federal class action (e.g., because a different attorney has already been appointed class counsel). Thus, for the state class attorney, the only option is to settle the federal claims in state court.

The outcome of a negotiation, such as a settlement negotiation, is circumscribed by each party's best alternative to a negotiated agreement. The alternative to a negotiated settlement is to continue litigation. A party will only agree to a settlement if settlement is preferable to (or, at a minimum, as good as) continuing litigation. We will refer to the settlement terms that are just as good as continuing litigation as the "minimum acceptable settlement terms." (Of course, a party may engage in strategic bargaining and refuse to accept a settlement offer above the minimum acceptable terms in order to obtain even better terms.) In the context of a class action, the relevant parties are generally the class attorney and the defendant.⁷¹

Compare now the state class attorney's alternatives to litigation in two instances: where the class attorney maintains

⁷⁰ See *Prezant v De Angelis*, 636 A2d 915, 919 (Del 1994) (overturning state class settlement releasing state and federal claims for failure of Chancery Court to make explicit findings on adequacy of representation and noting state counsels' "weaker bargaining position")

⁷¹ For a more in-depth analysis of bargaining, see, e.g., Howard Raiffa, *The Art and Science of Negotiation* (Harvard University Press, 1982) and Eric Rasmusen, *Games and Information* (Basil Blackwell, 1989).

two claims (A and B), both of which can be litigated in state court; and where she maintains one claim (A) which can be litigated in state court and another claim (B) which is within the exclusive jurisdiction of the federal courts. In the first case, the class attorney's alternative to settlement is to litigate both claims in state court and to obtain potential attorneys' fees related to any ultimate recovery on claims A and B (and incur litigation costs). In the second case, the alternative to settlement is to litigate claim A in state court and to obtain potential attorneys' fees related to any ultimate recovery on claim A alone.⁷² If the expected recovery on claims A and B exceeds the expected recovery on claim A alone -- either because asserting claim B increases plaintiffs' likelihood of winning or because it increases the amount of recoverable damages -- the alternative to settlement is worse when class attorney cannot litigate claim B in state court than if she can. The inability to litigate claim B therefore lowers the minimum acceptable settlement terms and thereby weakens the state class attorney's bargaining power. Other things being equal, therefore, a class attorney is likely to settle for a lower

⁷² From the perspective of the defendant, the alternative to settlement is approximately equal in both cases. In the first case, failure to settle involves the risk of liability on claims A and B (and litigation costs); in the second case, if a different attorney has brought claim B in federal court, failure to settle claim A involves the risk of liability on claims A and B (and litigation costs). If claims A and B are pursued in two separate proceedings (e.g., claim A in a state court proceeding and claim B in a federal court proceeding) rather than in a single proceeding, litigation costs may increase.

amount if she can litigate only claim A in state court than she would if she could litigate both claims in state court.

The degree to which the inability to litigate the federal claims lowers the minimum acceptable settlement terms depends on two factors. One factor, of course, is the litigation value -- the "merits" -- of the federal claim.⁷³ Weak federal claims will reduce the minimum acceptable settlement terms less than strong federal claims. The second factor is the extent to which the addition of the federal claim increases defendant's exposure

⁷³ Some commentators have claimed that certain types of federal securities claims tend to have little merit. See, e.g., James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Litigation*, 144 U Pa L Rev 903 (1996) (finding that most suits relating to IPOs are frivolous). For other empirical studies on the significance of merits in securities litigation, see, e.g., Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J L Econ & Organization 55 (1991) (finding that shareholder class action suits are less likely to be frivolous than derivative suits); Jennifer Francis, Donna Philbrick & Katherine Schipper, *Determinants and Outcome in Class Action Securities Litigation* (Aug 1994); Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja & Denise N. Martin, *Revent Trends III: What Explains Settlements in Shareholder Class Actions?* (National Economic Research Associates 1995) (concluding that some so-called nuisance suits may be efficient low-value settlements of meritorious cases with high trial costs); Willard T. Carleton, Michael S. Weisbach & Elliott J. Weiss, *Securities Class Action Lawsuits: A Descriptive Study*, forthcoming *Arizona Law Review* (finding that data on low-value settlements is consistent with the presence of nuisance suits settled on the basis of plaintiff's attorney's expenses rather than on the economic damages suffered by plaintiffs). In our view, the empirical evidence on the merits of securities fraud suits is inconclusive. At least some suits are meritorious in that plaintiffs sometimes prevail on the merits after litigation. To the extent that securities litigation is burdensome, inefficient and unjustified, more dramatic reforms of securities litigation in general are in order. See, e.g., Victor P. Goldberg, *Securities Litigation Reform: A Fish Story* (Working Paper 1995); Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L J 945 (1993).

beyond the level of exposure on the state claim alone. Defendant's exposure can increase either because it is possible for the plaintiff to prevail on the federal claim without prevailing on the state claim (e.g. because the two claims are different in nature, as in *Matsushita*, or because the federal claim is easier to prove) or because the plaintiff can recover higher damages (or obtain additional remedies) if she prevails on both claims than if she prevails on the state claim alone. If the federal claim neither increases plaintiff's likelihood of winning nor her damages if she wins, the ultimate recovery on both claims would not exceed the ultimate recovery on one claim - and the attorney's bargaining power would not be impaired by the inability to assert one of the claims.

Let us now revisit the assumption that the state class attorney could not be appointed class counsel in federal court. If the reverse is true, and the class attorney is sure to be appointed class counsel in a federal class action, the alternative to a settlement would be to litigate both claims -- either in federal court (an alternative approximately equivalent to litigating both claims in state court)⁷⁴ or, more rarely, in two separate proceedings. In that case, the inability to litigate claim B in state court would not weaken her bargaining power.

⁷⁴ If the state and the federal claims grow out the same sets of facts, both claims could be litigated in federal court as a matter of supplemental jurisdiction. See 28 USC §1367. Indeed, failure to assert such a state claim with the federal claim might result in preclusion of the state claim.

In a number of circumstances, however, the state class attorney may not be confident that she will be appointed class counsel in federal court.⁷⁵ This may be particularly likely for cases filed after the passage of the Private Securities Litigation Reform Act which, in relevant parts, applies to securities class actions brought in federal court, but not to class actions in state court.⁷⁶ The Act provides that the court appoint as lead plaintiff, from all the those seeking to become lead plaintiff, the class member with the largest financial interest in the claims⁷⁷ and empowers the lead plaintiff to

⁷⁵ These possibilities should be assessed in light of the choice by the class attorney to bring a case in state court rather in federal court. While there are clearly innocent reasons to explain this choice of forum, the choice may also be explained by the class attorney's belief that she would not be appointed class counsel in federal court.

⁷⁶ The provisions on the appointment of lead plaintiff apply only to private actions that are "brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." Pub L No 104-67, 109 Stat 737, secs 101(a) §27(a), 101(b) §21D(a) (to be codified at scattered sections of 15 USC).

⁷⁷ The Act provides that the plaintiff who files the first complaint must publish notices of the action in widely-circulated business papers or wire services inviting other class members to move the court to serve as lead plaintiffs. The court is then to select the lead plaintiff from among those that have filed a complaint or made a motion in response to the notice. The court must appoint the plaintiff with the largest financial interest as lead plaintiff unless that plaintiff does not meet the requirements of Rule 23, will not fairly and adequately represent the class, or is subject to certain unique defenses. Moreover, the Act restricts the number of times any person may serve as a lead plaintiff during any 3-year period. *Id* at sec 101(a) §27(a) (3); *id* at sec 101(b) §21D(a) (3).

select class counsel.⁷⁸ The process of selecting the lead plaintiff is meant to proceed expeditiously and be completed no later than 110 days after the complaint is filed.⁷⁹ Given this selection mechanism, a state class attorney will frequently know, or be able to predict, whether she is likely to be selected as class counsel.

2. Defendant's Increased Ability to Engage in Plaintiff Shopping

Permitting state court settlements of exclusive federal claims also increases the defendant's ability to engage in "plaintiff shopping." Plaintiff shopping refers to the capacity of the defendant to choose the "class attorney" who negotiates settlement terms from among several attorneys who have filed related class actions. "Plaintiff shopping" obviously occurs when the defendant induces a particular attorney to file a class action, possibly after having already negotiated a settlement with that attorney. More importantly for our purposes, however, plaintiff shopping can also occur when two or more parallel

⁷⁸ The provisions on the appointment of lead plaintiff are likely to result in closer monitoring of the settlement by the class plaintiff. If the class member appointed as lead plaintiff has a sufficiently large financial claim, she may monitor the class attorney directly and refuse to accept a settlement that is below the litigation value of the claim. For that reason, as well, it is likely that the federal class attorney will be a more faithful advocate of the class members with respect to the exclusive federal claims than the state class attorney would be.

⁷⁹ Under the act, the plaintiff who files the action has 20 days to publish notice. *Id.* at sec 101(a) §27(a)(3)(A)(i); *id.* at sec 101(b) §21D(a)(3)(A)(i). No later than 90 days after publication of notice, the court must appoint the class representative(s). *Id.* at sec 101(a) §27(a)(3)(B)(i); *id.* at sec 101(b) §21D(a)(3)(B)(i).

lawsuits covering the same or related claims proceed. Since the lawsuit that is resolved first (by judgment or settlement) may be preclusive of the other suits, the defendant can effectively choose one negotiating partner from among those attorneys who have filed lawsuits by arriving at a quick settlement with that attorney and delaying the proceedings in all other suits.⁸⁰

Plaintiff shopping results in two problems. First, to the extent that plaintiffs' attorneys differ in their assessment of the litigation value of the claims, the defendant will choose the plaintiffs' attorney who has the lowest assessment and is consequently willing to accept the lowest settlement terms. Second, the knowledge by plaintiffs' attorneys that the defendant can engage in plaintiff shopping creates a strong incentive to accept settlement terms favorable to the defendant, even if they are below one's estimate of the litigation value of the claims, in order to maximize the likelihood of being chosen a negotiating partner and of earning attorneys' fees.⁸¹ For these reasons, the class attorney chosen by the defendant is likely not to be the one that would best represent the interests of the class members.

In class actions filed in federal court, there are limits on

⁸⁰ See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343, 1369-72 (describing the "reverse auction" phenomenon in state/federal securities litigation).

⁸¹ Indeed, *Matsushita* may entice state class attorneys to bring a non-meritorious state claim for the principal purpose of settling a pending federal claim -- and earning attorneys fee in the wake of that settlement.

a defendant's ability to engage in plaintiff shopping. If two or more class actions covering similar claims are filed in federal courts, most courts usually employ one of several mechanisms to consolidate the actions in the most appropriate forum: the general federal transfer statute may be used to transfer a case to a different forum;⁸² the case may be referred to the panel on multidistrict litigation which may transfer the case to a single district for coordinated or consolidated proceedings;⁸³ or other devices, such as a stay of the later-filed action or informal cooperation, may be adopted. Only rarely will two class actions covering essentially the same case proceed in parallel fashion in federal courts.⁸⁴

⁸² See 28 USC §1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district of division where it might have been brought").

⁸³ 28 USC §1407(a). The language of the statute refers to transfers "for coordinated or consolidated pretrial proceedings," but the case often is never remanded for trial. See *Manual for Complex Litigation*, Third §31.133 (1995) (suggesting that cases transferred under §1407 may be eligible for consolidation in transferee court under §1404 or §1406); Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §9.14 (3d ed 1992) ("the majority of cases transferred under §1407 reach final disposition in the transferee courts"); Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U Pa L Rev 711, 712 (1991) ("through manipulation of other venue statutes, the courts receiving the cases consolidated by the Panel often decide on their own to retain the cases for trial"). See also *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F2d 180, 196 n.31 (8th Cir 1976) (noting that the decision to remand is within the control of the panel and can only be reviewed by extraordinary writ).

⁸⁴ See Geoffrey P. Miller, *Overlapping Class Actions*, 71 NYU L Rev 514, 519-20 (1996) ("the problems of conflict and overlap have been handled quite effectively"); *FJC Study*, supra note 62, at 87 ("[W]e looked at how often courts do not consolidate [class

The newly-adopted Private Securities Litigation Reform Act further diminishes the ability to engage in plaintiff shopping within the federal system. Under the mechanism for the selection of the lead plaintiff established by the Act, the party with the largest financial interest is ordinarily entitled to become the lead plaintiff and selects the class attorney.⁸⁵ Thus, the ability of a defendant to influence the choice of the class attorney is practically eliminated.⁸⁶

The ability of state courts to settle exclusive federal claims short-circuits these constraints on plaintiff shopping. State courts are not subject to the supervisory powers of the Panel on Multidistrict Litigation and have not, to the same extent as federal courts, engaged in self-restraint in dealing with claims that have already been asserted in a different forum court.⁸⁷ Cooperative efforts between state and federal courts

action] cases even though they are related to other litigation On the federal level, nonconsolidation of related cases occurred in 5% to 21% of the cases in the four districts.").

⁸⁵ See text accompanying notes 77 to 80.

⁸⁶ Indeed, the defendant may even lack standing to challenge whether a plaintiff satisfies certain of the criteria for being appointed lead plaintiff. See *Greebel v FTP Software, Inc.*, 1996 US Dist LEXIS 13510, *9-11 (D Mass) (holding that defendant lacks standing to challenge presumption in favor of appointment of plaintiff with largest financial stake as lead plaintiff and has no right to pursue discovery on this issue).

⁸⁷ See, e.g., *In re Union Square Assoc. Securities Litig.*, 1990 WL 212308 (Del Ch) (approving settlement and release of claims and noting that the release will be used to seek dismissal of two later-filed federal actions that asserted exclusive federal claims); *Shingala v Becor Western Inc.*, 1988 WL 7390 (Del Ch) (approving settlement releasing claims asserted in later filed federal class action), reprinted in 13 Del J Corp L 1232.

occasionally occur, but they rest on the ad hoc efforts of particular judges.⁸⁸ Finally, the provisions of the Private Securities Litigation Reform Act do not apply to class actions filed in state court.⁸⁹

Thus, a state court could certify a party as class representative, and her counsel as class counsel, even if they could not represent the class on the federal securities claims in

But see *Prezant v De Angelis*, 636 A2d 915, 919 (Del 1994) (noting the Delaware court will usually stay after-filed suits when previously-filed suits stating similar claims are pending in another court, particularly federal claims pending in federal court). Delaware Chancery Courts, however, are divided over whether its stay policy prevents the state case from settling. Compare *Stepak v Tracinda Corp.*, 1989 Del Ch LEXIS 95 (staying state action and indicating that it will not hold future settlement hearings in deference to parallel state action) with *De Angelis v Salton/Maxim Housewares, Inc.*, 641 A2d 834, 838 (Del Ch 1993) (noting that because the state action was filed after several federal class actions, the plaintiff in the Delaware action "could have only hoped to settle"), rev'd on other grounds sub nom. *Prezant v De Angelis*, 636 A2d 915 (Del 1994).

⁸⁸ See *Manual for Complex Litigation, Third* §§31.3, 33.23 (1995) (offering possible methods of coordination). See also Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W Va L Rev 171, 203-08 (1996) (citing examples of the "fruits of coordination" that are "beginning to be visible"); William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va L Rev 1689 (1992) (discussing the problems of multiforum litigation and explaining methods of informally coordinating related state and federal cases).

One example is the coordination and joint rulings in the "Brooklyn Navy Yard" asbestos cases between Judge Helen Freedman of New York State Supreme Court and Federal Judges Jack B. Weinstein and Charles P. Sifton of the Eastern District New York. The state and federal courts coordinated motion rulings and other pretrial matters and even contemplated a joint trial. See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 129 F.R.D. 434 (EDNY, SDNY & Sup Ct NY 1990); Schwarzer et al., 78 Va L Rev at 1704-05.

⁸⁹ See supra note 77.

a federal court. Under *Matsushita*, the class representative in the state action could then settle any federal securities claim - - even if, under a deliberate scheme adopted by Congress, a different party has been appointed as class representative in federal court.⁹⁰ A defendant thus regains the ability to engage in plaintiff shopping: the defendant can choose a negotiating partner from among the class counsel appointed in federal court and any other attorneys who have advanced related claims in state court.

"Shopping" of a different variety -- to find a state court willing to approve settlements with less than rigorous oversight - is an additional danger created by *Matsushita*. Forum shopping between state and federal courts is the price one pays for federalism in both class⁹¹ and non-class litigation, but

⁹⁰ In a future case the Supreme Court could conceivably confine its holding in *Matsushita* to settlements that occurred prior to the Private Securities Litigation Reform Act.

⁹¹ An egregious example of this type of forum-shopping occurred after both the Third Circuit and the Texas Supreme Court refused certification of settlement classes in *General Motors Pick-Up Truck Fuel Tank*, 55 F3d 768 (3rd Cir 1995), cert. denied sub nom. *General Motors Corporation v. French*, 116 S Ct 88 (1995), and *General Motors Corp. v. Bloyed*, 916 SW2d 949 (Tex 1996). Although the Third Circuit had remanded the case to the federal district court in Philadelphia for further proceedings consistent with its opinion, the same class plaintiffs represented by the same class counsel brought a similar nationwide settlement class action in Louisiana state court, requesting approval of a slightly revamped version of the prior settlement (along with generous attorneys' fees) previously rejected by the Third Circuit. Such blatant attempts to undermine the authority of a court's prior exercise of jurisdiction should be remediable through use of a federal court injunction, the Anti-Injunction Act presenting no barrier when an injunction is issued "in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. §2283. See Geoffrey P. Miller,

federalism values play a subordinate role in the disposition of claims subject to the exclusive jurisdiction of the federal courts. The Delaware state courts have a substantial nexus with litigation arising under Delaware corporate law, and permitting Delaware global settlements offers only a limited opportunity for forum shopping. However, Matsushita itself sets no limit on any state's ability to settle exclusive federal claims in its courts, and greatly expands opportunities for forum-shopping.

3. *Court's Reduced Ability to Assess Fairness of Settlement*

Finally, in state court settlements of exclusive federal claims, the judge's ability to assess the fairness of a settlement is impeded. An independent substantive evaluation of the fairness of a settlement by the judge is an integral part of the procedural safeguards in a class action.⁹² To perform this evaluation, a judge must assess the legal and factual strength of the asserted claims from the perspective of a litigant. This requires information about the nature of the claim and any

Overlapping Class Actions, 71 NYU L Rev 514, 523-525 (1996). Of course, no such remedy is possible if, in future, plaintiffs and class counsel initially seek approval of a settlement class from a state court willing to bless such a settlement, thus engendering a "race to the bottom". Imposition of a nexus requirement between the forum and the litigation would discourage such court-shopping efforts. See *infra* at

⁹² See *Manual for Complex Litigation, Third* §30.42 (1995) (stressing the importance of the court's role in evaluating proposed settlements and setting forth factors that should be taken into account).

factual and legal disputes relevant to the claim.⁹³ The main sources for this information are the class attorney and the defendant's attorney.⁹⁴

At the time the attorneys for the class and the defendant submit a proposed settlement to the court, neither of them has an incentive to provide the judge with the requisite information. At that point, both the class attorney and the defendant share an interest in having the judge approve the settlement that they negotiated. They will therefore attempt to present only information that shows that the settlement is fair to the class members and try to withhold or downplay any information that would indicate that the settlement is not fair. Both sides can thus be expected to argue that the legal and factual basis of the claims is relatively weak, that the amount of the settlement is high relative to the strength of the claims, that the class members can count themselves lucky to obtain the benefits of such a settlement, and so on.⁹⁵

The only time when the judge is likely to receive information from the parties of record that may indicate that a

⁹³ The inherent limitations of making this evaluation are discussed in Judith Resnik, *Judging Consent*, 1987 U. Chi Legal F 43, 87-92.

⁹⁴ The judge can perform some limited independent research, especially on legal matters, and objectors to a settlement may occasionally present relevant evidence. See text accompanying notes 98 to 100.

⁹⁵ Depicting the settlement terms in this light has the added advantage of justifying a relatively high fee award for the class attorney (who negotiated such a good settlement).

settlement is not fair is during the adversarial proceedings that precede the settlement: in the complaint, in papers opposing a motion to dismiss or defendant's motion for summary judgment, in the plaintiffs' motion for summary judgment and for class certification, in pre-trial conferences, in discovery disputes, etc. In such proceedings, the class attorney has incentives to present the case in the strongest possible light.⁹⁶ Information provided in such proceedings may enable the judge to conclude that the legal and factual strength of the claims is relatively high -- and thus that the terms of a relatively low settlement are inadequate.⁹⁷

Class objectors to the settlement, if there are any, may

⁹⁶ The defendant always has an incentive to present the plaintiffs' case in the weakest possible light and will thus rarely be a source of information indicating that the substantive terms of a settlement are unfair.

⁹⁷ In certain cases, the number of plaintiffs who opt out of a settlement may also be a factor relevant to an assessment of the fairness of the settlement. For example, customers representing over 9 percent of all lysine sales opted out of the settlement of lysine price fixing claims against Archer Daniels Midland and others. See Nancy Millman, *ADM Settlement Approved: Firm to Pay \$25 Million 2 Others to Pay \$10 Million in Price Suit*, Chicago Tribune 1 (Jul 20, 1996) (noting that). Other things being equal, opt out should be more frequent if the settlement amount is low relative to the litigation value of the claims. However, in instances where the claims of individual plaintiffs are low, it is likely that most would not opt out even if the settlement amount were substantially below the expected recovery in a class litigation. For one, plaintiffs with individually small claims will not bother to expend the effort to determine the litigation value of their claims and will thus not know that the proposed settlement is low. Second, even a plaintiff who knows that the proposed settlement is low may decide not to opt out if he believes that most other plaintiffs will fail to opt out and that it would not be economical to pursue the claims of the few plaintiffs who do opt out in individual or class actions.

also provide information bearing on the fairness of the settlement.⁹⁸ Objectors, however, may be hampered by inadequate incentives to come forward, lack of information about the merits of a settlement, time constraints and an inability to conduct discovery,⁹⁹ and a dynamic favoring approval of a settlement once notice has gone out and a final fairness hearing has been scheduled.¹⁰⁰

⁹⁸ See *Manual for Complex Litigation, Third* §30.14 (1995) (suggesting that the judge may hear at the preliminary hearing from parties not involved in the settlement negotiations and that "[o]pportunity should be provided at the [formal] hearing for all objections to the settlement to be presented to the court"). For examples of objector involvement in settlement approval, see, e.g., *Sandler Assoc. v Bellsouth Corp.*, 818 F Supp 695, 699 (D Del 1993) (noting that the state court allowed objectors to settlement to engage in discovery); *De Angelis v Salton/Maxim Housewares, Inc.*, 641 A2d 834, 839-40 (Del Ch 1993) (stating that discovery undertaken by objectors revealed class representative's misrepresentations), rev'd on other grounds sub nom. *Prezant v De Angelis*, 636 A2d 915 (Del 1994); *Amsellem v Shopwell*, 1979 WL 2704 (Del Ch) (indicating objectors conducted a comprehensive review of discovery materials and then voiced specific objections), reprinted in 5 Del J Corp L 367.

⁹⁹ These factors would not apply to a party that has brought an independent suit. See also infra text accompanying notes 124 to 128. In federal class actions, the objectors' right to discovery is within the discretion of the trial court. See, e.g., *In re General Motors Corp. Engine Interchange Litig.*, 594 F2d 1106 (7th Cir 1979) (holding that trial court abused its discretion by not permitting objectors to class action settlement to engage in discovery regarding the adequacy of representation during settlement negotiations); *Geller v Tabas*, 462 A2d 1078, 1081 (1983) ("A refusal to delay a settlement to permit objectors to take discovery will not be overturned unless there was an abuse of discretion on the part of the Vice-Chancellor."). See also Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §11.57 (3d ed 1992) ("[T]he objector's request for discovery should be granted if he or she can demonstrate to the court that the previous discovery was not adversarial in nature.").

¹⁰⁰ The Federal Judicial Center's study provides additional insight about the role and effect of objectors at settlement hearings. The data shows that nonrepresentative parties attended

With respect to exclusive federal claims, pre-settlement adversarial proceedings never take place in the state court proceedings.¹⁰¹ Such claims will not be mentioned in the complaint; not be the subject of motions to dismiss, motions for summary judgment, and motions for class certification; and they will not be dealt with in pre-trial conferences. The judge may not even learn about the existence and nature of such claims until a proposed settlement encompassing such claims is presented to the court.¹⁰² Pre-settlement information about the factual basis of these claims would only be available to the judge to the extent that there is an overlap in the factual and legal issues relevant to the state and the federal claims. This information deficiency may render it more difficult for the judge to assess the fairness of a settlement with respect to these claims.¹⁰³

the settlement hearing infrequently (14% in one district being the high mark) but that settlements that were the subject of a hearing did generate at least one objection in one half of the cases. The majority of objections concerned the insufficiency of the award and the amounts of attorneys' fees. Ninety per cent of the proposed settlements were approved without changes. See *FJC Study*, supra note 62, at 146.

... An action brought in federal court solely to implement a previously agreed-upon settlement also avoids preliminary skirmishing. In this respect, such class actions suffer the same information deficiency as do global state court settlements. See *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361 (ND Cal, Walker, J.).

... If a federal case covering the exclusive federal claims has been filed, information about the case is also available from the federal plaintiff and from the federal litigation. See *infra* text accompanying notes 124 to 128.

... In some cases, the difficulty is further enhanced by the state court judge's lack of expertise with the governing federal law. While a concern about a state court's lack of expertise may

Moreover, apart from the problem that the class attorney and the defendant have no incentive to alert the court of facts suggesting that a negotiated global settlement may not be fair, the class attorney may not even bother to determine whether any substantial federal claims exist that would be released. Ordinarily, parties investigate the strength of their claims for three reasons: first, in order to prepare for litigation; second, in order to guide one's settlement negotiations by assessing one's own bottom line settlement offer (i.e., the value of one's best alternative to settlement); and third, in order to guide one's settlement negotiations by estimating the other side's bottom line settlement offer. But if the class attorney cannot litigate the federal claims in federal court, the first two motives for investigating the claims are not pertinent. Thus, to the extent that the federal claims involve legal and factual questions that differ from the state claims, the state class attorney will tend to investigate the federal claims much less than she would if she could litigate them in state court.¹⁰⁴

be misplaced in the case of the Delaware Chancery Court, see, e.g. William H Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus Law 351 (1992) -- the court in which the issue of settlement of exclusive federal claims has most frequently arisen -- we note that there is no bar to proposing such a settlement in other state courts where this concern may be more acute.

.. In some cases, the class attorney in the state action may also be hampered by an inability to investigate the federal claims. Since the federal claims are never directly presented in the state court, they may be outside the scope of discovery in the state case. Depending upon the relationship between the state and federal claims, the class attorney may not have access to information necessary to assess the strength of the federal

Thus, even if the state class attorney fully disclosed to the court all information bearing on the fairness of the proposed global settlement, a state court would be hampered by an information deficiency with respect to any legal or factual questions specific to the exclusive federal claims.

* * *

In the context of state court settlements of exclusive federal claims, the reduced bargaining power of the state class attorney, defendant's increased ability to engage in plaintiff shopping, and the court's difficulty in making an independent assessment of the fairness of a proposed settlement are sufficient to raise the yellow cautionary flag. Such concerns suggest that some limitations should be placed on global state court settlements encompassing exclusive federal claims.

C. Benefits of State Court Global Settlements

The principal benefit of permitting state court settlements to encompass exclusive federal claims is to make it easier for parties to arrive at a settlement, thereby reducing litigation cost and attorneys' fees.¹⁰⁵ It is commonly asserted that a defendant would not be willing to settle a case unless the settlement releases all -- state and federal -- claims that could

claims. However, to the extent that the state and federal claims are transactionally linked, most discovery regimes would be broad enough to provide access to information relevant to both claims.

¹⁰⁵ Making it easier for the parties to settle may not be desirable if ease of settlement is achieved by eroding the procedural and structural protections accorded to class members.

be brought. If a state court cannot release the defendant from liability under the federal claims, settlement of a state class action would thus be impeded. Viewed from this perspective, permitting state court settlements of exclusive federal claims promotes settlements (at least in state courts).¹⁰⁶

In some instances, a settlement of just the state claims would indeed offer no benefit to a defendant. This would be the case if the defendant's exposure on the federal and the state claim would not exceed its exposure on just the federal claim (i.e., if it is possible for the plaintiff to prevail on the state claim without prevailing on the federal claim and if the plaintiff cannot recover higher damages if she prevails on both claims than if she prevails on the federal claim alone).¹⁰⁷ In such cases, a settlement of just the state claim would not be rational since it would impose costs on the defendant without reducing its exposure to liability.

Take, for example, shareholders who allege that the price

¹⁰⁶ The majority in *Matsushita* noted that recognition of state court settlements serve the "principles of comity and repose embodied in § 1738." See *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873, 883 (1996). The court also opined that recognizing state court releases of exclusive federal claims threatens neither policy justification for grants of exclusive federal jurisdiction: giving effect to such state court releases undermines neither the goal of greater uniformity of construction of federal law nor the achievement of more expert and effective application of that law. See *id* at 882.

¹⁰⁷ Another reason why settlement of the state-claim only would not reduce the defendant's exposure to liability is that the state claim is frivolous. As we discuss below, low merits of the state claim militates against a global state-court settlement.

received when their company merged was unfair (e.g., \$100 million too low) and seek recovery both under state corporate law (e.g., for breach of fiduciary duties) and the federal securities laws (e.g., for misleading disclosures in the proxy statement). Assume that there is no significant dispute over any of the elements of the state and federal claim except over one: whether the relevant facts as to the fairness of the price were properly disclosed.¹⁰⁸ If the case is litigated, and plaintiffs can show that the facts were properly disclosed, they prevail on both claims; if they cannot, they lose on both claims. But even if plaintiffs win on both claims, they can recover their damages (\$100 million) only once. Settling the state claims for, say \$10 million would not make sense for defendants, even if \$10 million is much less than the expected liability on the state claims -- say, because plaintiffs' chances of winning \$100 million are 30%. The defendant would be better off not having settled the state claim than having settled it for \$10 million and still be exposed to a 30% chance of losing the remaining \$90 million (and incurring litigation costs) on the federal claim.

In other cases, where exposure on the state and federal claims exceeds exposure on just the federal claim, settlement of

¹⁰⁸ Under federal law, there is no basis for a claim that a disclosure in a proxy statement is misleading if all material facts are disclosed. See *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749; 115 L. Ed. 2d 929 (1991). Under Delaware corporate law, approval of a transaction by disinterested shareholders after disclosure of all material facts in most circumstances insulates the transaction from subsequent challenges. See *In re Wheelabrator Technologies, Inc. Shareholders Litigation*, 663 A.2d 1194 (Del. Ch., 1995).

just the state claim would reduce the defendant's exposure to liability. In such cases, defendant should be willing to settle the state claim by itself on some terms. A global settlement may nevertheless be desirable because it may be easier to negotiate a global settlement than a settlement of just the state claims and because a global settlement would avert the necessity of a separate proceeding disposing of the federal claims.

In either of these cases, of course, it is not necessary for the state court to approve a global settlement. In most cases, it is equally possible for a federal court to approve a global settlement. Indeed, since a federal court ordinarily has jurisdiction over all the claims that would be settled,¹⁰⁹ approval of a global settlement by a federal, rather than a state, court would not entail the deficiencies discussed in the preceding section.

Nevertheless, there are some situations in which the state courts may be a preferable forum to entertain a global settlement. First, to the extent that the state claims are stronger than the federal claims, states with a substantial nexus to the parties or the claims¹¹⁰ have significant interests in

¹⁰⁹ See supra note 74.

¹¹⁰ Such a nexus will exist in these corporate/securities cases when the corporation is incorporated (or headquartered) in a state and its law is likely to govern the transaction or when large numbers of shareholders are residents of the state and the state has an interest in their protection.

supervising settlements of the state claims in their courts.¹¹¹ When there is a transactional nexus between the federal and state claims, a global settlement -- rather than separate settlements-- is still desirable. Therefore, both the state's interest in the matter and the efficiency values in a global settlement tilt toward allowing a state court settlement of the entire matter. Second, no federal claims may have yet been brought in federal court or the litigation in the state court may have proceeded much further than the litigation in the federal courts (e.g., state court discovery may be complete while federal discovery has not even started). Absent such circumstances, the federal court is likely to be at least as good a forum, and will often be a superior forum, for entertaining a global settlement proposal. In the next Parts, we discuss how to best effectuate state courts' authority under *Matsushita* to approve settlements encompassing exclusive federal claims, and under what circumstances such approval should be subject to collateral attack in federal court.

III. BEYOND MATSUSHITA: WHEN STATE COURTS SHOULD APPROVE

GLOBAL SETTLEMENTS

A. *Present State Court Practice*

Parts I and II set the context for a critical question that

¹¹¹ Requiring a nexus between the forum and the litigation will have the benefit of eliminating widespread forum shopping.

arises in light of the *Matsushita* decision: under what circumstances should state courts approve the release of exclusive federal claims and give preclusive effect to such judgments. State courts have not always been careful to distinguish settlements that release exclusive federal claims as part of the settlement from other settlements, thus ignoring proper allocation of state and federal interests. For example, the Delaware cases on class action settlements, which deal almost exclusively with claims based upon corporate duties and securities laws,¹¹² appear to apply similar criteria when the proposed settlements release claims brought before the court for adjudication and when the release includes other claims not asserted in the action, such as exclusive federal claims.¹¹³

¹¹² See, e.g., *Dieter v Prime Computer, Inc.*, 1996 WL 297058 (Del Ch) (slip op); *In re Dr. Pepper/Seven Up Co., Inc. Shareholders Litig.*, 1996 WL 74214 (Del Ch); *Prezant v De Angelis*, 636 A2d 915 (Del 1993); *In re Amstead Indus. Inc. Litig., Consol.*, 1988 Del Ch LEXIS 116, aff'd sub nom. *Barkan v Amstead Indus., Inc.*, 567 A2d 1279 (Del 1989); *In re Beatrice Co., Inc. Litig.*, 1986 WL 4749 (Del Ch), reprinted in 12 Del J Corp L 199, aff'd 522 A2d 865 (Del 1987); *Polk v Good*, 507 A2d 1089 (Del 1986).

¹¹³ "[T]he court's function is to consider the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of these factors." *Polk v Good*, 507 A2d 531, 534 (Del 1986) (citation omitted). The main difference that exists in a settlement releasing claims pending in another jurisdiction is that the value of those claims need to be evaluated as well. See *In re Mobile Communications Corp. of Am., Inc. Consolidated Litig.*, 1991 WL 1392 (Del Ch) (evaluating claims pending in federal court that arise under Securities Exchange Act, Securities Act and RICO), reprinted in 17 Del J Corp L 297; *In re First Boston, Inc. Shareholders Litig.*, 1990 WL 78836, 1990 Del Ch LEXIS 74 (examining pending Securities Exchange Act claims; settlement ultimately approved at 1990 WL 201388). At times,

Delaware courts, like courts in other jurisdictions, articulate a general test of substantive fairness, which applies to all settlements.¹¹⁴ And in making that evaluation, courts have given additional scrutiny to settlements on the basis of particular facts that are brought to their attention.¹¹⁵ Courts also profess to take seriously their role in protecting the interests of absent class members by assuring adequacy in representation of the class.¹¹⁶ The existence of pending claims in other jurisdictions is a factor to be taken into account in protecting the interests of class members, and in the MCA

however, this evaluation lacks, to put it mildly, explicitness. See *In re Union Square Assoc. Securities Litig.*, 1990 WL 212308 (Del Ch) (approving settlement that included a general release and only mentioning pending claims in two federal actions in a footnote).

Delaware Chancery Courts also have a history of approving settlements that release claims pending in other state courts. See, e.g., *Steiner v Sithe-Energies, L.P.*, 1988 WL 36133, (Del Ch), reprinted in 14 Del J Corp L 413.

¹¹⁴ For a brief summary of Delaware substantive considerations of settlement approval, see Theresa L. Kelly, *J.L. Schiffman & Co. v Standard Industries, Inc. and Other Recent Settlement Proposal Cases*, 19 Del J Corp L 447 (1994).

¹¹⁵ Delaware courts have noted several situations in which settlement approval will undergo greater scrutiny. See, e.g., *In re Amstead Indus. Incorp. Litig.*, 1988 Del Ch LEXIS 116, at *3 (non-opt out settlements); *In re MCA, Inc. Shareholders Litig.*, 598 A2d 687, 695 (Del Ch 1991) (small benefit offered to the class); *Kahn v Occidental Petroleum*, 1989 Del Ch LEXIS 92, at *9-10 (defects in the bargaining process).

¹¹⁶ See, e.g., *Prezant v De Angelis*, 197 A2d at 921 ("the settlement of a class action is unique because the fiduciary nature of the class action requires the Court of Chancery to participate . . . to the extent of determining its intrinsic fairness"); *Wied v Valhi, Inc.*, 466 A2d 9, 14 (Del 1983) (court should "guard against surreptitious buy-outs of representative plaintiffs, leaving other plaintiffs without recourse").

litigation, the Vice Chancellor himself noted that the court "must be particularly careful in reviewing a proposed settlement that has the effect of barring claims of at least arguable merit that are not being asserted in Delaware but are being asserted in another forum."¹¹⁷

Certain procedural requirements also characterize settlement class actions. Most courts adopt a two-step process for deciding whether to certify class treatment in a settlement class action.¹¹⁸ When a proposed settlement is reached between the parties prior to certification of the class, the court holds a preliminary hearing -- at which class counsel and defense counsel appear -- to review the settlement. If this preliminary evaluation does not suggest doubts as to its fairness or other deficiencies,¹¹⁹ the court directs notice be sent to class

¹¹⁷ *In re MCA, Inc. Shareholders Litig.*, 1993 WL 43024 (Del Ch) (Hartnett, V.C.). Particular care may arise in taking note of extreme informational gaps. Where the court lacks information sufficient to value claims pending elsewhere, the court may delay settlement approval. See *In re First Boston, Inc. Shareholders Litig.*, 1990 WL 78836, *9, 1990 Del Ch LEXIS 74 (delaying settlement approval because "the court must know something more in order to evaluate the two claims that remain open in my mind"), settlement later approved 1990 WL 201388. Filling this information gap, however, does not necessarily result in extensive information. See *In re Mobile Communications Corp. of America, Inc. Consolidated Litig.*, 17 Del J Corp L 297, 318-19 (Del Ch 1991) (noting that business judgments necessarily are made with imperfect information).

¹¹⁸ See *Manual for Complex Litigation, Third* §30.4 (1995)

¹¹⁹ Chancellor William Allen has observed that it is unlikely for a settlement to be rejected at this stage of the process. See *Stepak v Tracinda Corp.*, 1989 Del Ch LEXIS 95, *3:

It is the typical practice in this court, as elsewhere, to set a motion for a settlement of a class action down for a hearing on the merits and to defer all consideration of

members for participation at a formal hearing at which arguments and evidence are presented in support of and in opposition to the settlement.

B. A More Contextual Approach

These general settlement procedures may be adequate when a court is asked to approve the settlement of state claims that would come before it in a litigation mode. However, state courts should adopt more exacting standards and procedures before approving a global settlement encompassing exclusive federal claims. As explained above, global settlements in state court may result in three problems: impaired bargaining power of the state class attorney, plaintiff shopping by the defendant, and a reduced ability of the state court to evaluate the fairness of the settlement. The potential for state-court settlements to "hijack" exclusive federal securities claims is particularly troublesome in light of the recently adopted Private Federal Securities Reform Act. The provisions of the Act for the appointment of a lead plaintiff and class counsel would be undermined if state court global settlements could easily terminate securities litigation. State courts need to weigh

the substance of such proposal until notice has been afforded and a hearing held. This practice has the obvious advantage of efficiency. An alternative technique, although rarely invoked, is authorized. Occasionally, the particulars of a case may warrant the expenditure of judicial time in making a preliminary assessment of the proposed settlement in order to determine whether it meets truly minimum standards sufficient to invoke the mechanisms required by Rule 23 (e).

carefully the benefits of a state court global settlement against these dangers.

Our proposal -- which can be implemented for state courts as a matter of statute, court rule, or state practice -- offers standards for best accomplishing global settlements. The basic test imposes a set of substantive standards as well as procedural safeguards for settlements encompassing exclusive federal claims that go beyond the general inquiry as to the prerequisites for class certification and the substantive fairness of the settlement. In particular, before approving a state global settlement, a judge should obtain reasonable information about the federal claims to be settled. To obtain this information in the most expeditious manner, we recommend that counsel for plaintiffs who have filed federal claims be asked to participate in a preliminary fairness hearing on the state global settlement that is held before notice is sent to class members.¹²⁰ The state judge should weigh the benefits of a state global settlement against the possible dangers posed by the state class counsel's impaired bargaining power and the defendant's ability

¹²⁰ In some situations, detailed information about the merits of the federal claims should be made available to the class members as part of the notice procedure. See, e.g., *Sandler Assoc. v Bellsouth Corp.*, 818 F. Supp 695, 699 (noting that objectors were allowed by state court to include "a statement of reasons for their objections to the settlement in the hearing notice"). For empirical data about the content of notices of proposed settlements, see *FJC Study*, supra note 62, at 131-34 ("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.")

to engage in plaintiff shopping and against the federal interest in implementing the lead plaintiff scheme of the Private Securities Litigation Reform Act. These considerations play out differently in different contexts.

*1. State Court Settlement Proposed With
No Federal Claims Filed*

When no federal claims have yet been asserted by any party, a global settlement in state court involves significant benefits and relatively few drawbacks. As no claims are pending in federal court, the state court is the only court that can entertain a global settlement. Moreover, if no federal claims have been brought, it is relatively unlikely that a state court global settlement would release federal claims with significant litigation value. Finally, in this context, the likelihood that the state court settlement is the product of impaired bargaining power by the state attorney or of plaintiff shopping by the defendant is reduced.

Nonetheless, two concerns remain. First, there is the problem that the state court is not in a good position to evaluate the worth of the unasserted federal claims. Second, in some instances, a speedy state court settlement might be designed to preempt a later assertion of important and substantial exclusive federal claims (indeed, the availability of such preemption might encourage a rush to bring a state court settlement class action). These concerns take on additional importance in light of the Private Securities Litigation Reform Act, which establishes a set of conditions before a federal

securities claim is filed in federal court, thus imposing some lag before these claims can be asserted.¹²¹

Before approving a global settlement releasing unasserted exclusive federal claims, a state court judge should therefore obtain information about the existence and nature of any federal claims. As an initial matter, the defendant should be required to confirm that in fact no federal claims to be released under the proposed settlement have been filed elsewhere and that the defendant has no notice that any such claims are likely to be brought. Lawyers for the parties should then provide information about the viability of any potential federal claims that would be released as part of the settlement. Plaintiff's lawyer should disclose whether she has investigated the existence of possible federal claims; and both plaintiff and defendant counsel should provide the court with an assessment of their litigation value if any claims exist.

To be sure, where no federal claims have been filed, we expect that plaintiff and defendant counsel will ordinarily agree that either no federal claims are viable or that they have little

¹²¹ See Pub L No 104-67, 109 Stat 737, sec 101(b) §21D(a)(2) (requiring plaintiff to provide sworn certification he has reviewed and authorized complaint); §21D(b)(1) (requiring complaint to specify each allegedly misleading statement, the reason why statement is misleading, and any facts on which belief that statement is misleading is formed); §21D(b)(2) (requiring complaint to state with particularity facts giving rise to a strong inference that defendant acted with requisite state of mind). See also *Greebel v FTP Software, Inc.*, 1996 US Dist LEXIS 13510, *14 (D Mass) ("The purpose of requiring certification with the complaint is to slow the race to the courthouse by so-called professional plaintiffs.")

value. The imposition of sanctions for misrepresentations to the court and the availability of a legal malpractice claim against the plaintiff class attorney, however, offer some deterrent against unrealistic or sham representations about the nature of these claims.¹²²

Equipped with this information, a state court can then proceed to assess preliminarily whether, given the particular context, the value of possible federal claims has been reasonably investigated and whether the settlement is fair with respect to both the state and the federal claims to be released. If the court is satisfied, it can provide for notice and the opportunity to opt-out of the settlement class and then conduct a formal hearing on the fairness of the settlement. Since no federal claims are pending, the interest in settling the claims in state court is strong; the likelihood that substantial federal claims exist is reduced; and the concerns over class counsel's impaired bargaining power, the potential for plaintiff shopping, and the undermining of the Congressional lead plaintiff scheme are alleviated.

Only a state with a substantial nexus to the litigation

¹²² Some global settlements appear to provide for a release of malpractice claims against the class counsel. Brief for Appellants at 31, *Epstein v MCA Inc.*, No. 92-55675 (stating that release approved by Chancery Court absolved state class counsel from any liability for their conduct in the Delaware litigation). Our guidelines for state court settlement practice would have courts refuse to approve settlements containing such a release. See also *Durken v Shea & Gould*, 92 F3d 1510 (9th Cir 1996) (holding that a court-approved settlement in a derivative action does not immunize an attorney from a subsequent malpractice action).

should be permitted to approve a global settlement. Such a nexus may exist because the corporation is incorporated in a state and its law would govern the state law claims, or because there are substantial shareholders from the state which is asked to approve a settlement affecting their interests. Such a nexus requirement will have the advantage of discouraging efforts to forum shop for a court that might be too eager to attract settlement business through easy approval of what could be sell-out or collusive settlements.

A state court global settlement should also be limited to federal claims that have a transactional relationship to the state claims. The transactional requirement ensures that the plaintiffs' lawyer's investigation of the basic state claims brings her into contact with the necessary facts and events that might give rise to possible federal claims and helps to assess to what extent the litigation value of such claims should be further explored. Moreover, both from defendant's and the state's perspective, a transactional requirement should satisfy the need to achieve a reasonable and workable settlement of the state claims.¹²³

One variation on this scenario is a federal claim that is not pending when the state settlement is proposed, but which is

¹²³ See, e.g., *Nottingham Partners v Dana*, 564 A2d 1089, (Del 1989), which limits the preclusive effect of releases to claims based on the same operative facts. For the debate over the nature of the similarity required in Delaware, see *infra* note 45.

filed before the final settlement hearing takes place.¹²⁴ As part of the fairness hearing, the court should inquire whether the circumstances with respect to the existence of federal claims have changed. In the usual case, a subsequent "later-filed" federal claim should not per se disturb the balance of equities favoring a global settlement.¹²⁵ Otherwise, notice of a proposed global settlement would invite federal "spoiler" claims brought principally as an impediment to an imminent state court settlement. However, if the court determines that there was a "rush to settlement" (leaving no time for a federal court to be filed before the settlement was proposed), or if the federal claim did not arise until after a preliminary settlement hearing was held, the court should treat the claim as if it had been pending when the state court settlement was proposed -- the variation we examine in the next section.

2. State Court Settlement Proposed and Federal Claims Pending

When a federal claim is pending at the time a global state court settlement is proposed, the state court's actions should be

¹²⁴ See *In re Mobile Communications Corp. of Am., Inc. Consolidated Litig.*, 1991 WL 1392, *6 (Del Ch) (noting that federal class action was commenced subsequent to the preliminary fairness hearing), reprinted in 17 Del J Corp L 297. Cf *McCubbrey v Boise Cascade Home & Land Corp.*, 71 FRD. 62, 69 n.15 (ND Cal 1976) (listing several individual actions that were filed after class notice was sent but before the settlement was approved).

¹²⁵ The court, of course, must still evaluate the fairness of the settlement at the settlement hearing in light of all relevant information, including any evidence presented by a federal plaintiff who appears as objector in the state fairness hearing.

guided by the following considerations. First, the existence of a pending federal claim and of a party pressing that claim increases the information that the court could, and should, obtain. Second, the presence of a pending federal claim makes it more likely that the state counsel's bargaining power in negotiating the settlement was impaired and that the defendant engaged in plaintiff shopping. And third, if the federal claim is a securities claim, a Congressionally sanctioned process for the appointment of lead plaintiff as class representative, which would be undermined by a state court global settlement, has commenced. In this situation, state court should proceed as follows.

(a) Obtaining Information about the Federal Claims

As soon as it appears that a proposed state court settlement would release a pending federal claim, the defendant should be required to inform the state court of the claim and of the identity of the federal plaintiffs. To obtain information about these federal claims in the most expeditious manner, the court should invite counsel for the federal plaintiffs, and in particular counsel for the lead plaintiff if one has been appointed, to a preliminary fairness hearing.¹²⁶ At the preliminary hearing, the federal plaintiffs through their counsel should be given full opportunity to inform the judge about their views of the strength of the federal claims to be released, the

¹²⁶ If the appointment of a lead plaintiff in the federal action is imminent, the judge should postpone the preliminary hearing until a lead plaintiff is appointed.

fairness of the settlement, and the circumstances in which the settlement was negotiated.¹²⁷ The court should also take into account the extent to which the federal and the state plaintiff's counsel have examined the facts and the law bearing on the strength of the federal claims. Finally, the state court should give substantial weight to the views of a federal lead plaintiff, to whom Congress-- through the Private Securities Litigation Reform Act -- has entrusted the responsibility of class representation.

There are two major benefits to inviting representatives of the federal plaintiffs to a preliminary hearing. First, if the court rejects a proposed settlement, it is preferable to do so at a preliminary hearing, before the time and expense of sending notice to class members and holding a final hearing is incurred.¹²⁸ Second, it may be easier at the preliminary stage to address deficiencies in the structure of the proposed settlement or to renegotiate its terms.

If a settlement is approved, counsel for federal plaintiffs should in proper circumstances be awarded attorneys fees even if

¹²⁷ If a federal court has issued rulings on the federal claim bearing on the strength of these claims, the state court should also review these rulings.

¹²⁸ For the costs of notice, see *FJC Study*, supra note 62, at 129-30 ("Across the [four] 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. [footnote omitted] In at least 25% of the cases in each district, the cost of notice 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.").

she does not represent any plaintiffs in the state action and did not participate in the settlement negotiations. Such fees are appropriate whenever the presence of federal claims increased the litigation value of the claims and federal counsel contributed to the development of these claims.¹²⁹ The award to the state counsel should correspondingly be reduced.¹³⁰

An award of attorneys' fees to the federal counsel is compelled by considerations of fairness, incentives, and federalism. To the extent that the work product of the federal counsel resulted in an increase in the amount defendant was willing to settle for, the proper party to be rewarded is the federal counsel. Moreover, if the federal counsel could not obtain fees in a global settlement, such counsel could be placed

¹²⁹ Some courts recognize the possibility of awarding attorneys fees to lawyers other than class counsel. See, e.g., *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 FRD 416, 422-23 (WDNY 1994) ("in order for the court to grant the fee petition of [objecting plaintiff's] counsel, counsel must demonstrate that they had performed specific services that have benefited the fund in some tangible way"). Other courts have awarded such fees. In *In re Amstead Indus. Incorp. Litig., Consol.*, 1988 Del Ch LEXIS 226, aff'd 567 A2d 1279 (Del 1989), the court awarded such fees to an objecting class member's attorney, even though the value of the settlement to the class was not increased and the counsel "failed to win acceptance of his position." *Id.* at *32. Instead the court noted the counsel's "determined, detailed and highly professional advocacy" which "forced the court to review the proposal most searchingly." *Id.* The court went on to note the counsel's participation in discovery and stated that "the class has benefitted thereby in just the way it would benefit if the court were to require an additional expert to evaluate the settlement." *Id.* at *33, *34.

¹³⁰ See *In re Amstead*, 1988 Del Ch LEXIS at *32 (noting that settlement agreement provided for legal fees not to exceed \$300,000, and granting fees to objector's counsel which necessarily reduced amount available to class counsel).

in a dilemma. When faced with a global settlement proposal that is fair, the counsel would either have to favor the settlement -- and forfeit any fees for her work -- or oppose the settlement despite its fairness.¹³¹ Finally, due regard for the Congressional scheme for the appointment of a lead plaintiff requires that the counsel selected by the lead plaintiff be compensated to the extent that she contributed to the class recovery.

We expect that this integrated role of a federal plaintiff -- in particular, an appointed federal lead plaintiff -- at the preliminary hearing stage will, in turn, influence the way in which a proposed global state court settlement is negotiated to start with. As we explain below, the views of the federal plaintiff with respect to the fairness and appropriateness of the proposed settlement are to be accorded substantial weight (at least as far as the federal claims are concerned); thus, a defendant who is not trying to engage in plaintiff shopping has every incentive to involve the federal plaintiff in the settlement negotiations from the start. Finally, our proposal would prevent a federal plaintiff who fails to respond to the state court's invitation to participate in the state court hearing from attacking a state court global settlement

¹³¹: Conversely, state counsel's incentives to consent to an inadequate settlement for the federal claims are reduced if state counsel has to share fees with federal counsel according to their contributions. See *supra* text accompanying notes ___ to ___ (discussing how possibility of obtaining fee award for federal claim may induce state class attorney to assent to inadequate settlement).

collaterally.¹³² Thus, our proposal results in incentives to fashion participatory global settlements between the defendant and both the state and the federal plaintiffs.

(b) Should the State Court Approve a Global Settlement?

Although the access to more information will obviously assist the court in determining the fairness of the settlement, state court settlements of pending exclusive federal claims necessitate additional safeguards even if the proposed global settlement is within the range of fairness. As discussed above, state court settlements of pending federal claims can entail impaired bargaining power by the state class attorney and plaintiff shopping by the defendant. The state court needs to be cognizant of this potential and to consider the circumstances of the particular case to determine how serious it is.¹³³

¹³² See *infra*, text accompanying notes 187 to 190. There are precedents for such "compulsory intervention." For example, the common law practice of "vouching in" allowed a defendant to give timely notice to a third person who had an obligation of indemnification to the defendant and to request that the third party undertake the defense. Whether or not the third party accepted the invitation to participate, the third party was bound by an adjudication of defendant's liability to the plaintiff. See James, Hazard & Leubsdorf, *Civil Procedure* (4th ed.) at §10.18 n4 (Little Brown 1992). The 1991 amendments to the Civil Rights Act of 1964 (42 USC 2000e-2(n)) overturned the Supreme Court's decision in *Martin v Wilks*, 190 S.Ct 2180 (1989) (stating that non-parties who have notice of an action and bypass an opportunity to intervene are not bound by the decree). Under the amendment, in federal employment discrimination cases, a person who has notice of a proposed judgment or order and an opportunity to present objections in the action may not later challenge the practice that is resolved by the judgment or order.

¹³³ *Prezant v De Angelis*, 636 A2d 915, 925 (Del 1993) (noting that apparent fairness of settlement is not sufficient for settlement approval "because an adequate representative, vigorously prosecuting an action without conflict and bargaining

Moreover, the interest of the state court in disposing of the claims through a settlement and the possibility of a partial (state-claim only) settlement will vary case by case. To illustrate how a state court should proceed, we discuss four different paradigm cases: first, the likelihood of success on the state and the federal claims turns on the same issues and plaintiffs are limited to one recovery,¹³⁴ (the "single exposure" case); second, the state and the federal claims turn on different issues and the state claims are stronger than the federal claims (the "state claims stronger" case);¹³⁵ third, the claims turn on different issues and the federal claims are stronger than the state claims (the "federal claims stronger" case); and fourth, the claims turn on different issues and both claims are about equally strong (or equally weak) (the "equal merits" case).

(i) *The "Single Exposure" Case*

As we explained above, in the "single exposure" case, a separate settlement of the state claims is not feasible, and a

at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative").

¹³⁴ A combination of a state and a federal claim can increase exposure beyond one of the claims by itself if the claims do not turn on the same issues (thus making it possible to prevail on one claim but not on the other if both were litigated) or if recovery if the plaintiff prevails on both claims exceeds recovery if the plaintiff prevails on just one of the claims.

¹³⁵ By stronger, we mean that the litigation value is higher. A claim may be stronger than another claim either because plaintiff's chances of obtaining recovery are higher or because damages are higher if plaintiff obtains recovery.

state has an obvious interest in disposing of claims arising under its own law and asserted in its own courts. Moreover, in the "single exposure" case, several of the concerns about state court settlements of exclusive federal claims are absent. The bargaining power of the state class attorney is not impaired by her inability to assert the federal claims in state court since the federal claims would not contribute to either the plaintiffs' likelihood of prevailing or to the amount of damages if the plaintiffs prevail.

One problem remains, however: the ability of the defendant to engage in plaintiff shopping and, relatedly, the undermining of the "lead plaintiff" provisions of the Private Securities Litigation Reform Act. If a global settlement is proposed in a state court, the state court should therefore examine the conduct of the respective counsel for indicia of plaintiff shopping. A partial list of relevant factors includes: whether the state attorneys actively prosecuted the state claims or entered settlement negotiations immediately after the claims were filed; whether the federal attorneys actively prosecuted the federal claims; whether the defendant actively defended against the claims in both courts; the type of settlement discussions between the defendant and the different attorneys; the amount of attorneys fees proposed to be awarded; and the timing of the relevant litigation and settlement activities (e.g., whether the state claims were filed after negotiations with the federal

plaintiffs broke down).¹³⁶

If the state court concludes that no plaintiff shopping took place and that the terms of the settlement are fair, it should approve a global settlement. The federal class attorney, of course, will have an opportunity to present views on both of these issues in the preliminary hearing.

(ii) *The "State Claims Stronger" Case*

If the state and federal claims turn on different issues or potentially afford different measures of damages, a state's interest in disposing of its claims in its own courts is also strong if the state claims are stronger than the federal claims.¹³⁷ Moreover, if the federal claims are weak, the concern that they may not be adequately dealt with in the state proceeding is ameliorated. Thus, a state court can approve a global settlement so long as the settlement meets the ordinary standards necessary for approval.

We caution, however, that the very issue of assessing the

¹³⁶ State courts, of course, should also be aware of the opposite problem -- the potential for federal claims being asserted for the principal reason of "spoiling" a global state court settlement. The problem of federal "spoiler" claims, however, is ameliorated by several provisions of the Federal Securities Litigation Reform Act. The Act makes it easier for a defendant to have a securities fraud claim dismissed and provides for mandatory sanctions for filing frivolous claims. Moreover, the provisions for the appointment of a lead plaintiff reduce the incentives to file a "spoiler" claim. See *supra* note 7.

¹³⁷ The relative strength of the state claims ought to be reflected in the substantive terms of the proposed settlement. A proposed settlement that offers only minimal recovery to class members is unlikely to be based on relatively strong state claims and should not be analyzed under this subsection.

relative merits of the state and the federal claims brings into play the concerns discussed in the previous Part. That is, a state class attorney has an incentive to play down the federal claims that she cannot litigate and the defendant has the ability to "shop" for a state attorney that will do so and settle the claims cheaply. The court should take this into account in assessing the relative merits of the state and the federal claims and give particular weight to the views of the counsel for the federal lead plaintiff. Since Congress through the Private Securities Litigation Reform Act has put its trust in lead plaintiffs and their counsel to adequately represent a class of securities claimants, the state court should give proper deference to this mechanism. Nonetheless, the focus should be on the assessment of the relative merits of the claims.¹³⁸

(iii) *The "Federal Claims Stronger" Case*

If the federal claims are stronger than the state claims, a global settlement in state court is not proper. The dangers of a "hijacking" of the federal claims are too high, and the state's interest is too low, to justify state court approval of a global settlement that is opposed by the federal plaintiff. State courts, however, would be free to approve of settlement that

¹³⁸ For cases that discuss the relative merits of claims, see, e.g., *In re Mobile Communications Corp. of Am., Inc. Consolidated Litig.*, 1991 WL 1392, *6-10 (Del Ch) (weighing the strength of several federal and state claims), reprinted in 17 Del J Corp L 297; *Raskin v Birmingham Steel Corp.*, 1990 WL 193326, *5 (Del Ch) (finding that of four sets of claims, federal Securities Exchange Act claims "appear to be the only seriously litigable claims and that they do not appear to be strong").

encompass only state claims according to its normal procedures.¹³⁹

(iv) *The "Equal Merits" Case*

The case where the federal and state claims turn on somewhat different issues and neither claim can be said to be stronger may be hardest to deal with. In this case, there is a concern both about the ability of the defendant to engage in "plaintiff shopping" and about impaired bargaining power of the state class attorney. States have some interest in settling the state claim in state court, but separate settlements are conceivable (though a global settlement may be more efficient).

In the "equal merits" case, as in the "single exposure" case, the court should examine the conduct of the respective counsel for indicia of plaintiff shopping and not approve a settlement if they find that the defendant has engaged in it. Even if they find that there was no plaintiff shopping, state courts should give special weight to the views of a federal class attorney who opposes the settlement. Unlike the "single exposure" case, a settlement of the state claim is not inextricably tied to a settlement of the federal claim, reducing the state's interest in a global, as opposed to state-claim only, settlement; and, even in the absence of plaintiff shopping, the bargaining power of the state class attorney with respect to the federal claims is impaired.

¹³⁹ The first MCA settlement proposal, which the Delaware Chancery Court rejected, presumably falls in this category. See *supra* TAN.

One factor that a state court should consider in deciding whether to approve a global settlement in these circumstances is the progress of the litigation in the two fora. If the federal litigation has progressed significantly, the state court should not approve a settlement encompassing the federal claims. The benefit of settling the federal claims is reduced since the parties have already expended much litigation effort on these claims. Moreover, if there were to be a settlement, the federal court that had overseen the prior litigation would be in a better position to assess its fairness. On the other hand, if the state litigation had progressed significantly and the federal litigation had not, the state court may be the superior forum for entertaining a global settlement.

Finally, the state court needs to remain cognizant that as far as the federal claims are concerned, the positions of the state and the federal class attorney are not equal. Under the timetable provided by the Securities Litigation Reform Act, the appointment of a lead plaintiff will ordinarily either have occurred or be imminent when the state court settlement is proposed. Thus, at least in securities cases, the federal class attorney will have the imprimatur of a Congressional judgment as to who can best represent the class members. The state class attorney not only lacks this imprimatur, but lacks any authority to litigate the federal claims and thus has a disadvantage in bargaining over the terms on which they ought to be settled. Given this status gap, state courts should refrain from approving

a global settlement opposed by the federal class attorney unless the state court is convinced that its failure to approve a global settlement would be seriously detrimental to the interests of the class members.¹⁴⁰

IV. AVAILABILITY OF FEDERAL COLLATERAL ATTACK

In Part III, we proposed a set of procedural and substantive safeguards to protect against the dangers in state court global settlements and to take account of federal interests at stake when exclusive federal claims are released as part of such settlements. Another attractive feature of our proposal is that it provides an alternative to collateral attack as a means of protecting federal interests.

A. *The General Problem of Collateral Attack In Class Action Settlements*

As a matter of due process, class action judgments and class action settlements can bind absent class members only when there has been adequate representation by the class representatives. Class action procedures in both the federal and state courts generally provide for a determination that the representative party will "fairly and adequately protect the interests of the

¹⁴⁰ The application of these criteria to the second MCA settlement is discussed text accompanying notes 186 to 190 infra.

class"¹⁴¹ to be made as part of the class certification process. Challenges to a finding of adequacy of representation can be reviewed through the appellate process and (as a due process issues) ultimately by the Supreme Court of the United States.

What is unclear is whether a determination of adequacy of representation -- either in litigation or in a settlement -- may be collaterally challenged by class members. In the non-class context, absent fraud and collusion, collateral attacks are generally limited to issues of personal and subject matter jurisdiction, both of which determine a court's power to proceed. Even then, such a challenge is usually authorized only where a defendant defaults in the first action and raises the jurisdictional issue collaterally. This general policy limiting collateral attacks requires parties to litigate and appeal disputed issues in the case as it is being heard, and accords finality to whatever decision is reached. Jurisdiction is an exception because it is thought that the defendant should not have to raise the matter of jurisdiction before a court without the power to proceed.¹⁴²

¹⁴¹ Adequate representation under FRCP 23(a)(4) encompasses both the adequacy of the representative plaintiff and the adequacy of class counsel. See Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §7.24 (3d ed 1992) (stating that adequate representation requires both); see also *Manual for Complex Litigation, Third* §30.16 (1995) (noting that selection of class counsel has implications for adequacy of representation).

¹⁴² With respect to personal jurisdiction, defendant may challenge jurisdiction collaterally only if he defaults and does not appear in the action. Otherwise, the defendant must contest jurisdiction in the action (or waive it) and will be bound by the court's determination. Subject matter jurisdiction may get

To some degree, the question of adequate representation in class actions is akin to the question of jurisdiction: both go to the basis of the court's authority over the absent class member, and both implicate due process of law. This suggests that lack of adequate representation -- like lack of jurisdiction -- may be raised collaterally. On the other hand, a court hearing a class action *does* have personal jurisdiction over absent class members if there has been notice and a right to opt-out;¹⁴³ forcing a class member to object to the adequacy of representation in the court entertaining the proposed class suit thus does not undermine the adequacy requirement in the way that forcing a party to raise the lack of personal jurisdiction directly would undermine the personal jurisdiction requirement.

Moreover, a court entertaining a proposed class action is charged with the responsibility of assuring "adequacy" before a class action is permitted. In a contested case, the issue of adequacy will usually be litigated, and the court will have the arguments of counsel to aid it in deciding the matter. In a settlement, where there may be no adversarial litigation of

somewhat more favorable treatment in a collateral challenge. If there is no default and the issue of subject matter is raised and decided (or if it could have been raised), collateral attack is usually not permitted. But when a court "lacks capability to make an adequately informed determination of a question concerning its own jurisdiction," a party may be given the opportunity to attack the court's subject matter jurisdiction in a collateral challenge. See Restatement (Second) of Judgments §12.

¹⁴³ In *Phillips Petroleum Co. v Shutts*, 472 US 797 (1985), the Supreme Court held that absent class members who receive individual notice and fail to opt-out of a proposed class action "consent" to the jurisdiction of the court.

adequacy,¹⁴⁴ the court itself has the obligation to make the finding of adequate representation.¹⁴⁵ The court's determination, like other issues litigated by class representatives, is binding on absent class members.¹⁴⁶ These arguments suggest that, as long as the court entertaining a proposed class action affords class members fair opportunity to raise the issue, adequacy of representation should be raised directly, and not be permitted to be raised collaterally.

The choice of the appropriate model for raising the issue of "adequate representation" in class action settlements faces the Ninth Circuit on remand in *Matsushita*.

B. Hints from the Supreme Court in *Matsushita*

¹⁴⁴ Objectors to the settlement may contest the issue; indeed, our proposal invites other counsel who object to the settlement to raise their objections directly in the settlement court.

¹⁴⁵ See, e.g., *In re California Micro Devices Securities Litig.*, 1996 US Dist LEXIS 1361, *5 (ND Cal) ("A critical factor in determining whether a settlement is worthy of court approval under FRCP 23(e) is whether the class has been 'fairly and adequately' represented by the class representative during settlement negotiations.").

¹⁴⁶ Note, however, that a representative does not bind those for whom he acts as against third parties who are aware of the representative's failure to fulfill his responsibility. This limitation encompasses collusion or other situations where the representative's management of the litigation is so deficient as to be apparent to the opposing party. See generally Restatement (Second) of Judgments §42(1)(e):

(1) A person is not bound by a judgment for or against a party who purports to represent him if:

(e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

At the Supreme Court, the federal due process challenge was avoided by the majority of the Court. Footnote 5 of Justice Thomas's opinion states: "We need not address the due process claim . . . because it is outside the scope of the question presented in this Court."¹⁴⁷ Nonetheless, Justice Thomas's additional observations in that same footnote may be some indication of his predisposition. He wrote that the due process challenge is made "in spite of the Chancery Court's express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class."¹⁴⁸

Justice Ginsburg, in her partial dissent, offered an extensive analysis of the due process question, providing a roadmap for a possible constitutional collateral attack on the Delaware judgment. Justice Ginsburg first observed that the Supreme Court's decision in *Kremer v Chemical Const. Corp.*¹⁴⁹ provides a limited exception to 28 USC §1738 in that a "state may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a

¹⁴⁷ *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct 873, 880 n.5 (1996).

¹⁴⁸ *Id.* The Court drops a Cf. citation to *Prezant v De Angelis*, 636 A2d 915, 923 and quotes language from the decision: "[The] constitutional requirement [of adequacy of representation] is embodied in [Delaware] Rule 23(a)(4), which requires that the named plaintiff 'fairly and adequately protect the interests of the class'".

¹⁴⁹ 456 US 461 (1982).

judgment."¹⁵⁰ She emphasized that due process requires more than notice and an opportunity to opt-out -- both of which were available in the Delaware proceeding -- and stressed that adequate representation is critical in "class action lawsuits, emphatically including those resolved by settlement."¹⁵¹

What Justice Ginsburg did not say-- and what the Supreme Court heretofore has left unanswered -- is whether state rulings on these matters can be second-guessed in a collateral attack. Justice Ginsburg's characterization of the Delaware court proceedings in this case -- "the order contains no discussion of the adequacy of the representatives" and the settlement approval "contains only boilerplate language" on adequacy of representation -- suggests that she would open the door for some kind of limited check on this issue by the federal court.

C. *The Case Law Backdrop*

The leading case permitting a collateral attack for a failure of adequate representation of class members is the well-known early case of *Hansberry v Lee*.¹⁵² (Indeed, plaintiffs have suggested that *Matsushita* is the modern corporate equivalent of *Hansberry*.) In *Hansberry*, a first action was brought in Illinois state court by white landowners to enforce a racially

¹⁵⁰ 116 S Ct at 888, quoting *Kremer*, 456 US at 482.

¹⁵¹ 116 S Ct at 890.

¹⁵² 311 US 32 (1940).

restrictive real property covenant¹⁵³ "in behalf of themselves and all others similarly situated."¹⁵⁴ The parties stipulated - - falsely, as it turned out -- that the requisite number of property owners had signed the covenant, thus making the covenant enforceable.¹⁵⁵ Without definitive procedures, like those under Rule 23, in place, the court in the initial action did not formally designate the action as a class suit and made no finding of adequate representation.¹⁵⁶ In a second action in Illinois state court, the Illinois courts held that the plaintiff in that action -- the husband of the plaintiff in the first action and a denominated member of the original class -- was precluded from challenging the stipulation in the first suit.¹⁵⁷ The Supreme

¹⁵³ See *Burke v Kleiman*, 277 Ill App 519 (1934).

¹⁵⁴ In its decision reviewing the later action, the Supreme Court described the plaintiffs in this action as seeking "to compel performance of the agreement in behalf of themselves and all others similarly situated, noting that they "did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind the others." 311 US 32 (1940) at 44.

¹⁵⁵ Citation and more description

¹⁵⁶ Although it is sometimes suggested that *Hansberry* may also have been a case about inadequate notice, it should be noted that the class member who challenged the original judgment was the husband of the plaintiff who brought the initial action. See *Lee v Hansberry*, 372 Ill 369, 372 24 NE 37, 39 (1939).

Although as a "common law" class action there were no formal procedures by which class members could object or opt-out, the *Hansberry* class, as property owners subscribing to a common covenant, might well fall within a modern Rule 23 (b) (1) (A) class, where opt-outs would not be required. Adequate representation would, of course, still have to be found.

¹⁵⁷ *Lee v Hansberry*, 372 Ill 369, 24 NE 37 (1939).

Court of the United States reversed, holding that the "procedure and the course of litigation"¹⁵⁸ were insufficient to satisfy the requirements of a class suit. The Court acknowledged that members of a class not present as parties to the litigation may be bound by a judgment "where they are in fact adequately represented by parties who are present,"¹⁵⁹ but that "due process" requires that the "procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound."¹⁶⁰

Hansberry presents a good fit for the *Kremer*-type exception, which has generally been interpreted to mean that a judgment need not be recognized if there was no full and fair opportunity to raise objections in the initial proceeding. However, it offers little guidance as to the obligations of parties who forego the opportunity to challenge adequacy in the initial proceeding and later attempt to raise a collateral challenge.¹⁶¹ Unlike in

¹⁵⁸ 311 US at 42.

¹⁵⁹ 311 US at 43.

¹⁶⁰ 311 US at 42. See also *Richards v Jefferson County, Alabama*, 116 S Ct 1761 (1996) (where taxpayer plaintiffs in state action did not sue on behalf of a class and the judgment in the action did not purport to bind taxpayers who were non-parties, other taxpayer plaintiffs in federal action were not bound by prior judgment).

¹⁶¹ The Reporter's Note to Restatement (Second) of Judgments §42, Comment e discusses the black letter rule in §42(d) that a person is not bound by a class representative if there is such a divergence of interest that he could not fairly represent them. The Reporter's Note, citing *Hansberry v Lee*, states: "The finding of divergence of interest may, of course, be made on collateral challenge." However, as we have explained above, *Hansberry* itself was a case where there were no procedures available in the

Hansberry, various procedural safeguards for the protection of absent class members were present in the Delaware *Matsushita* proceedings, including formal notice, the right to opt out, and an opportunity to object.¹⁶² (Indeed, objections to the settlement on the basis of possible collusion, unfairness of the settlement, and lack of adequate representation had been raised by several members of the class in the Delaware proceedings, although not by the Epstein plaintiffs.)¹⁶³

Recent cases dealing with collateral attacks on federal class action settlements appear to have limited *Hansberry* in precisely this way. Collateral attacks based on inadequacy of representation have not been looked on favorably;¹⁶⁴ and the few

direct proceeding to challenge the alleged conflict between class members.

¹⁶² See *In re MCA, Inc. Shareholders Litigation*, 1993 WL 43024 (Del Ch) and Chancery Court Rule 23, Del. C. Ann.

¹⁶³ The Epstein Briefs to the Ninth Circuit on remand insist that the objectors did not raise "adequate representation claims at all," see Plaintiffs-Appellants' Reply Brief on Class Action Issues at 18, and that "no one focused on adequate representation apart from collusion," Plaintiffs-Appellants' Opening Brief at 22. However, *Matsushita* states in its Briefs that the arguments raised by Plaintiffs on remand -- that the settlement was collusive, that defendants were attempting to purchase immunity for a meager sum, that the Delaware plaintiffs were unable to litigate the federal claims and did not understand their true value, that the settlement benefitted the wrong class, that the Delaware representatives did not provide adequate representation, and that the settlement was designed solely to eradicate the federal claims which the Delaware representatives grossly undervalued, see Defendants' Brief in Response at 7-8 -- were actually litigated by the Delaware objectors, see Defendants' Sur-Reply Brief at 6.

¹⁶⁴ See, e.g., *Thompson v Edward D. Jones & Co.*, 992 F2d 187 (8th Cir 1993) (holding that plaintiff, who received notice of earlier class settlement and failed to opt-out, was bound by

courts that have permitted a limited attack denied the merits of challenge itself.¹⁶⁵ A restrictive approach to collateral attack is justified in this context because federal class action procedures in effect appoint the court as guardian of the interests of absent class members to ensure adequate representation and the fairness of any settlement.¹⁶⁶ When an opportunity to object to or opt-out of the settlement is available, there is little reason to offer a party who refuses to avail itself of these opportunities to collaterally attack the settlement; in effect to permit a collateral attack in these

settlement agreement and stating that plaintiff should have objected to the settlement or sought direct relief from the judgment in the earlier action); *King v South Central Bell Telephone and Telegraph Co.*, 790 F2d 524, 530 (6th Cir 1986) ("King had retained her own counsel and there was ample time to challenge the class action settlement by appeal. She chose to attack the settlement collaterally and should not now complain of any inadequacy in representation.").

¹⁶⁵ See, e.g., *In re Agent Orange Product Liability Litigation*, 996 F2d 1425, 1437 (2d Cir 1993), cert denied, 114 S Ct 1126 (1994) (rejecting challenges to class action settlement on adequacy of representation grounds due to conflict between present and future claimants); *Brown v Ticor Title Ins. Co.*, 982 F2d 386, 390-91 (9th Cir 1992), cert. dismissed, 506 US 953 (1994) ("to avoid the binding effect of a prior class action based on class counsel's error, a party must show not only that the prior representative failed to prosecute or defend the action with due diligence and reasonable prudence, but also that the opposing party was on notice of facts making that failure apparent.")

Compare *Gonzales v Cassidy*, 474 F2d 67 (5th Cir 1973) (collateral attack on class action judgment for inadequate representation permitted where class representative secured a better monetary deal for himself than for rest of the class; behavior of class representative after certification gave rise to challenge to adequacy of representation).

¹⁶⁶ See generally Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv L Rev 589 (1974).

circumstances is to offer a post-settlement election opt-out and to undermine the ability to settle an action altogether. Moreover, if the court is assessing adequacy at the time the settlement is approved (rather than as a predictor as the start of litigation, as in class actions that go to trial), it has information about the quality of representation at all relevant times.¹⁶⁷ Finally, the federal appellate courts are available to check abuses by the trial courts with respect to determinations of adequacy of representation.¹⁶⁸

¹⁶⁷ Collateral attack, as a post-judgment election to opt out, makes more sense in the non-settlement context, where the adequacy of representation may be satisfied at the time of class certification but the later conduct of the representative is actual evidence of "inadequate representation." This was the situation in *Gonzales v Cassidy*, 474 F2d 67 (5th Cir 1973), where the court permitted a collateral attack on a class action judgment. The first court's finding of adequacy of representation did not preclude the second court from evaluating the quality of representation with respect to conduct that took place after the initial certification.

¹⁶⁸ Federal review is conducted under the abuse of discretion standard. See, e.g., *DeGrace v Rumsfeld*, 614 F2d 796, 810 n.12 (1st Cir 1980) ("Where, as here, the district court has not operated under any erroneous legal premises in its application of the requirements of Fed.R.Civ.P. 23, its decision will be overturned only upon a showing that it abused its discretion."); *Harris v Peabody*, 611 F2d 543 (5th Cir 1980) (holding that district court did not abuse its discretion in dismissing party as inadequate representative). See also Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §11.60 (3d ed 1992) (noting "when the district court simultaneously certifies a class and approves a settlement, the court [of] appeal 'will more rigorously scrutinize the [d]istrict court's analysis of the fairness, reasonableness and adequacy of both the negotiation process and the proposed settlement.'") (quoting *In re Drexel Burnham Lambert Group, Inc.*, 960 F2d 285, 292 (2d Cir 1992)).

State courts also seem to conduct a similar review. See *Prezant v De Angelis*, 636 A2d 915, 925 (Del 1993) (stating that challenges to settlements based on noncompliance with Rule 23 requirements will be reviewed only for abuse of discretion).

For the view that adequacy of representation by the attorney

The equities with respect to collateral attack are somewhat different in the *Matsushita*-type settlement, where a state court is releasing exclusive federal claims. As we have shown, there are institutional process deficiencies in global state court settlement -- deficiencies that our proposals seeks to remedy. However, in the absence of the safeguards we recommend, potential dangers in the settlement process pervade the adequacy issue itself. The weaker bargaining power of the state class attorney, the defendant's ability to engage in plaintiff shopping, the state court's reduced ability to obtain information and evaluate the fairness of the settlement, and (in future cases) the undermining of the lead plaintiff scheme of the Federal Securities Litigation Reform Act¹⁶⁹ make the process of

should be reviewed de novo, see *In re Asbestos Litig. (Ahern)*, 90 F.3d 963, 1009 (5th Cir 1996) (Smith, J. dissenting) ("We apply a mixed standard of review to a district court's determination that a conflict of interest does not exist. The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review de novo."); *FDIC v United States Fire Ins. Co.*, 50 F3d 1304, 1311 (5th Cir 1995) ('we interpret the controlling ethical norms governing professional conduct as we would any other source of law') (quoting [*In re Dresser Indus., Inc.*], 972 F2d [540] at 543); see also *id* (stating that 'we will perform a 'careful examination,' or de novo review, of the district court's application of the relevant rules of attorney conduct'))).

¹⁶⁹ As noted earlier, the federal interests are even stronger with the enactment of the Private Securities Reform Litigation Act. The new Act expresses a Congressional policy that certain shareholders are the appropriate representatives of shareholders asserting federal claims under the Securities Acts. If the state class plaintiffs and their attorneys are other than those designated in the Congressional scheme, the state court's determination that there has been adequate representation may be incompatible with the federal scheme. In such a situation, the effect of the state court judgment in a subsequent action in

determining adequacy potentially suspect.

If no collateral review is permitted in federal court, federal plaintiffs with exclusive federal claims are forced to raise their objections to the propriety of a state court global settlement in a forum not of their choice and without jurisdiction over the claims themselves. The federal plaintiffs are subject to the vagaries of the procedures and quality of adjudication in the state courts for resolution of the adequacy of representation and fairness of the settlement with respect to claims which Congress has prohibited the states from entertaining. While theoretically any due process violation can be remedied through direct Supreme Court review, as a practical matter the check is not a meaningful one.

On the other side, however, stand the strong policies with respect to finality of and respect to state court adjudication. By definition, in a court-approved settlement, a state court has determined that the class is adequately represented and that the settlement is fair. Moreover, the state court has at least implicitly determined that it is a proper forum for entertaining a global settlement encompassing exclusive federal claims. Allowing a collateral attack undermines the very authority of the state that is recognized in *Matsushita*. The finality of the

federal court may be captured by the provision in Restatement Second of Judgments §86(2): A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of that issue in question.

state's settlement authority is impaired because there is always the threat of subsequent litigation, however weak the merits of the challenge. Indeed, dissatisfied class members may be encouraged not to appear in the state court proceeding, but instead to raise their objections in a collateral attack in federal court. In effect, class members can decide where they have the best opportunity to make the challenge, and engage in their own kind of forum-shopping. The result will be a significantly reduced incentive for defendants to enter into a global state class settlement because there will always be the threat of additional litigation to challenge the settlement, even if the attack does not ultimately succeed on the merits.

To be sure, global settlements may still take place in federal court. But forcing all state claims related to federal securities matters into federal court -- even when the federal claims are weak and might not have been asserted in the ordinary course --- is hardly an attractive alternative.¹⁷⁰ Multiple settlements with different groups of plaintiffs' counsel are also a possibility, but this alternative encourages duplicative litigation and substantially increases the transaction costs of settlements.

These concerns were sufficiently strong to lead two federal courts to reject federal collateral challenges to global

¹⁷⁰ It would appear that the Supreme Court decision in *Matsushita* also found this alternative unappealing when it agreed that state courts may approve settlements releasing exclusive federal claims.

settlements approved by state courts. In *Nottingham* and *Grimes*, the First and Third Circuits found that class members whose federal claims were released by a Delaware settlement (even one without opt-out rights) could not collaterally attack the propriety of class certification or fairness of the settlement in a subsequent federal action.¹⁷¹ In *Nottingham*, the class members seeking to make a collateral attack had objected to the settlement (as well as its non-opt-out nature) in the Delaware Chancery Court and appealed the approval of the settlement to the Delaware Supreme Court. In *Grimes*, one of the class members appeared in Delaware and challenged both the adequacy of the representation and the fairness of the settlement; the other class member did not appear or raise objections in the state proceedings.¹⁷²

As a matter of due process, the decisions in *Nottingham* and *Grimes* might be considered stronger cases for permitting collateral attack than *Matsushita* because the state court

¹⁷¹ See, e.g., *Nottingham Partners v Trans-Lux Corporation*, 925 F2d 29 (1st Cir 1991) ("If, having objected and been overruled, appellants were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief"); *Grimes v Vitalink Communications Corp.*, 17 F3d 1553 (3d Cir 1994) (where class objector pursued adequacy of representation and disclosures issues through the Delaware court system and to the Supreme Court, objector and other represented plaintiffs are barred from relitigating those issues in later-filed federal action). See generally Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv L Rev 589 (1974).

¹⁷² See *Grimes v Vitalink Communications Corp.*, 17 F3d 1553 (3d Cir 1994).

settlements in those cases did not provide for opt-outs by class members.¹⁷³ But *Matsushita* is unique in another way in that the settlement is invoked to preclude federal claims brought as a *federal class action*.¹⁷⁴ Although class members in *Matsushita* were able to opt out of the Delaware settlement class, their likely alternative was a small-stakes individual federal action (only if the number of individual opt-outs was extremely high

¹⁷³ Because both state actions were suits for injunctive relief, the Delaware courts ruled that no opt out was necessary, despite the fact that the releases included federal claims for money damages. See also *King v South Cent. Bell Telephone & Telegraph*, 790 F2d 524 (6th Cir 1986) (class member in non-opt out Title VII settlement in federal court precluded from raising adequacy of representation in collateral federal action).

For a contrary view of when opt-outs are required by due process for out-of-state plaintiffs, see *Colt Indus. Shareholder Litig.*, 565 NYS2d 755, 762 (NY 1991) (holding out-of-state plaintiff must be given an opportunity to opt out of predominately equitable action whose settlement "purported to extinguish . . . rights to bring an action in damages in another jurisdiction"). See also Note, *State Settlement Class Actions that Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 Colum L Rev 1765, 1783-1791 (1995) (summarizing the different approaches taken in Delaware and New York).

¹⁷⁴ In *Nottingham*, a pending individual securities action brought on behalf of a large individual shareholder was held precluded by the non-opt out Delaware class settlement; in *Grimes*, a later-filed federal action brought on behalf of two class members was held barred and the ability to challenge the adequacy of representation was denied.

The federal district court in *Matsushita* denied class certification and dismissed the claim, but on appeal the Ninth Circuit ruled that the action was properly brought as a class action. Thus in its posture before the Ninth Circuit, the question is whether the Delaware settlement can appropriately release a federal class claim within the federal court's exclusive jurisdiction. It should also be noted that several plaintiffs did opt out of the Delaware settlement class, and those claims may proceed in federal court irrespective of the settlement.

would a federal class action be viable in these circumstances).¹⁷⁵ To the extent that a federal court is precluded from re-examining the issue of the adequacy of representation, the state court controls who "represents" federal class members with respect to the settlement of exclusive federal claims as well as the due process dimensions of such representation. In light of the Federal Securities Litigation Reform Act, federal plaintiffs have an even stronger claim that federal relitigation of the adequacy issue should be permitted; the revised federal standard for the appointment of a "lead plaintiff" to represent class members and to select class counsel now conflicts with the standards used by state courts for the selection of class representative and class counsel.¹⁷⁶ The

¹⁷⁵ See *Prezant v De Angelis*, 636 A2d 915, 924 (Del 1994) (opt-out rights "are infrequently used and usually economically impracticable"). It might be possible to argue that where a federal class has been certified in federal court, it is appropriate for the federal class plaintiffs to "opt-out the entire federal class" from the state class settlement. Such a course of action was unavailable to the Epstein plaintiffs in *Matsushita* because class certification had been denied.

Such an approach would moot our proposal in the limited situation where a federal class is actually certified prior to approval of a state settlement. Although we recommend guidelines that would generally lead state courts to refrain from settling federal claims under these circumstances, we do not give the federal action an "absolute right to proceed." A "federal opt-out class" has the danger of offering unrestrained incentives to "spoiler" federal claims.

¹⁷⁶ The argument looks to the Restatement (Second) of Judgments §86(2) exception to preclusion which permits relitigation if preclusion would undermine federal interests. The point here would be that a federal court must be free to relitigate the issue of whether class representatives in the state class action were "adequate" to release federal class claims in light of the new Federal Securities Act provisions of who is an adequate representative of securities claims brought in

argument is that the federal court must be free to decide for itself whether state court representatives were "adequate" to release the claims of a potential federal class.¹⁷⁷

Even here, however, broad collateral attacks are unwarranted. Just as we would reject a strict rule that the new Securities Litigation Reform Act prevents state court settlements from releasing exclusively federal claims, we do not believe it justifies relitigation of state determinations of adequacy made in the course of a global settlement. The more appropriate reform is to ensure that state and federal courts share settlement authority in class actions involving federal and state claims, and that approval of global settlements by state courts fairly and adequately take account of federal interests. Our proposal offers a set of procedures and safeguards to accomplish both of these objectives.

The proposals we advance for adoption by state courts when there is a global settlement releasing federal claims has the advantage of reducing the need for a subsequent federal collateral attack. As discussed above, the arguments for federal collateral attack in a *Matsushita*-type settlement are based on

federal court.

¹⁷⁷ Similar concerns have led some commentators to argue that federal law should operate as a check on domestic preclusion law more generally, either because domestic preclusion law "chooses" federal law or because federal law supervenes as a matter of federal common law. See Stephen B. Burbank, *Interjurisdictional Preclusion*, *supra* note 38, at 799-800; William V. Luneberg, *The Opportunity to be Heard and the Doctrines of Preclusion: Federal Limits on State Law*, 31 *Vill L Rev* 81, 140-42 (1986).

the need to accommodate federal interests which carry with them important due process implications. By providing state courts considering global settlements with a fuller range of information and by enhancing their sensitivity to the federal interests involved in the release of exclusive federal claims, the quality of state settlement procedures is substantially improved. Objecting class members (and their counsel) have incentives to participate in the state proceedings, and as a result, state courts are able to make a realistic appraisal of the competing state and federal interests and accordingly determine the proper scope of a particular settlement.¹⁷⁸ Under such a regime, no collateral attack is warranted. State courts would engage in a genuine balancing of state and federal interests as part of the settlement process, and the settlement approval, like other state court determinations, is entitled to full faith and credit.

D. A Return to Matsushita

The analysis above does not directly speak to the issue of whether a collateral attack is appropriate in *Matsushita* itself. On the one hand, as a state court global settlement, it carries process deficiencies which we have previously discussed. On the other hand, the Federal Securities Reform Act was not yet in place and thus no express federal standard of "adequacy"

¹⁷⁸ The propriety of releasing the federal claim should be reviewable by the Supreme Court of the United States either as a matter of due process or because an improper release of a federal claim raises an issue of federal law.

determined who should represent a federal class on a federal securities claim.

But even before reaching the question of whether an exception to 28 USC §1738 is warranted on due process grounds, there is an initial question as to what rule of preclusion applies under §1738 as a matter of Delaware law. Under §1738, Delaware law, as an initial matter, determines whether or not a collateral attack is available.

In *Prezant v De Angelis*¹⁷⁹, the Delaware Supreme Court spoke to the collateral attack point in a somewhat different context. In reversing the Chancery Court's approval of a state class settlement releasing federal claims, the Delaware Supreme Court ruled that there must be an explicit determination that the class representatives adequately represent the class before a settlement can be approved. Indeed, it instructed the Chancery Court to articulate on the record its findings regarding the satisfaction of the Rule 23 criteria and supporting reasoning in order to facilitate possible appellate review. The Court further commented:

Such a determination will include a finding that their due process right to adequate representation has in fact been satisfied. *Defendants will be protected from a possible collateral attack on the validity of the settlement by a class member claiming the settlement did not meet the requirements of Rule 23.* This protection will help insure that the final release sought by defendants in settlements is indeed final.¹⁸⁰

¹⁷⁹ 636 A2d 915 (Del Ch. 1994)

¹⁸⁰ 636 A2d at 925. (Emphasis added)

Thus, to the extent that a state court approving a class settlement made no findings of adequate representation, it seems that Delaware law would itself permit a collateral attack on due process grounds.

The Vice Chancellor's opinion approving the *Matsushita* settlement does not discuss adequate representation per se. It says only that the settlement is "fair," "in the best interests of the class" and that there is "no evidence of collusion."¹⁸¹ Even though the Delaware Supreme Court (four months prior to *Prezant*) approved the settlement in a one paragraph conclusory order¹⁸², the Vice Chancellor's opinion on its face seems to fail to satisfy the requirement to articulate in the record its findings regarding adequacy and supporting reasoning. Whether this suffices as a matter of Delaware law to preclude collateral attack raises at least a plausible issue for consideration.¹⁸³

¹⁸¹ *In re MCA, Inc. Shareholders Litig.*, 1993 WL 43024 (Del Ch). The order and final judgment approving the settlement also contain general language referring to the adequacy of representation, but do not articulate specific findings regarding the satisfaction of the Rule 23 criteria and supporting reasoning. See Order and Final Judgment, *In re MCA, Inc. Shareholders Litigation* (on file with authors)

¹⁸² *In re MCA, Inc. Shareholders Litig.*, 633 A2d 370 (Del 1993).

¹⁸³ The majority opinion in *Matsushita* did forecast Delaware preclusion law to this degree: it stated that the "Delaware Supreme Court has further manifested its understanding that when the Court of Chancery approves a global release of claims, its settlement judgment should preclude on-going or future federal court litigation of any released claims." 116 S Ct at _____. However, since the due process issue was not addressed at the Supreme Court, Delaware's law on the particular point of if and when adequacy of representation may be challenged collaterally was never explored.

The more likely focus on remand, however, is the argument suggested by Justice Ginsburg -- that *federal* due process provides the basis for a collateral attack on the state court settlement.¹⁸⁴ The Epstein plaintiffs contend in their briefs that they fall within the *Kremer* exception because the Delaware settlement lacked due process, and in particular, failed to ensure that the class representatives met the adequate representation requirement. They rely specifically, as did Justice Ginsburg, on Section 42(d) of the Restatement (Second) of Judgments, that represented persons may avoid being bound when the "representative could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked."¹⁸⁵

Because they did not appear or participate in the Delaware proceedings, the federal plaintiffs contend that they may now challenge the adequacy of representation. As to the Chancery Court's determination that the Delaware plaintiffs "as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and

Note also that the Delaware Supreme Court's affirmed the settlement in the *Matsushita* case on September 21, 1993; its decision in *Prezant*, requiring an express finding of adequate representation in the chancery court, was rendered on February 3, 1994. If Delaware law was not changed by *Prezant*, the mere affirmance of the MCA settlement by the Delaware Supreme Court might not prevent the collateral attack that *Prezant* implies; alternatively, a 60(b) proceeding in Delaware might be possible.

¹⁸⁴ *Matsushita Elec. Indus. Co. v Epstein*, 116 S Ct at (1996) (Ginsburg, J. concurring and dissenting in part)

¹⁸⁵ Restatement (Second) of Judgments §42 (d).

that the maintenance of this action as a class action meets all the requirements of Rule 23 (a) and (b) (3) of the Court of Chancery,"¹⁸⁶ they argue that no deference is due¹⁸⁷ because there was no serious consideration or litigation of the issue. The broad role for collateral attack advocated by the federal plaintiffs in *Matsushita* -- i.e. that by not participating in the state settlement proceedings they are free to relitigate the issue of adequate representation and fairness of the settlement in their own action -- claims too much and would make unworkable the very settlement authority that the Supreme Court approved in *Matsushita*. To be sure, *Hansberry* and *Kremer* leave open to plaintiffs to show that the state procedures in place -- or lack of them-- were deficient as a matter of due process to assure adequacy of representation and fairness of the settlement. But this may be a difficult position for the Epstein plaintiffs to maintain. Whatever the failings of the settlement or the actual determination of adequacy of representation, the Epstein plaintiffs appear to have had alternative routes to attack the

¹⁸⁶ Citation to Record at SR 613 is noted in Defendants' Brief at p. 9. The Epstein plaintiffs resist any characterization of the Delaware Chancery Court order as a "finding" because there is no evidence in the record as to the adequacy of representation and because the order referring to the adequacy of representation was prepared for the Vice Chancellor's signature by Delaware counsel. See Plaintiffs-Appellants' Reply Brief at 8-9.

¹⁸⁷ See Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §11.64 (3d ed 1992) (arguing that collateral "relief should be granted . . . only in those rare circumstances in which the complaining party can demonstrate that the defect in proceedings was basic to the validity of the class judgment").

Delaware settlement. Even if the opt-route was unlikely to have preserved the viability of a future federal class, they were free (as other objectors did) to appear and object at the fairness hearing before the Chancery Court, seek further review from the Delaware Supreme Court and ultimately (however unlikely) the Supreme Court of the United States. Indeed, even after the settlement was approved, they might have attempted to open up the judgment in a 60(b) proceeding in Delaware.¹⁸⁸

Collateral attacks should not serve to factually review state court findings. But they can offer a check on the structures of state court settlements. As discussed before, class action settlement structures must afford class members a fair opportunity to object to the adequacy of representation and to the substantive fairness of a settlement. To the extent they do not, collateral attack is permitted.

In the context of global state court settlements encompassing exclusive federal claims, however, settlement structures must go further: they must also take account of the federal interests. Our proposals set forth in Part III are designed to assure that state courts are sensitive to these interests. While we do not suggest that state courts must adopt our proposal in all its details to insulate their global settlements against collateral attack, they must take reasonable measures to protect the federal interests -- and guard against the deficiencies of global state court settlements that we

¹⁸⁸ See De R CH CT 60.

discussed in Part II -- in fashioning their settlement structures.

In *Matsushita*, the Delaware state courts showed some sensitivity to the impact of the release of the federal claims before it. The Chancery Court rejected the first settlement, noting that a state court must "carefully scrutinize" a global settlement in considering whether to release exclusive federal claims; when the second settlement was proposed, the court noted its reluctance "to take any action that could be construed as attempting to interfere with the appellate process in the federal courts;" and it is those facts that class certification had been denied in the federal action, that the federal claims had been dismissed, and that a motion for expedited appeal to the Ninth Circuit had not been granted appear to have been important factors in the Chancery Court's decision to approve the second settlement proposal.

On the other hand, several factors were present in the *Matsushita* settlement that should lead a state court, according to our proposal, to refrain from entertaining a global settlement: the federal claims were actively pursued while the state claims lay dormant; the defendant failed to have the state claims dismissed, even after the Chancery Court characterized them as extremely weak; the circumstances of the first settlement proposal suggest that it was intended to hijack the federal claims; the settlement proposal provided for relatively high attorneys' fees (which the court reduced by 74%); and given the

different nature of the claims, a settlement of just the state court claims was, in principle, possible.¹⁸⁹

If the Federal Securities Litigation Reform Act had applied to the *Matsushita* claims, the Delaware global settlement would evidence sufficient disregard for the role of a federal plaintiff and of the federal interest to be subject to collateral attack. In *Matsushita* as it is presented to the Ninth Circuit, however, though the issue is close, we would not permit a collateral attack under federal law (though, as noted, we believe Delaware state law might well allow for collateral attack in these circumstances).

Apart from the facts the Delaware courts showed some sensitivity to federal interests and that the Federal Securities Litigation Reform Act was not in place, our conclusion is reinforced by the Epstein plaintiffs strategic decision not to present their case to the Delaware courts.¹⁹⁰ As we discussed, it is state courts, in the first instance, that should decide whether or not to approve a global settlement and that proper incentives should be provided to all parties to supply

¹⁸⁹ See text accompanying notes 8 to 31.

¹⁹⁰ The choice may be the result of a decision like *Nottingham*, discussed supra note ___, where the First Circuit Court of Appeals applied principles of issue preclusion to preclude a collateral attack on a no opt-out Delaware global settlement where the federal class plaintiffs had previously raised their objections to the settlement in state court. Of course, the Third Circuit, in *Grimes*, discussed supra note ___, had also barred a collateral attack in a situation where the federal plaintiff had made no objection in the state proceeding and where no opt-out right had been afforded.

information that the state courts need to make this decision. If federal plaintiffs fear that state courts do not take sufficient account of the federal interests, they should appear in state court and argue their case -- rather than sit back and attack a state court settlement collaterally. Contrary to some federal courts who seem to regard objections by federal plaintiffs in the state proceedings as a reason not to permit collateral attack,¹⁹¹ we view such an appearance as a prerequisite for collateral attack¹⁹² -- at least as long as such an appearance

¹⁹¹ *Nottingham Partners v Trans-Lux Corp.*, 925 F2d 29, 33 (1st Cir 1991) ("If having objected and been overruled, appellant were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief.").

¹⁹² The requirement is similar to a rule of exhaustion of remedies. The requirement we impose is not unlike the exhaustion of state remedies doctrine developed by the Supreme Court in the context of habeas corpus, see Charles Alan Wright, *Law of Federal Courts* 354 (West 1994), and later written into the statute, see 28 USC §2254(b)(c).

In the context of judicial review of administrative proceedings, exhaustion of "legislative" or "administrative" remedies may be required before certain federal actions can be brought; however, invocation of a state "judicial remedy" will result in preclusion by virtue of 28 USC 1738, see *Kremer v Chemical Construction Corp.*, 456 US 470-71 (1982). *Kremer* itself leaves open an exception to preclusion if there was not a "full and fair opportunity" to litigate the claim or issue, 456 US at 480-81, but adds that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. *Id.* at 481.

Our position is consistent with *Kremer* in leaving open a structural challenge to state proceedings that fail to consider federal interests.

in not clearly futile.¹⁹³ By forcing federal plaintiffs to raise objections in state courts, but permitting them to attack the settlement collaterally if the structures that state courts employ in settling federal claims do not reasonably protect the federal interests, state courts will have both the requisite information and an added incentive to abstain from settling exclusive federal claims when federal interests so require.

V. IMPLICATIONS FOR CLASS ACTION SETTLEMENTS MORE GENERALLY

The proposals we have urged for adoption by state courts are directed to the particular problems of global state court class settlements that release exclusive federal claims. We do not offer these procedures as a remedy for the alleged defects of class action litigation¹⁹⁴ or the claimed process deficiencies in other types of class settlements, such as mass torts¹⁹⁵ or voucher-based settlements.¹⁹⁶ Various reforms, such as

¹⁹³ Of course, raising objections to a proposed state court global settlement can only be a prerequisite for a collateral attack if the federal plaintiffs receive timely notice of the proposed settlement.

¹⁹⁴ Many of the problems of class action practice are surveyed by Professor Edward Cooper, Reporter to the Advisory Committee on Civil Rules, in Cooper, *Rule 23: Challenges to the Rulemaking Power*, 71 NYU L Rev 13 (1996). See also Brian Wolfman and Alan B Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 NYU L Rev 439 (1996).

¹⁹⁵ See, e.g., John C. Coffee, Jr. *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum L Rev 1343 (1995).

¹⁹⁶ See, e.g., Note, *In-Kind Class Action Settlements*, 109 Harv L Rev 810 (1996).

improvements with respect to notice to absent class members,¹⁹⁷ broader opt-out rights,¹⁹⁸ and availability of interlocutory appeal of certification decisions have been advocated to improve the class action,¹⁹⁹ and jurisdiction over absent class members and requirements of opt-out rights in class actions providing limited monetary relief will be issues before the Supreme Court this term.²⁰⁰ More particularly, in the wake of debate over

¹⁹⁷ Empirical data relating to notice questions is included in *FJC Study*, supra note 62.

¹⁹⁸ See, e.g., George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 *NYU L Rev* 258 (1996).

¹⁹⁹ Proposed amendment Fed R Civil P 23(f) permits appeals from an order granting or denying class certification at the discretion of the court of appeals.

²⁰⁰ See *Adams v. Robertson*, 676 So2d 1265, 676 So 2d 1265 (Ala 1995), cert granted. In *Adams*, the Alabama Supreme Court approved a settlement in a nationwide state class action on behalf of cancer policy insureds who claimed that their insurer fraudulently caused them to switch cancer insurance policies. The settlement provided for the restitution of benefits available under the prior policies, elimination of monetary limits in the new policies, and reinstatement of lapsed policies without evidence of insurability or payment of back premiums, and released all other claims related to the insurance exchange program. Prior to any settlement being reached, a nationwide class was certified under Alabama Rule 23 (b)(1)(B) and 23(b)(2) without any provision for class members to opt out of the class in order to bring individual lawsuits. When a settlement was reached several months later, court-approved notice was sent to class members, providing class members with a right to object to the settlement at a fairness hearing but not to opt out of the settlement because opt-outs "would create a risk of a race to the courthouse by those permitted to opt-out in an effort to obtain for themselves alone the entirety of the constitutionally permissible punitive recovery in one or a few individual actions". The Alabama Supreme Court affirmed the trial court's findings that no opt-out right was required in this type of class action, and that out-of-state plaintiff class members/objections need not have "minimum contacts" with the State of Alabama in order to be bound

abuses in the class action settlement practice, class action settlements have been a subject of consideration in the Advisory Committee on Civil Rules, and a revision of Rule 23 has been circulated for notice and comment²⁰¹. Two recent and important Court of Appeals decisions -- in reaching conflicting decisions about the criteria that must be satisfied in order to have a class action settlement -- have sharpened that debate.²⁰² The Third Circuit's opinion in *Georgine v Amchem Products*,²⁰³ held that the certification requirements of Rule 23 -- both those of 23(a) and 23(b)(3) -- are to be applied to class action settlements in the same way as they would be if the case were to be litigated. Under that standard, the court held that class counsel could not adequately represent both extant and latent claimants in futures-only asbestos action.²⁰⁴ Several months later, in *In re Asbestos Litigation (Ahern)*²⁰⁵ the Fifth Circuit approved a class settlement of future asbestos victims and expressed its view that the negotiation process and the

by the class action settlement.

²⁰¹ See Fed R Civ P 23 (Proposed Draft, Apr. 1996).

²⁰² Compare *Georgine v Amchem Products Corp.*, 83 F3d 610 (3d Cir 1996) (reversing district court approval of certification and holding that settlement classes must meet the same requirements as classes certified for trial) with *In re Asbestos Litigation (Ahern)*, 90 F3d 963 (5th Cir 1996) (holding that the settlement should be considered when determining whether the requirements of FRCP 23 have been met).

²⁰³ 83 F3d 610 (3d Cir 1996)

²⁰⁴ *Id.* at 630-31.

²⁰⁵ 90 F3d 963 (1996).

settlement itself were important factors in determining whether certification of a class in a settlement context was proper. Both of the cases purported to be a construction of the present Rule 23, although there are obviously due process concerns about adequate representation lurking in the background. The issue is likely to be settled shortly by the Supreme Court of the United States, which recently granted certiorari in *Georgine*.²⁰⁶

The Advisory Committee on Civil Rules and the Standing Committee on Rules of Practice and Procedure have proposed an amendment to Rule 23 for comment, which addresses the issue of settlement classes.²⁰⁷ The present Rule 23, in subdivision (b), describes the three types of actions²⁰⁸ that may be maintained as class actions, provided the prerequisites listed in subdivision (a) are met.²⁰⁹ The proposed amendment adds a (b)(3) settlement class as an additional category (4) along with these requirements:

(4) the parties to a settlement request

²⁰⁶ See *Amchem Products v Windsor*, No 96-270.

²⁰⁷ Fed R Civ P 23 (b) (4) (Proposed Draft, Apr. 1996)

²⁰⁸ Fed R Civ P 23 b(1), (b) (2), and (b) (3)

²⁰⁹ FRCP 23(a) lists four 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.

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.²¹⁰

No other criteria or procedures are included in the rule, and no specific guidelines for the approval of class action settlements are set forth.²¹¹ As others have suggested,²¹² more definite guidance is required.

As we have shown by our close examination of the particular type of class settlement involved in *Matsushita*, different species of class actions may call for specialized procedures that are not necessarily trans-substantive. At the same time, some of the deficiencies we identify in class settlement practice, such as plaintiff-shopping and the conflicts of interest between class counsel and class members permeate class settlements more generally. Ultimately, we believe that class action settlements require special attention and that more detailed procedures for class settlements ought to be included as part of the Rule 23 agenda. We hope that our proposals here will serve as a model for continuing efforts in that direction.

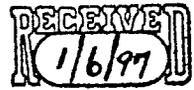
²¹⁰ Fed R Civ P 23 (b) (4) (Proposed Draft, Apr. 1996).

²¹¹ Indeed, there is no express provision in the proposed Rule which authorizes opt-out rights in settlement classes, but the Advisory Committee Note indicates that members of settlement classes do have that right. The omission is criticized by John C. Coffee, Jr., *Class Action "Reform": Advisory Committee Bombshell*, *NYLJ* (May 21, 1996) at 1 col. 1.

²¹² See particularly William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 *Cornell L Rev* 837 (1995).

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96-CV-096

January 3, 1997

VIA FEDERAL EXPRESS

Advisory Committee on the Federal Rules
of Civil Procedure
c/o Peter G. McCabe, Secretary
Committee on the Practice and Procedures of
the Judicial Conference of the United States
1 Columbus Circle, N.E.
Washington, D.C. 20544

Re: Public Hearings on Proposed Rules Amendments to the Federal
Rules of Civil Procedure

Dear Members of the Advisory Committee:

I sought to comment on the proposed changes to Rule 23 before I was aware of the activity of my partners, Mel Weiss and Len Simon at Milberg Weiss Bershad Hynes & Lerach LLP, in the same vein. Perhaps my rush to comment was the result of having practiced elsewhere for the bulk of nearly 20 years, concentrating on antitrust franchise class action, products class actions, as well as securities fraud class actions. Having now read their submissions, I want to express my concurrence with the views of my partners. Their experience confirms mine. More important, I share their understated fears that the proposed amendments will inject further roadblocks to justice and deterrence, and create a balance in favor of the rich and powerful.

Rather than repeat and reemphasize their statements, I only request that the Committee keeps focused, in its conscientious deliberations, on the fact that the class action device was fashioned, in substantial part, to fill a void in the court system that for so long had neglected the rights of our poorer or less able citizens to equal access and justice under the law. The proposal in subparagraph 23(b)(3)(F) to weigh on individual class member's "probable relief," against "the costs and burdens of class litigation," is a direct affront to such 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 -- as Marie Antoinette trivialized the predicament of her fellow countrymen's hunger by declaring, "Let them eat cake!" The long term implication for our society may be a bitter citizenry required to seek redress, indeed vengeance, elsewhere.

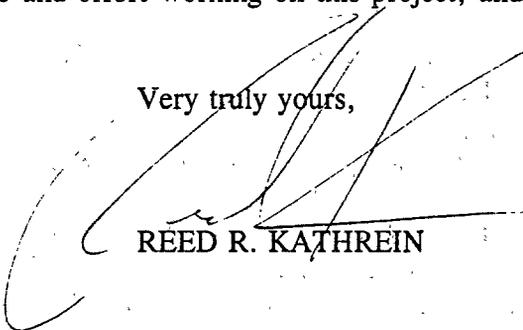
The class action device is still evolving. While often criticized, such criticism is belied by the facts and tools already available to the courts. See 1 Herbert Newberg & Alba Conte, Newberg On Class Actions §5.45-5.57 (3rd ed. 1992). To tinker with it now would stop its evolution and begin the process anew. Throwing out the bathwater of precedent without proof that it is poisoned ignores the ability of our federal judges to mold the law to reflect our society's needs. As recognized by Justice Oliver Wendell Holmes, our court system is resourceful, flexible, tunable and in tune with the times:

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and a last a new form, from the grounds to which they have been transplanted.

Oliver Wendell Holmes, The Common Law 32 (Harvard University Press ed., 1963) (1881). The class action device developed under Rule 23 has served our society well for the past 30 years, and should be allowed to continue this development, unhampered by the addition of new language requiring years of protracted litigation to develop and possibly resulting in consequences unforeseen.

I thank you for your time and effort working on this project, and for considering my comments.

Very truly yours,



REED R. KATHREIN

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GUY ROUNSAVILLE, JR.
Executive Vice President
Chief Counsel and
Secretary

420 Montgomery Street
San Francisco, CA 94163

February 20, 1997

Honorable Paul V. Niemeyer, Chairman, and Members of the
Advisory Committee on Civil Rules
c/o Peter G. McCabe, Esquire
Committee of Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, District of Columbia 20002

Re: Supplemental Comments Regarding Proposed Rule 23 Revisions

Dear Judge Niemeyer and Members of the Advisory Committee:

Wells Fargo appreciates the opportunity to submit the following supplemental comments regarding proposed Rule 23 revisions.

These comments are directed at so called "consumer class actions," namely that type of class action in which there are insignificant distributions to class members, substantial transactional costs, and very high attorneys' fees paid to class counsel. The purpose of the consumer class action is generally to recover a fully disclosed price (or a small fraction of the price) paid in a competitive market for a product or service. Wells Fargo, like virtually all other financial institutions, has been served with many such class actions in recent years, and the following comments are based primarily upon the experience of defending these actions.

I. When Considering Consumer Class Action Reform, It is Important to Know How They Work In The Real World

A. The Consumer Class Actions Filed Against Wells Fargo in the Last Year

To give the Committee a sense of the volume and type of consumer class action now commonly filed, following are the consumer class actions filed against Wells Fargo since January 1, 1996. Many of these actions have also been filed against other banks throughout the country. The fees attacked are fully disclosed and are, I believe, at market rates.

1. Alfich v. Wells Fargo (Arizona Superior Court, County of Maricopa, No. CV 962240, Filed December 13, 1996). This action alleges that Wells Fargo improperly charges a fee when residential loans are paid off or refinanced.

2. Bell v. Wells Fargo, et al (Los Angeles Superior Court, No. BC 148433, Filed April 19, 1996). This action is filed against numerous title insurers and lenders for alleged overcharges

in the price charged for a Trustee's Sale Guarantee, which in California real estate practice is commonly issued during a foreclosure.

3. Briseno v. Wells Fargo (U.S.D.C. Northern District of Ill, No. 97 C 0237, Filed in January, 1997). This action alleges that Wells Fargo collects excessive amounts for residential mortgage escrow accounts.

4. Dombrowski v. Wells Fargo (Circuit Court of Cook County, Illinois, No. 96 CH 5474, Filed July 10, 1996). This action alleges the unlawful collection of late charges on residential mortgages.

5. Kehoe v. Wells Fargo (San Diego Superior Court, No. 696473, Filed January 19, 1996). This action alleges that Wells Fargo charges an excessive premium on the insurance purchased by Wells Fargo when the borrower allows home insurance to lapse. [In prior years, Wells Fargo (and First Interstate, which Wells Fargo recently purchased) had five such forced placed insurance class actions arising out of auto loans].

6. Laughman v. Wells Fargo (U.S.D.C. Northern District of Ill, No. 96 C 0925, Filed September 16, 1996). This action alleges that a lease provision in the Bank's auto lease does not provide sufficiently clear disclosure as required by Regulation M of the Federal Reserve Board.

7. Murphy v. Wells Fargo (San Francisco Superior Court, No. 978007, Filed August 15, 1996). This action alleges that Wells Fargo improperly handles levies served on accounts in which social security checks are directly deposited, and that the fee charged by the Bank to process such levies is too high.

8. Seaman v. Wells Fargo (San Francisco Superior Court, No. 984497, Filed February 5, 1997). This action alleges that Wells Fargo charges improper or excessive fees in connection with the administration of private trusts.

9. Wachman v. Republic Mortgage Insurance, et al (Superior Court of New Jersey, Camden County, No. L 5807-95, Filed November 1, 1996). This action challenges Wells Fargo's right to collect premiums on private mortgage insurance on residential loans.

B. How a Consumer Class Action Works in the Real World -- The Winners and Losers in the California Credit Card Class Action Litigation

Numerous class actions attacking the credit card late and overlimit fee were filed in California (and throughout the country) starting in the mid-80's. It is informative to review the course of this litigation against Wells Fargo because (1) plaintiff's counsel cite (as they did before this Committee in San Francisco) the litigation as a "good" class action; because (2) the litigation, in fact, shows the harm and irrationality of consumer class actions; and because (3) the litigation demonstrates how attorneys disproportionately gain from the process.

Honorable Paul V. Niemeyer
February 20, 1997
Page 3

The first credit card class action against Wells Fargo, Beasley v Wells Fargo, was filed in 1986. At that time, Wells Fargo's late fee was 5% of the minimum amount owed, with a minimum of \$3.00 and a maximum of \$5.00. The average late fee charged by Wells Fargo during the prior years was \$3.18. The overlimit fee was \$10.00.

Throughout the 1980's, more than 50% of the California credit card market was controlled by out of state credit card issuers, whose late and overlimit fees were not subject to California law. The typical late fee charged by out of state issuers was several times higher than Wells Fargo's. The Discover Card, CitiCorp and other large out of state issuers had a late fee up to \$15.00. In the Beasley trial, the judge ruled that evidence of the late and overlimit fees charged by out of state issuers in the California market was irrelevant and inadmissible.

The legal theory asserted in Beasley was that Wells Fargo's fees were unlawful liquidated damages under California law. The case went to trial in 1989, and sought to recover damages back to 1982. The resolution of the case turned on a jury's determination of Wells Fargo's "costs" for administering and collecting the late and overlimit fees. Under California law, plaintiffs alleged, the late and overlimit fees could not exceed these costs.

Wells Fargo's accounting experts testified that under generally accepting accounting principles, the Bank's costs exceeded the revenues collected. The plaintiff's expert, using a marginal cost accounting theory, testified that the Bank's revenues exceeded its costs by about 20%. The trial court gave the jury no guidance regarding which cost accounting theory was appropriate. The jury split the difference exactly in the middle, and returned a verdict of approximately \$5 million against Wells Fargo.¹

Prior to final judgment in Beasley, Wells Fargo had agreed to settle the Crocker credit card class action, which Wells Fargo had assumed responsibility for in 1986 after acquiring Crocker, by using the same formula for damage calculation that might be used in the Beasley case. This meant that when the Beasley judgment became final in 1992, Wells Fargo was required to distribute, with interest, \$11,852,730 to credit card holders who had paid late and overlimit fees from 1982 to 1989.

A total of \$6 million was distributed to over 1,000,000 customers whose "damages" and addresses were known from old computer tapes. The average distribution to these customers was \$5.31. Another \$2.5 million was paid out by crediting existing customers with an average of \$3.94. Because few eligible class members made a claim for the remaining "damages", there was a residue of \$3.3 million. Wells Fargo argued this amount should be distributed in some fashion to its customers. Class counsel urged that the funds be distributed to consumer action

¹ Wells Fargo unsuccessfully argued before trial that plaintiffs were not entitled to a jury trial under California law. On appeal, the California Court of Appeal agreed, but held that Wells Fargo had not been prejudiced by having the cost accounting data and issues resolved by the jury. Based upon post trial interviews of jurors, it was clear that they had had, understandably, a very difficult time dealing with the cost accounting issues in the case.
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groups, and the court distributed the funds as follows: Consumers Union (\$750,000); Consumers Action (\$750,000); California Voluntary Legal Services Project (\$750,000); Consumer Credit Counselors (\$750,000) and San Francisco Neighborhood Legal Assistance (\$300,000).

Plaintiffs attorneys were awarded \$3.16 million in attorney fees (and have subsequently received more than \$100,000 in fees for "monitoring" the settlement). Wells Fargo's direct costs of administering the distributions to class members were \$732,938, and its own attorneys' fees were approximately \$2 million.

In 1990, plaintiff's counsel filed a second class action identical to Beasley to recover late and overlimit fees for the post 1989 period. In addition, Wells Fargo assumed responsibility for two additional Beasley type class actions through acquisitions. These cases settled in the early 1990's as follows: Case I -- payment to the class of \$238,000, plus payment of attorneys' fees to plaintiffs of \$102,000; Case II -- payment to the class of approximately \$2,550,000 plus attorneys' fees of approximately \$166,268; Case III -- payment to the class of \$425,000 plus attorneys' fees of \$507,000. In each of these three cases, the settlement was distributed by a reduction in Wells Fargo's late charge by 50 cents for the length of time it took to pay off the settlement. Wells Fargo's own attorneys' fees in these three cases were approximately \$1.5 million. The costs of administering the settlements is not available.

Consumer class actions making the same Beasley type allegations were filed against virtually all credit card issuers in California.² In 1994, the California legislature enacted a statute permitting a \$15 credit card late charge, but for Wells Fargo, it was too late. Wells Fargo's credit card product relocated to Arizona to avoid the adverse litigation environment in California.

So, in summary,³ following is the scorecard of where things stand after the credit card class action litigation against Wells Fargo:

Consumers: Millions of credit card customers received payment, on average, of under \$10.00. Some consumer activist groups, and legal services programs, who were not parties to the litigation, received sizable donations. The late fee has been raised from an average of \$3.18 (maximum of \$5.00) to \$20.00, which is the current market rate nationally. The overlimit fee has doubled to \$20.00, which is also market rate. Consumers are paying far more than when the litigation started.

² Through acquisition of First Interstate, Wells Fargo has also assumed responsibility for two additional class actions. In Hitz v FICAL, the distribution of approximately \$7 million will begin shortly to class members. Plaintiffs' counsel is currently demanding \$2 million to settle the case of Andrews v FICAL. Plaintiffs' counsel--one of the two lawyers who brought Beasley--will collect well in excess of \$1 million for these two cases.

³ Stewart Baird of Wells Fargo provided certain cost data on Wells Fargo class actions during the hearing in San Francisco. The data presented mixed the results of various class actions filed against the bank. The above data is from consumer class actions filed against the bank and should be used in place of the oral testimony presented.

The State of California: The State's job seekers and economy are losers, because of job loss as a result of the litigation.

The Attorneys: The attorneys are big winners. All of the credit card class actions against Wells Fargo were filed by the same two partner law firm. **This firm has been paid approximately \$4 million to date in the cases they filed against Wells Fargo.** The amount they collected on the many other credit card class actions they filed against other issuers is not known to Wells Fargo. Wells Fargo paid approximately \$3.5 in attorneys fees to its own attorneys.

Wells Fargo: In addition to paying the above sums, Wells Fargo paid direct administrative costs of well over \$1 million. Thousands of employee hours were spent defending these suits and administering the settlements.

It is readily apparent that the real winners from the credit card class actions were the lawyers, and selected consumer groups (several of which have close working relationships with the plaintiff's attorneys). Everybody else lost. If the California credit card litigation is the best plaintiffs' counsel can find to support consumer class actions, there is nothing to commend the procedure.

C. Consumer Class Actions Are Highly Inefficient Ad Hoc Retroactive Attempts To Regulate Price

In Wells Fargo's experience, the consumer class action procedure is, in effect, an attempt to retroactively reduce the price paid for goods or services. Government price regulation under the best of circumstances is a difficult and usually unsuccessful endeavor, but ad hoc retroactive price regulation by lawsuit is particularly poor public policy. As can be seen from the credit card class action litigation in California, such actions inevitably ignore market place reality. Price regulation by lawsuit is an extraordinarily inept substitute for price regulation by competitive markets.

D. Class Action Litigation Imposes Enormous Costs

Class actions are enormously expensive litigation. Attorneys' fees for the defendant will often exceed \$1 million per case. The class action process itself adds substantial expense. It currently costs approximately \$20,000 for one class action notice published in the Wall Street Journal. To publish one notice in local newspapers covering California now costs approximately \$31,000. Many class actions require several notices to the class, and sometimes the same notice must be published several different times.

The administrative costs of making distributions to class members is very expensive as well. Often computer technicians must write custom software to extract data from existing databases. In addition, plaintiff's attorneys are increasingly seeking fee recovery under private

attorney general concepts which are added to the costs of settlements. Plaintiff's fee requests almost always seek multipliers on top of the highest hourly rates charged in the locale (even though plaintiffs attorneys almost never engage in an hourly rate practice).

Wells Fargo has incurred in recent years, not including the settlements themselves, millions of dollars in legal costs associated with class actions. There is no reason to think that Wells Fargo's experience is atypical. The costs of class action litigation imposes an enormous burden on the economy. Most of these costs are ultimately passed on to consumers.

It was suggested during the San Francisco hearing that class actions costs were not as serious as claimed because these costs were covered by insurance, as if insurance were free. In most cases, insurance is not available, but even when it is, the future costs of insurance premiums reflects claims experience.

The extreme costs of class actions divert resources from customer services, product development, and job creation, and impair shareholder value. It is important to keep these extreme costs in mind when one is measuring the alleged benefits of consumer class actions.

E. Consumer Class Actions Generally Do Not Help The Indigent

Some proponents of the class action process testified in San Francisco that it was inappropriate to criticize the insignificant distributions of consumer class actions because many class distributions help the indigent, for whom even a \$5.00 distribution is economically significant. In Wells Fargo's experience, members of consumer class actions typically have not been indigent. They have been persons with sufficient credit to qualify for a loan, establish a private trust or receive some other banking service. The plaintiff who filed a class action against Wells Fargo over his forced placed auto insurance had received his auto loan to buy a Mercedes. The plaintiff, Alice Beasley, who first sued over the credit card late fee is a lawyer. Consumer class action distributions in Wells Fargo's experience have generally gone to the economically stable or even affluent, for whom an insignificant distribution is not sufficiently meaningful to justify the extreme costs of the class action procedure.

F. Prospective Injunctive Relief is Far Superior Judicial Policy for Consumer Class Actions

Most of the consumer class actions filed against Wells Fargo attack a fee or a business practice used throughout the banking industry. The complaint will contend that the bank is misinterpreting a particular regulation or that a particular fee common in the industry violates, for whatever reason, one of the many consumer protection statutes now existent. The fee or practice being challenged is almost always fully disclosed to consumers and has been agreed to by them for many years prior to the commencement of the class action.

When a consumer class action is filed, it seeks a one time, lump sum return of revenue collections spread out over many prior years. The size of the threatened damages is often so large that it dominates all aspects of the litigation, and, as a practical matter, restricts the ability of a prudent defendant to have a trial on the merits. Defendants are, in effect, denied due process. The cases are more like shake downs, giving rise to the appropriately scorned practice of insignificant distributions for consumers and millions for class counsel. And, because the merits are rarely reached, there never is a final judicial review of the alleged unlawful practice or charge.

Some of the downsides reviewed above of consumer class actions would be avoided if they were generally limited to actions for prospective injunctive relief. In such actions, the disputed business practice can be fully litigated, and the defendant (and industry in which the defendant exists) can be guided by whatever judicial decrees are issued. Class counsel are still free to seek attorney fees for their endeavors. Large settlements, which are, in effect, a charge imposed on current customers to make a payment to former customers, are avoided.

II. This Committee's Proposed Revisions to Rule 23 Are a Minimal First Step Towards Reversing the Law of Unintended Consequences

Because there is no indication that drafters of the 1966 revisions to Rule 23 anticipated current class action practice, there was much discussion at the San Francisco hearing regarding the Law of Unintended Consequences, both from supporters of current class action practice (Professor Arthur Miller) and its critics (Lewis Goldfarb from Chrysler).

The statement of John Frank, a distinguished member of the Committee when the 1966 revisions were adopted, submitted (but not orally presented) at the San Francisco hearing is a detailed, dramatic account of the Committee's deliberations leading up to the adoption of the 1966 revisions to Rule 23. Mr. Frank's statement is essential reading for an understanding of the 1966 revisions, and, in particular, the creation of the "opt out" provision. Mr. Frank makes it crystal clear that the current consumer class action process was never contemplated by the Committee and would not have been favored by the Committee.

Professor Miller's testimony in San Francisco regarding the intent of the drafters of the current Rule 23 was as astonishing as it was colorful. He stated that he served as "Assistant Reporter" to Benjamin Kaplan, and that this position allowed him unique and intimate insight into Professor's Kaplan's and this Committee's intent when drafting the 1966 revisions. Indeed, Professor Miller even suggested that he had himself done some drafting of the 1966 revisions "in the bowels of the ferry on the way to Martha's Vineyard." Professor Miller then noted that he subsequently served as a member of the Committee and as its Reporter. After citing this extensive background with the Committee's work, Professor Miller testified as follows with respect intent of the 1966 revisions:

“So if anybody can claim to have been there at creation, I was there at creation. If anyone can claim to tell you what was in Ben’s mind or the committee’s mind, John [Frank] comes close, but I yield not to John. Nothing was in the committee’s mind. And anyone who tells you that wondrous things were going on with direct relevance to the year 1997, it’s good story telling. Just put yourself back in the 1960 to ‘63 [era]. Nothing was going on. There were a few antitrust cases, a few securities cases. ...You did not have the consumer legislation. And the Rule was not thought of as having the kind of application that it now has.” (Hearing Transcript, page 64).

In less colorful but equally revealing language, Professor Kaplan gives a detailed discussion of the Committee’s intent leading up to the 1966 revisions in his article, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967). It appears that the primary concern of the Committee, in Professor Kaplan’s view, was to correct ambiguities in the “true”, “hybrid” and “specious” class definitions which existed in the prior Rule 23. “The class action process...had become snarled”, Professor Kaplan writes, by these overly “abstract” concepts that were difficult to put into practice (81 Harv. L. Rev. at p. 385).

Professor Kaplan’s article nowhere expresses the desire of the Committee to usher in a new era of consumer class actions. As Professor Kaplan makes clear, the Committee fashioned the 1966 revisions to Rule 23 by looking backward, not forward. He writes: “Approaching rule 23..., the Committee strove to sort out the factual situations or patterns that had reoccurred in class actions and appeared with varying degrees of convincingness to justify treatment of the class *in solido*. The revised rule was written upon the framework thus revealed...” (81 Harv. L. Rev. at p. 386). By looking back at class action fact patterns the Committee was not focused on consumer class actions, because such actions did not then exist. One looks in vain for reported consumer class actions prior to 1966.

The 1966 revisions to Rule 23 have had a profound impact on civil litigation in this country and have imposed enormous costs on the economy. They have revolutionized federal civil practice and have stimulated liberalized class actions procedures in virtually every state. None of this was intended by the 1966 revisions.

Professor Kaplan is quoted in the Willging study as having made the following wise observation: “...it will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23.” 71 N.Y.U.L. Rev. 74, 79 (1996).

In view of this history, it is appropriate for the Committee to go “back to the drawing board” and examine Rule 23 in light of present class action experience. The proposed revisions presently being considered are a minimal first step in gaining control over the class action process as it works in the real world of everyday litigation. The proposals should be adopted, and more needs to be done, as indicated below.

III. Wells Fargo Supports the Interlocutory Appeal Provision in Rule 23(f)

The certifiability of the class is the whole ball game in any "opt out" class action litigation. Certification determines if the defendant faces a few individual claims, usually asserting small damages, or a huge multi-million dollar claim which can threaten its financial stability. Once a class is certified, the pressure on a defendant to settle is extreme. 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.

IV. Wells Fargo Supports the "Just Ain't Worth It" Provision in Rule (3)(b)(f)

Because, as set forth above and in Wells Fargo's prior statement, it has been our experience that consumer class actions do not benefit consumers, and because of the extreme costs and coercive effects of consumer class actions, Wells Fargo strongly supports this proposed Rule. However, the Rule is broadly worded, and clearer language is needed in the Rule's comments to give it strength. Wells Fargo has previously submitted proposed modifications of the comments. In the alternative, Wells Fargo also supports the proposed revisions to the comments proposed by William Montgomery of State Farm

V. Wells Fargo Strongly Supports an "Opt In" Requirement for Consumer Class Actions

Wells Fargo supports the proposal of John Frank (submitted in his statement to you) for an "opt in" procedure in consumer class actions. Mr. Frank's written statement makes it clear that the current "opt out" procedure was never intended by the Committee to apply to consumer class actions with thousands of class members. As a practical matter, the "opt out" procedure allows the claim of a single or several disgruntled consumers to be converted into highly costly, burdensome and coercive litigation. 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. There is no reason to presume that consumers who, years prior, voluntarily purchased goods or services in a competitive market want to inflict upon themselves the expense of litigation to recover a portion of the price paid. We should presume rational consumers, aware of the true costs of such litigation, would not want it. It does not make sense to permit such costly and significant litigation without at least some minimal expression of interest from each of the persons on whose behalf the action is allegedly filed.

VI. The Class Action Device Is Not Justifiable on Grounds of Deterrence

Supporters of the consumer class actions seek to justify class actions on grounds that they deter improper conduct. There is no evidence to suggest that consumer class actions deter undesirable business conduct. There is evidence which suggests that class actions deter legitimate business activity. When litigation costs in a line of business reach a certain level,

firms will exit that business because they cannot make a profit. Consumers are thus denied the option of that competitor in the market place.

The statement of William A. Montgomery of State Farm submitted in San Francisco cites the following portion of the Committee's minutes properly rejecting a "public interest" justification for a Rule 23 action:

"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 authorized 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."

Preliminary Draft, pp. 25-26.

VII. It Is Important to Be Mindful of the Limited Scope of The Willging Study

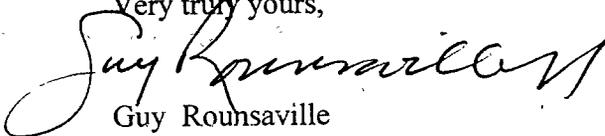
The Willging study collects empirical data on terminated class actions (most of which were securities class actions, which have since been the subject of reform legislation) for a two year period in four federal districts. However, beyond the collection of empirical data, the study was not intended to examine the coercive effects of consumer class actions. The authors explicitly noted: "Whether the size of the potential liability affected settlement was beyond the scope of the current study." 71 N.Y.L.R. 74, 177 (emphasis added). As many speakers stated during the San Francisco hearing, the size of potential liability, in the real world, is often the ISSUE in class action litigation and is the source of its coercive effects and abuse.

Accordingly, the Willging study cannot be used to draw ultimate conclusions about the cause of class action abuse or appropriate cures. This observation is not intended in any way to fault the study, but merely to observe its scope. Because of its limited scope, it is not appropriate for supporters of consumer class actions, citing the study, to dismiss the wide-spread criticisms of consumer class actions as merely "anecdotal".

Honorable Paul V. Niemeyer
February 20, 1997
Page 11

Thank you very much for giving Wells Fargo the opportunity to submit its views on this important subject. Thank you for the consideration of our views. Please let me know if there is any additional information that Wells Fargo could provide to assist the work of the Committee.

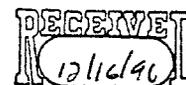
Very truly yours,

A handwritten signature in cursive script that reads "Guy Rounsaville". The signature is fluid and somewhat stylized, with a large initial "G" and a long, sweeping tail.

Guy Rounsaville

1910

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Office of General Counsel

Richard S. Paul
Senior Vice President and General Counsel
Direct Dial: (203) 968-4380

96-CV-129

December 10, 1996

Secretary,
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Secretary:

I am writing on behalf of Xerox Corporation in support of the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure and to urge at least one additional modification of Rule 23 not proposed by the Committee. Specifically, I believe the recent experience of Xerox with a massive class action involving alleged consumer overcharges fully supports the need for the proposed Section 23(f) and additionally demonstrates the need for Rule 23 (b)(3) to be further amended.

In early 1994, Xerox entered into a settlement of a class action brought in the U.S. District Court for the Eastern District of Texas. That lawsuit was settled on terms that included a \$5 million payment to the named plaintiffs, \$225 million in awards that may be used by class members as a credit against the price of Xerox products purchased by class members in the future, and attorney fees of \$30 million. As more fully described below, Xerox was bludgeoned by an erroneous court ruling into settling this case. Had class certification not been precipitously granted or had an appeal of the District Court's Order properly been permitted, it is extremely unlikely that Xerox would have agreed to a settlement remotely similar to the one it was constrained to accept.

The class action in Texas involved claims by customers who, according to plaintiffs, paid more than a billion dollars in overcharges to Xerox for the purchase of Xerox service and equipment. Plaintiffs' principal claim was that Xerox unlawfully "refused to deal" with Independent Service Organizations ("ISOs") by not selling them parts for certain Xerox equipment. The theory of injury advanced by plaintiffs was that Xerox customers ("end-users") were damaged because Xerox' refusal to deal with the ISOs



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lessened potential competition that would have been provided by ISOs. This potential competition, they claimed, would have forced Xerox to reduce its prices to each member of the end-user class and that the aggregate price decrease would have exceeded \$1 billion.

In February 1992 (less than a year after the lawsuit was filed), the district court granted plaintiffs' motion for class certification in its entirety¹, notwithstanding that plaintiffs offered no basis for showing how they would establish the fact of injury to the end-user class by common proof. In June 1993, Xerox filed a petition for writ of mandamus to the Fifth Circuit to direct the district court to vacate its class certification order with respect to the end-user class. Xerox' challenge to the class certification was based principally on the requirement of Rule 23(b)(3) that common questions predominate over individual ones. Plaintiffs potential competition theory of indirect injury created no presumption of injury as to each member of the end-user class, the plaintiffs presented no means for establishing classwide injury through common proof, and the district court made no determination that the plaintiffs had offered any means of establishing classwide injury through common proof. The district court nonetheless certified the end-user class and thereby converted Rule 23 into an instrument for legalized blackmail against Xerox.

After holding oral argument in an opinion dated August 25, 1993, the Court of Appeals for the Fifth Circuit denied the petition for mandamus with the following comments:

"After carefully reviewing the briefs and record, the court is not convinced that the end-user class of plaintiffs will ultimately be able to sustain its burden to prove classwide impact from the alleged monopolization and tying practices of Xerox It also appears that a certification of interlocutory appeal under 28 U.S.C. Section 1292(b) could have permitted a judicially efficient review of the issue of class certification.

"Nevertheless, because mandamus is an extraordinary remedy and cannot be used for a substitute for appeal even when hardship may result from delay or an unnecessary trial . . . we cannot conclude that the district court's decision warranted that reproof."

"Consequently, the petition for mandamus is Denied." (citations omitted).

¹ In March 1992 Xerox filed a motion for reconsideration or, in the alternative, for certification pursuant to 28 U.S.C. Section 1292(b). The district court denied this motion without opinion on April 8, 1993.



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A copy of the entire opinion of the Fifth Circuit is attached.

In light of the comments of the 5th Circuit, on August 27, 1993, Xerox again moved the district court for certification of the court's end-user class certification order. Astonishingly, on October 6, 1993, the district court denied Xerox' request for a Section 1292(b) appeal. The result was that an erroneous class certification decision had imposed irreparable injury upon Xerox. 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. The proposed amendment of Rule 23 by the addition of section (f) would have had a major impact on this abuse of the class action process.

In addition to expanding the opportunity for appellate review, I believe that subsection (b)(3) of Rule 23 should include at least one more factor pertinent to the required finding by the court that common questions of law and fact predominate and that a class action is superior to other methods of adjudication.

Specifically, I recommend that subsection (b)(3) be amended to include the following:

“(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.”

Appropriate consideration of this factor will help insure that the predominance requirement of Rule 23 is adhered to and that plaintiffs will be held to the burden of proof imposed upon them by subsection (b)(3).

Xerox strongly supports the reduction of class action abuses and I hope that my comments are helpful in this cause.

Sincerely yours,



Richard S. Paul

Attachment



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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS

FILED

AUG 25 1993

RICHARD E. WINDHORST, JR.
CLERK

No. 93-4934

IN RE XEROX CORPORATION,

Petitioner,

Order Re Petition for Writ of Mandamus

Before JONES, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

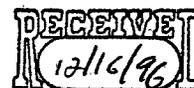
After carefully reviewing the briefs and record, the court is not convinced that the end user class of plaintiffs will ultimately be able to sustain its burden to prove classwide impact from the alleged monopolization and tying practices of Xerox. See State of Alabama v. Bluebird Body Co., Inc., 573 F.2d 309 (5th Cir. 1978); Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368, 378-79 (5th Cir. 1977). It also appears that a certification of interlocutory appeal under 28 U.S.C. § 1292(b) could have permitted a judicially efficient review of the issue of class certification.

Nevertheless, because mandamus is an extraordinary remedy and cannot be used for a substitute for appeal "even when hardship may result from delay or an unnecessary trial," In re Ramu Corp., 903 F.2d 312, at 318 (citing Schlagenhauf v. Holder, 379 U.S. 104,

110 (1964)), we cannot conclude that the district court's decision warranted that reproof.

Consequently, the petition for mandamus is DENIED.

#1913



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CPC
International

Legal Department

96-CV-130

FAX: (201) 894-2193

December 12, 1996

Secretary, Committee on Rules
of Civil Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D. C. 20544

Re: Proposed Amendments to Federal
Rule of Procedure 23

Dear Sir:

I appreciate this opportunity to express a personal view regarding the intelligently conceived and carefully drafted reform proposals presently before your Committee. My concern is that if not pressed further these measures, useful as they are, may offer no more than symptomatic relief for a long-festering problem. The problem, with Rule 23 (b) (3) in particular, is that it has become seriously threatening alike to litigants, judicial dockets and the good name of the legal profession. I fear that the abuses that have flourished since the 1966 amendments, if not adequately addressed, could well prove detrimental to the legitimate purposes of the class action remedy as well as to the victims in mass tort cases which are now funneled through a Rule 23 process to which they are ill-adapted.

The abuses of Rule 23 (b) (3) are well known. In general, they capitalize on the unwieldiness, snowballing costs and liability potential that combine to make trial on the merits impracticable. This fact, together with the impact on Federal court dockets, greases the skids for extortionate settlements. I see three at least analytically distinct types of cases that lend themselves to these abuses:

- Hair-trigger, often unsubstantiated claims, usually based on a reported event (accident, pending grand jury investigation, etc.), which the courts often routinely certify without regard to their lack of substance in order to bring about docket-clearing settlements. In view of the sheer size of the defendant's potential exposure, it usually elects not to stay the course and test the merits of the claim.

- Artificial or “gotcha” controversies which involve very substantial aggregate amounts but are not monetarily meaningful to the individual class members and are driven by the prospect of class action counsel’s fees for their “private attorneys general” services.
- Mass tort cases and others where liability may be genuine and massive although common issues, such as impact and damages, do not predominate and class action manageability is highly questionable; the court, faced with a staggering caseload burden, nevertheless contrives to certify in order to promote a settlement.

In short, we are confronted with a case of the “better highway syndrome”. Unfortunately, much of the unwanted traffic seems to be driven more by the desire for legal fees than it is by redress for class members. Moreover, the District Courts, obliged to police this traffic, have frequently resorted to expedients that are legally dubious, unfair to the defendants and sometimes short-change the class membership, all in order to force-feed settlements. Such injurious distortions of the legal process are the iatrogenic diseases of our profession.

Rather than concentrating attention (and controversy) on measures such as the pre-certification approval of settlement classes, which are at best symptomatic in their effects and may in fact encourage more unwanted traffic, I believe these reforms should reflect a more fundamental reassessment of the proper scope of Rule 23 (b)(3). Should our Federal judiciary be made to serve as so many small claims courts in cases seeking monetary relief which, however sizable in the aggregate, is inconsequential from an individual standpoint? At the other extreme, are our district courts the appropriate forum for assessing and apportioning the sometimes staggering damages involved in mass tort cases, which typically cover a broad and unmanageable spectrum of distinctive causation, injury and damage issues?

The primary office of our courts, after all, is the resolution of legal issues, and the primary need of litigants is a timely opportunity for such a resolution on the merits of those issues. In order to assure that these basic purposes are not jeopardized in an effort to accommodate class action claims under Rule 23 (b) (3), I suggest that a screening mechanism or mechanisms be considered that would allow the courts to eliminate improper cases at an early stage, before the threat of greased-skid certification and enormous financial exposure effectively mandates a non-merits based settlement. Such mechanisms could also be used to identify early on those cases where a declaratory adjudication and/or equitable relief under Rule 23 (b) (2) rather than individually insignificant monetary relief under (b) (3) would be appropriate. (In such cases, court-awarded fees for plaintiffs’ counsel, while necessary and appropriate, would not drive the litigation and would be measured by services rendered in correcting a wrong rather than ostensible benefit to the putative class of “injured” parties.)

In addition, in those cases, typically of the mass tort variety, where injuries, however caused, are serious and widespread, a threshold mini-trial procedure could be provided (pace Eisen) to assess the probable merits of a defendant’s liability prior to class certification. Based on the outcome, the court could direct trial of a test case, require needed merits discovery or, if

appropriate, dismiss the class action as improvidently brought. In cases where liability has been adjudicated, an extra-judicial tribunal may be needed to handle claims assessment.

Over the years since Rule 23 was amended, there has been no dearth of reform proposals that could accommodate this need to purge Rule 23 (b) (3) of its abuses, including those mentioned in the 1972 Report and Recommendations of the American College of Trial Lawyers. Without purporting to cover all of the possibilities worth considering, I offer the following as illustrative of the types of mechanisms that could be incorporated in the Rule:

- The Committee's proposed additional Rule 23 (b) (3) criterion (F), "whether the probable relief to individual class members justifies the costs and burdens of class litigation," could be amplified to specifically authorize courts to dismiss class actions under this subsection 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.
- Alternatively, the courts could be empowered in cases where the cost-benefit ratio is unfavorable to bind as class members only those prospective members who have been actually notified and who opt in (provisionally) and do not opt out finally in the event of a settlement or pending adjudication. Such a procedure might facilitate an early assessment by the parties of the scope and potential certifiability of the claim as a class action, thereby fostering reality-based settlements.
- In mass tort cases, i.e., cases involving substantial and numerous injuries arising out of a common set of operative facts, special provision could be made for probable liability rulings as a prerequisite to class certification, as mentioned above. Considering such a reform clearly involves a major assessment in its own right, which could include matters such as the need for an administrative tribunal to handle the damage and pay-out issues which plague such cases. Moreover, funding such damage payments using Workers Compensation as a model might be worth considering. A system under which companies are bankrupted without fully compensating the victims leaves something to be desired.

I hope that the foregoing suggestions will be useful as your Committee proceeds with its very important deliberations.

Sincerely,

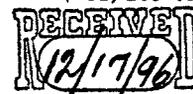

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96-CV-131

December 12, 1996

Secretary of the Committee
of Rules of Practice and Procedure
Administrative Office of the U. S. Courts
Washington, DC 20544

Re: Proposed changes to Federal Rule 23

Dear Sir or Madam:

I am writing to register my opposition to the proposed change to Federal Rule 23 which would authorize District Judges to certify a class action "for settlement only."

I suggest that the proposed change in the Rule would do little to yield fair results for any potential plaintiff class. To the contrary, precisely because proposed Paragraph (b) (4) would permit the certification of a class where the same class would not be certifiable for trial, one-sided, unfair settlements would more likely result.

There is certainly no impetus for the defendant in such a case to make a "fair" settlement offer: the defendant knows with certainty (and by definition) that the action could never proceed to trial as a class action, so any leverage enjoyed by a traditional plaintiff class is reduced nearly to zero.

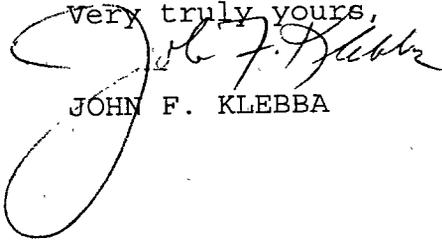
Contrariwise, the defendant is free to cap its liability if it can only convince the class counsel and the court that the settlement is a good one.

Finally, although I do not believe that this is currently a problem worthy of note, the proposed rule change may encourage class counsel to settle, even at unfavorable terms for the class, simply in order to recover attorneys' fees which would not be forthcoming if there were no settlement (an eventuality which would be a virtual certainty where the defendant has no fear of the case proceeding to trial).

Secretary of the Committee of
Rules of Practice and Procedure
December 12, 1996
Page 2

For the above reasons, I urge that the proposed rule change be abandoned.

Very truly yours,



JOHN F. KLEBBA

JFK/bsr

A. 1786

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ATTORNEYS AT LAW

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*ALSO ADMITTED IN NEW JERSEY

DEC. 6 1996



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MAXWELL P. BRALOW
OF COUNSEL

December 4, 1996

96-CV-132

Advisory Committee on Civil Rules
Marshall Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, DC 20002-8003

Gentlemen:

I wish to express my opposition to the proposed changes to Rule 23 of the Federal Rules of Civil Procedure.

It is my opinion that these changes are unnecessary, will be counter-productive and will work against certification of "run-of-the-mill" consumer cases.

First, the idea of a "settlement class" that does not, arguably at least, meet the class certification requirements of 23(a) and (b) makes no sense. It would be impossible to file a claim or negotiate a settlement for a "settlement class" without being exposed to a Rule 11 Motion For Sanctions. It is also, I would suggest, unnecessary. It seems that the motivation for this change is the *Georgine* decision, i.e., that a class can not be certified for settlement purposes unless it would be certified for trial purposes. The fallacy with the court's opinion in *Georgine* is that because we are dealing with an adversarial system, the parties, i.e., the representative plaintiffs and defendants -- not the court, should have the right to structure an arms-length settlement, and that the defendants should have the right to stipulate that a case CAN be certified as a class for trial purposes. 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 decision-making as to whether the case meets Rule 23 criteria.

Secondly, the fact that the parties have prepared a settlement certainly should be a factor weighing in favor of class certification. Courts should then be concerned with fairness and whether the rights of absent class members are protected. Once there is a proposed settlement the substantive issues concerning

Advisory Committee on Civil Rules
December 4, 1996
Page 2

class certification are moot because there is no longer a dispute. It seems to me that the Fourth Circuit's decision in *In Re Robbins* which considered the fact of a settlement and the class' reaction as an "important factor" is the proper way to go.

Regarding proposed subdivision (b)(3)(f), it is my understanding that this would allow the court to consider "whether the probable relief to individual class members justifies the cost and burdens of class litigation". Class actions are supposed to be for the consumer -- the little guy. They are intended to provide a remedy for a large number of individuals where the individual recovery would not otherwise justify the cost and burden of litigation. Isn't this the point? No doubt, if this proposed change is adopted, the judiciary may seize on this rule change and reject certification of consumer class actions whenever it seems that the cost and burdens of class litigation on the defendant would outweigh the benefit to individual class members.

For these reasons, I would strongly oppose these changes. Leave well enough alone.

Very truly yours,

Ronald Jay Smolow

RJS:phk

#2004



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96-CV-133

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OF COUNSEL

FAX: (215) 569-5872

November 22, 1996

The Hon. Anthony J. Scirica
United States Court of Appeals
for the Third Circuit
22614 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Hearing on Proposed Changes to Rule 23

Dear Judge Scirica:

It was good seeing you at today's hearing on Rule 23. I thought I'd share with you my reactions to the morning session, for whatever they're worth.

First, I thought some of the comments by Professor Koniak, in particular, and to a lesser extent by Professor Resnik, reflected a fear of abusive class action settlements that is not supported by actual experience. Their testimony was notably devoid of examples of abusive settlements that had been approved by the courts, because in fact, such settlements are rarely, if ever, approved. The fact of the matter is that, as Eugene Spector pointed out, the overwhelming majority of class counsel take their ethical responsibilities seriously, and will not sell out the interests of absent class members to make a quick buck, at the risk of permanent damage to their reputations. In those few cases where lawyers are willing to ignore their legal and ethical duty to the class, Rule 23(e) provides an additional layer of protection. I believe Rule 23(e) already provides adequate protection against abusive settlements. If it didn't, Professor Koniak would have been able to cite some examples of abusive, court-approved settlements to support her indictment of settlement classes.

Professor Koniak's proposal that settlement classes be absolutely forbidden in cases that could not be tried on a class basis -- so-called "malignant" cases -- ignores the fact that the result of such a rule would ordinarily be that class members in such cases recover nothing. How does such a rule protect absent class members? Are they better off with no recovery than they would be with a settlement that reflected the fact that the case was likely not triable?

November 22, 1996

Page 2

Mr. Glickstein's denial of your suggestion that the interlocutory appeal proposal, while facially neutral, actually favors defendants was, frankly, disingenuous. This fact becomes obvious when one notes that all of the plaintiffs' lawyers opposed it and all of the defense lawyers supported it. The main reason is that it would promote delay, which almost always favors defendants. Class actions take long enough as it is; we don't need another layer of appellate review. The mandamus remedy and Rule 1292(b) provide adequate protection against truly egregious class certification decisions. If it ain't broke, don't fix it.

Ms. Mather appeared to suggest that the class action determination should be made later in the course of litigation, because otherwise the overwhelming majority of cases will settle. Since when is this a bad thing? The meritless cases are thrown out on dispositive motions, and the rest settle on terms that reflect their relative strength or weakness. Again, the prevalence of settlements shows that Rule 23 is working, not that it needs to be overhauled.

Mr. Vladick (I'm not sure I got his name right) stated that settlement classes are a bad idea because they transform a litigation device into a settlement device. As Ms. Mather pointed out, however, Rule 23 already is overwhelmingly a settlement device (as, indeed, are most of the Civil Rules).

My somewhat limited experience (just over four years at Fine, Kaplan and Black) is that Rule 23 works remarkably well. The mere fact that the press and/or Congress has chosen class actions and class action attorneys as their villains du jour does not justify radical changes to a process that, in the vast, silent majority of cases, works extremely well. I think most of the proposed changes that were discussed at today's hearing are likely to create more problems than they solve, and leave victims of wide-scale fraud, misconduct and abuse with less recourse than they currently have. In my view, that would be a bad thing.

Sincerely,



Richard A. Koffman

\rak

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**DAVIS &
FEDER**

ATTORNEYS AT LAW

MARK W. DAVIS
RON M. FEDER*

*Admitted in Mississippi, Alabama & Texas

Of Counsel:
GERALD R. EMIL

RECEIVED
12/30/96

96-CV-136

December 16, 1996

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of United States Courts
Washington, D.C. 20544

Re: Proposed amendments to F.R.C.P. 23

Dear Secretary McCabe:

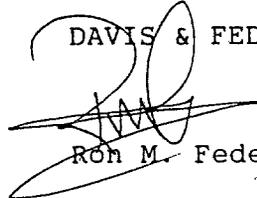
Let me take this opportunity to register my strong opposition to the proposed amendments to F.R.C.P. 23, particularly that section which permits settlement-only classes. I particularly object to any provision that denies the individual the right to consult and employ counsel and any provision which would deny relief to potential class members who have not yet developed an injury. The proposed Georgine was an abomination. The emergence of the National Class Action Specialists has threatened to destroy traditional and proper state-by-state resolution of personal injury and commercial claims. This must not be allowed.

F.R.C.P. 23 serves a valid goal but is susceptible to abuse. The proposed amendments will not serve individual claimants, the public, nor the judicial system.

With warmest regards,

Sincerely,

DAVIS & FEDER



Ron M. Feder

RMF:chr

LEGAL ASSISTANTS

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96-CV-137

David O Haughey
3219 Bonnell SE
Grand Rapids, MI 49506

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December 14, 1996

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington DC 20544

Re: Class Actions; Rule 23

Dear Mr. McCabe

I write primarily as an investor who has had some experience with Class Actions as a claimant, but also as a retired litigator who is still interested in sensible administration of justice.

The Fall-Winter issue of the University of Michigan LAW QUADRANGLE NOTES carries an article by Professor Edward H Cooper, which is "A Midpoint Report" on the proposals to change Rule 23. This article brings to mind a long-standing gripe I have had with Class Action practice. Professor Cooper touches close to the point I wish to make, but so far as I can tell from his article, there is nothing in the proposals to deal effectively with the particular abuse of Rule 23 which I have in mind.

On several occasions I have found myself, as an investor, to be a passive member of a plaintiff class in a Class Action suit. The enclosures relating to GSU SECURITIES LITIGATION illustrate the situation I am talking about. It is the only case of this sort in which I took the trouble to complain, but the same sort of thing has happened to me at least three times.

You will see from the enclosures that my claim in the GSU case was forfeited for the sole reason that my calculated recovery was less than \$10. The only reason given for this forfeiture was that the administrative expense involved in paying those claims was deemed to be unjustified.

I have represented many insurance companies over the years, and I am well aware that the administrative cost ratio for processing small claims can be higher than for large claims. But almost all of that cost arises from proving (and resisting) the claim, not from issuing the check to pay it. The response of most insurance companies to this problem is to quickly pay small claims without requiring real proof. It really does not cost any more to issue a check for \$5 than it does to issue one for \$5000, or \$50,000.

The real cost of claims administration is in determining whether, and how much, to pay.

The primary justification for many Class Actions is to provide a remedy for a large class of people who have been (allegedly) victimized in some systematic manner for amounts which are individually too small to justify making a claim, but which in the aggregate have (allegedly) unjustly and substantially enriched some perpetrator. In such cases it does seem strange that we allow the disqualification of claimants because their claims are small, in order to enrich the bigger claimants and their attorneys. I deduce from the Co-Administrators' letter that about 35,000 claims in the GSU case were forfeited simply because they were small, after all of those claimants had gone to the expense and trouble of providing proof of their claims. *And the Administrators had gone to the trouble and expense of calculating how much each of the 35,000 claimants should be paid!*

I don't know what the best answer is, but the forfeiture of small claims seems to me to be about the worst answer to this problem of relatively high administrative cost. When it comes to proving damages, the proponents of a Class Action want to include as many in the class as possible. They hang out the carrot of unspecified potential recovery to induce potential claimants to go to a lot of trouble and incur expense to submit a proof of claim in order to provide to the proponents the maximum possible proofs of damages. Then when it comes payoff time they try to exclude as many as they can from participation, starting, of course, with those least likely to complain.

Why not exclude the biggest claims on the ground that they can support their own individual lawsuit? That makes at least as much sense as forfeiture by the small claimants for whose protection the Class Action was invented. If the court can determine which claims are too small to justify the cost of issuing a check, it should be able to determine which claims are large enough to be litigated individually.

Perhaps no claimant who has gone to the trouble and expense of submitting proper proof of claim should be excluded. To avoid the anomaly of paying 32 cents to mail a check for 25 cents, the court could order a minimum of say \$10 to be paid to anyone who has gone to the trouble of submitting a valid claim at the request of the proponents. This would be better than insulting worthy but small claimants with a forfeiture of their claims.

Very Truly Yours,



Co-Administrators
GSU Securities Litigation
P.O. Box 719
Garden City, N.Y. 11530

September 19, 1990

Claim No. C34 0018289

David O. & Roberta L. Haughey
3219 Bonnell SE
Grand Rapids MI 49506

NOTICE OF DISPOSITION OF CLAIM

Dear Claimant:

In accordance with an Order entered by the United States District Court for the Eastern District of Texas, Beaumont Division (the "Court"), no distribution shall be made from the GSU Securities Litigation Settlement Fund (the "Fund") to any claimant whose calculated recovery from the Fund is less than \$10.00.

Your claim (number C34 0018289) against the Fund has been evaluated. Based on the losses that you incurred as a result of your purchases of Gulf States Utilities shares between August 7, 1984 and April 15, 1987, you would be entitled to receive less than \$10.00. Accordingly, we regret to advise you that you will not participate in the distribution of the Fund.

Very truly yours,

Co-Administrators

DAVID O. HAUGHEY
3219 BONNELL SE
GRAND RAPIDS MI 49506

(616) 949-5571

October 9, 1990

CO-ADMINISTRATORS
GSU SECURITIES LITIGATION
P.O. BOX 719
GARDEN CITY, NY 11530

Claim No. C34 0018289
(formerly S15 0018289)
David O. and Roberta L.
Haughey

Dear Sirs,

Your letter of September 19, 1990, advising that our claim is forfeited because it is less than \$10.00 is acknowledged.

It has always been my understanding that the Class Action Suit was a remedy which was devised to protect a group of people with claims which in the aggregate are substantial, but no one of which is of sufficient value to justify litigation.

But according to your letter the COURT has ordered that claims under \$10.00 are to be forfeited. Please send me a copy of that order.

Please also explain who profits from the forfeiture of those claims of less than \$10.00, and to what extent. How many claims are forfeited? What is the aggregate amount of the forfeiture? Does this forfeiture increase the fees of the Administrators? Does it increase the attorney fees? Does it increase the recovery of those whose claims are more than \$10.00? Does it benefit the wrongdoers? Who represented the sub-class with claims of less than \$10.00?

The forfeiture of claims because they are small would seem to be inconsistent with the theory and purpose of the Class Action remedy.

Very truly yours

David O. Haughey

cc/ Clerk of the Court
US District Court, E. D. Texas
Beaumont, Texas 77703

Co-Administrators
GSU Securities Litigation Settlement

P.O. Box 719
Garden City, New York 11530

Toll Free
1-800-327-3664

October 25, 1990

Telecopier
516-794-2511

Mr. David O. Haughey
3219 Bonnell SE
Grand Rapids, MI 49506

Re.: Claim No. 0018289

Dear Mr. Haughey:

We received your response to our letter dated October 9, 1990. We understand your frustration at learning that you will not receive any distribution from the Settlement Fund (the "Fund"). The lists of claimants that you request comprise 4,400 pages. We cannot duplicate it with our reproduction equipment. To produce a copy for you would necessitate rerunning the computer program that produces these lists at a significant charge. In lieu of the lists, we provide the following to clarify your situation.

1. Nearly 85,000 claims were filed, covering hundreds of millions of shares and nearly \$200 million of "Compensable Loss." (See ¶3 for an explanation of the term "Compensable Loss".) The amount recovered in the settlement was approximately \$6.7 million. This amount was ruled by the United States District Court for the Eastern District of Texas (the "Court") as fair, reasonable and adequate. In making its decision, the Court considered that Gulf States Utilities Company could not withstand a larger judgment (*i.e.*, it had no more money) and was unable to secure additional credit.
2. For the reasons stated above, no claimant can receive 100% of his Compensable Loss from the Fund. In addition, the case was settled which necessarily means that 100% of damages are not recovered. Here, claimants will only recover a small percentage of their loss.
3. There is a difference between your actual loss (*i.e.*, your purchase price minus your sales price or current value) and the calculated recovery referenced in our letter. Based upon the facts of the case, three claimant groups (Pool A, Pool B and Pool C) were established, each having different entitlement to recovery (*i.e.*, "Compensable Loss"). Membership in these pools is determined by

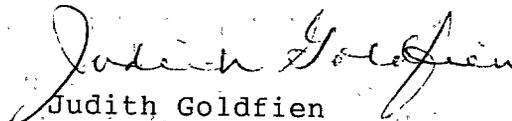
Mr. David O. Haughey
October 25, 1990
Page 2

transaction dates. A claimant's purchases and sales can result in assignments to more than one pool. "Compensable Loss" and how it is computed for each pool is defined in detail at page 7 of Notice of Hearing on Proposed Settlement of Class Actions, Settlement of Derivative Action and Certification of Class for Purposes of Settlement dated April 26, 1988 which was mailed to you. In summary, each pool uses a different formula for computing Compensable Loss and is entitled to a different proportion of the total Fund (95%, 4.5% and .5%, respectively). Thus, your computed recovery is based upon the pool assignment of your transactions which determines (1) a Compensable Loss formula and (2) the degree to which the total Compensable Loss claimed by pool members exceeds the proportion of the Fund assigned to that pool, for which downward adjustment is made. In all cases, for the reasons cited herein and in ¶1 above, computed recovery is always significantly less than actual loss.

4. Regarding the Court's decision that no distribution shall be made to claimants whose calculated recovery from the Fund is less than \$10, the Court considered the cost associated with producing, distributing, reconciling and following each check which cost is borne by the Fund. Please note that none of this "non-distributed" money goes to attorneys. It will all be distributed pro rata to the remaining (approximately 50,000 claimants). We have no option to distribute recoveries of less than \$10. The Court's decision is final in this regard.

If you have any questions regarding the foregoing, please do not hesitate to contact us at the toll-free number provided above.

Very truly yours,


Judith Goldfien

JG:byf

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1/6/97

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96-CV-145

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December 31, 1996

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Advisory Committee on Civil Rules
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8003

Re: Rule 23 Changes

Gentlemen:

I wish to present my views on the proposed Rule 23 changes. I write from the perspective of having studied and been involved in class actions in tort cases for many years and having written a treatise on the subject: Mass Tort Litigation (Clark Boardman Callaghan 1996) (copy sent under separate cover).

It is quite apparent in the area of class actions in the mass tort area that we have significant operational problems. However, the proposed changes:

- a. do not address themselves to the actual problems that exist (probably because the advisory committee was too focused on older problems);
- b. not only do not hold the potential for solving the actual problems but in fact would actually aggravate them.

Where have class actions proved to be dysfunctional in mass tort litigation?

1. Attempting to control futures. 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. That this deprives this group of persons of their rights, and induces lawyers to place themselves into unethical positions, is demonstrated by the decision in *Georgine v. AmChem Products*, 83 F.3d 610 (3d Cir. 1996) (which I heartily endorse). This topic is covered in some detail in my book; see §§ 3:66; 3:83; 3:19; 2.8.

2. Controlling all cases nationally when the scope of the litigation is unclear. Mass litigation needs a long period of time to mature, especially when it is not clear that there was an actionable tort or causation is heavily disputed. To impress class control on top of nationwide litigation which is at its inception is therefore unwise. This is demonstrated in *Castano v. American Tobacco Co.*, 84 F.2d 734 (5th Cir. 1996) (with which I agree). See §§ 3:32, 2:6.

3. Serious conflict of laws problems. Since at present it is believed that the class court must apply the law of every state where a plaintiff resides (which may be every state), great problems are presented for a national tort class especially where the laws on the particular issue may differ widely. This problem has been fully analyzed by such decisions as *In re Rhone-Poulenc Rorer, Inc.*, 5 F.2d 1293 (7th Cir. 1995) and *Castano, supra*. See chapter 8 re choice of law; and also §§ 3.33, 3:88. These sections make suggestions for how to handle the choice of law problems, which suggestions could be part of a change of Rule 23.

4. Serious fees and ethics problems. The GM coupon settlement, *In Re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995) and other recent decisions have pointed up the unseemingly problems with ceding control to lead counsel; unethical conflict of interest positions; and excessive fees. See Chapter 21; and also §§ 3:70, 3:78. Here again systems for control of these problems exist, but are not addressed in the proposed changes.

5. Impracticalities of opting out. As mass tort class actions are conducted today, there is little realistic opportunity for unhappy claimants to opt out in 23(b)(3) classes. Often the notice of the opportunity to opt out is given quickly and only in a few publications, and often there are so many penalties built into opting out (e.g., mandatory arbitration, delay for trial), that one does not have a meaningful right to opt out. See sections in my book 3:53 et seq. 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.

- - -

In light of the present problems, one can now turn to the proposed changes (I am not addressing the right of appeal, which I feel to be a good idea).

I. Rule 23(b)(3)(F): costs and burdens.

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. Yet it is often this group of claims that justify class action, since the claimants cannot find a lawyer to handle their cases individually. Thus, as a practical effect it is the decision of this committee to cut off the right to sue even where a great number of persons have been injured tortiously. Rather, the claimants are to live with their injuries remediless.

The recent Albuterol class litigation involved many thousands of small claims, In re Copley Pharmaceuticals, Inc., 158 F.R.D. 485 (D. Wyo. 1994). We know they are small since the eventual settlements ranged between \$2000 and \$20,000. These people developed pneumonia from a bacteria that carelessly was allowed by the manufacturer to get into the finished product. What analysis would we do retrospectively to know what the "costs and burdens" were?

II. Rule 23(b)(3)(A): practical ability.

This seems to suggest that there are mass torts where the initial injuries are so large that the individual claimants will be able to find counsel. (Parenthetically, if cases can be too big for class action and also too small--factor F--what is just the right size?) The fact that individuals may be able to find a lawyer does not negate the value of a class action on occasion, especially if it is a mature one. Further, the reality is that with any mass tort disaster there are both big and small injuries.

III. Rule 23(b)(3)(c): maturity.

The commentary seems to see maturity only in one dimension: so mature as to not justify class action. The real problem is in the other direction--immaturity, as discussed above. This is not addressed.

IV. Rule 23(b)(4): settlement classes.

As I have detailed above, the 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. Otherwise, unethical behavior is induced, rights are compromised, and persons are suddenly made a part involuntarily of a class that would never have come into fruition originally. That the predominance and management problems are created by the settlement should therefore not be a way around the requirements.

- - -

Returning to my list of present problems, one can now analyze how the problems are addressed by the proposed changes (using the above numberings):

1. Futures: unaddressed
2. Immature torts: unaddressed
3. Choice of law problem: unaddressed
4. Fees and ethics: greatly aggravated
5. Right to opt out: unaddressed.

It is thus one person's opinion that as far as mass tort goes, you should scrap all of the proposed revisions and return to the drawing board. The advisory committee should hear from lawyers with real experience in mass tort-class action litigation. (I have no view on the applicability of the proposed changes to other than tort, and for all I know the changes might be advisable for securities litigation, etc.)

Since mass tort differs in so many ways from the types of actions that led to the creation of class actions--and yet has come to dominate the litigation--what I believe the committee should do is segregate the particular problems that arise in mass tort and address changes for this subset of all class actions. As I have said in another connection, we need a Rule 23A: Mass tort litigation. The committee could also profit from the scholarship in recently published law review symposia, including NYU (Vol. 71, No. 1); Cornell (Vol. 80, no.4).

Cordially,


Paul D. Rheingold

PDR:gn

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December 31, 1996

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

**Re: Proposed Rule 23(e)
Federal Rules of Civil Procedure
Response to Request for Comments**

Dear Sir:

The juxtaposition of the discussion of proposed Rules 23(c) and 23(e) in Part I of the August 1996 Summary causes me to inquire:

after 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?

Very truly yours,

DONALD E. KLEIN

DEK:st

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New York State Bar Association

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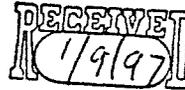
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96-CV-

147

January 3, 1997

Hon. Alicemarie H. Stotler, Chair
Standing Committee on Rules of
Practice and Procedure
c/o John K. Rabiej, Chief,
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Report on Proposed Amendments
to Rule 23

Dear Judge Stotler:

I am pleased to send you a copy of the report by the Commercial and Federal Litigation Section of the New York State Bar Association concerning proposed amendments to Federal Rule of Civil Procedure 23. We hope you will give the report careful consideration. Should you have any questions, please feel free to contact me.

Sincerely,

Mark C. Zauderer

MCZ:ms
Enclosure

cc: Lesley S. Friedman, Esq. (by mail, w/encl.)
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PROPOSED AMENDEMENTS TO RULE 23

REPORT BY THE COMMERCIAL AND FEDERAL LITIGATION SECTION

December 1996

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INTRODUCTION

In September 1990, in response to the burgeoning case management problems caused by asbestos litigation, Chief Justice Rehnquist created the Ad Hoc Committee on Asbestos Litigation. The Ad Hoc Committee issued a report in March 1991 recommending, in part, that the Advisory Committee on Civil Rules of the Judicial Conference consider "whether Rule 23, F.R.C.P., should be amended to accommodate the demands of mass tort litigation."¹

Thereafter, the Advisory Committee prepared various drafts of different proposals to amend Rule 23, each of which has been modified in response to comments offered by legal scholars, bar association committees and practicing attorneys. This process has been undertaken against a backdrop of increasing, but uncertain, use of the class action device in the area of mass torts.² At the same time, the Advisory Committee did not restrict itself to issues that solely arise

¹ See Samuel Estreicher, Federal Class Actions After 30 Years, 71 N.Y.U. L. Rev. 1, 4 n.16 (1996) (quoting Ad Hoc Committee on Asbestos Litigation, in Reports of the Proceedings of the Judicial Conference of the United States 33 (Mar. 1991)).

² See, e.g., In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (reversing on a writ of mandamus a decision certifying a class of hemophiliacs who received infusions of HIV-tainted blood, on the grounds that certifying only liability issues would likely prove unmanageable and that greater experience with individual suits were necessary before subjecting an entire industry to huge potential liability); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (reversing on § 1292(b) interlocutory appeal a decision certifying a class of all nicotine-dependent persons in the United States who purchased and smoked cigarettes manufactured by the defendants on similar grounds, emphasizing that it was too early to determine whether potential manageability problems could be resolved); In re Copley Pharmaceutical, Inc., 161 F.R.D. 456 (D. Wyo. 1995) (certifying a class of users of the prescription drug "Albuterol" and criticizing the decision in Rhone-Poulenc); Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir.), cert. granted, ___ U.S. ___, 1996 U.S. LEXIS 6586 (Nov. 1, 1996) (reversing settlement of class action litigation against asbestos manufacturers on grounds that, inter alia, settlement provided inadequate protection for "futures" claimants, i.e., those who may have been exposed to asbestos but have not yet developed symptoms of injury); Flanagan v. Ahearn (In re Asbestos Litig.), 90 F.3d 963 (5th Cir. 1996) (affirming approval of a Rule 23(b)(1) settlement against asbestos manufacturer permitting damage determinations to be made by mediation at time of injury and also permitting subsequent resort to litigation, with a cap on recovery, if mediation fails); In re Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 94-P-11558-S, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (approving a \$4.23 billion settlement of claims arising from breast implants. The settlement later unraveled when it was discovered that it vastly underestimated the number of claimants).

in the context of mass torts.

On April 18 and 19, 1996, the Advisory Committee recommended to the Standing Committee on Rules of Practice and Procedure its proposed amendments to Federal Rule of Civil Procedure 23. On June 20, 1996, the Standing Committee approved the revisions for publication and comment.

In the draft Committee Note (the "Draft Note") that accompanied its proposals, the Advisory Committee stated the following:

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.

Draft Note at 5.

The Section measured the proposed revisions against the purposes of the class action device: judicial efficiency, access to the courts for small claimants, deterrence, protection of defendants from inconsistent obligations and protection of the interests of absent class members. See generally 1 H. Newberg & A. Conte, Newberg on Class Actions § 1.06 (3d ed. 1992). In addition, particularly in light of the Advisory Committee's statement that many of the draft revisions, while phrased in general terms, are intended to address problems in the area of mass torts, the Section evaluated the extent to which the revisions would affect other areas of class action litigation in which case law is well-developed.

Outside the context of mass torts, over a 30-year period, courts have developed a substantial body of law defining the contours of Rule 23. The Section believes that this process, during which courts have frequently had the opportunity to build upon the common law

understanding of Rule 23's standards, has resulted in clear, predictive guidelines that, for the most part, meet the needs of litigants and the courts while safeguarding the objectives of the Rule.

The Section further believes that Rule 23's standards and objectives are sufficiently broad so that, for the most part, courts have been able to successfully adapt them to the changing dictates of experience.

Notwithstanding the foregoing, the Section recognizes that the Rule and decisions interpreting its provisions do not represent an ideal free of imperfections. The Section is well aware of and takes seriously certain recent criticism leveled at use of the class action device, particularly as it relates to the growing effort to aggregate mass tort claims. It is for that reason that the Section supports, wholly or with a varying amount of qualifications, a number of the proposals suggesting modest revisions. It is also why, in most instances, where the Section opposes a provision it also offers an alternative designed to meet the Advisory Committee's goals.

However, the Section wishes to stress that the occasional unsatisfactory decision or perceived abuse does not necessarily mean the fault lies with the Rule. Before attempting substantial modification of Rule 23, courts should first be provided with a sufficient opportunity to clarify whether its provisions can adequately address existing problems.³

In short, while the Section agrees with the Reporter for the Advisory Committee that "[s]urely there is room, both here and there, to improve the Rule," it also agrees with his qualification: "And if there is room to improve, there also is room to confuse, weaken, or even

³ For example, the Supreme Court has recently decided to hear the appeal of the Third Circuit's decision in Georgine. The court's decision will provide a more definitive understanding of the extent to which the Rule can constructively contribute to the settlement of complex disputes while at the same time protecting the rights and interests of all class members.

do great harm." Edward H. Cooper, Rule 23: Challenges To The Rulemaking Process, 71 N.Y.U. L. Rev. 13, 14 (1996).

COMPARING "PROBABLE RELIEF" WITH THE "COSTS AND BURDENS" OF CLASS LITIGATION-PROPOSED RULE 23(b)(3)(F)

The proposed revisions would add a new subsection (F) to the list of factors which a court is required to consider in deciding if class certification meets the superiority criterion under Rule 23(b)(3):

whether the probable relief to individual class members justifies the costs and burdens of class litigation

The Section believes that adoption of this provision would risk an unwarranted and profound shift in the doctrinal underpinnings of Rule 23. Accordingly, the Section opposes adding it to the Rule.

A fundamental rationale for the class action device is that it provides an aggregating mechanism for claims which, though numerous and similar, are of insufficient value to support litigation on an individual basis. As the Second Circuit long ago held in Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir.), cert. denied, 382 U.S. 816 (1965):

In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group.

Id. at 733. See also Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

As such, the need for the class action device increases when the litigation necessary to obtain redress for small claims raises complex issues and, therefore, is likely to be costly. See duPont Glove Forgan Inc. v. American Tel. & Tel. Co., 69 F.R.D. 481, 488 (S.D.N.Y. 1975) (plaintiffs' case "is fraught with difficult questions of law and fact, which makes the class action a superior method of resolving the issues").

This basic understanding of the nature and purpose of the class action device does not preclude a court from using a form of cost/benefit calculation in determining whether to certify a class. Indeed, courts have performed such an analysis under Rule 23(b)(3)(D), pursuant to which they must consider whether the proposed class action would be "manageable". However, in doing so they have been careful to focus upon the effect of aggregate costs on aggregate net recoveries or, what amounts to the same thing, the extent to which each individual's share of aggregate costs would reduce his or her maximum recovery. See In re Hotel Tel. Charges, 500 F.2d 86, 91 (9th Cir. 1974) ("The average individual recovery in this case is estimated to be only two dollars. Even trebled, the amount of recovery would be entirely consumed by the costs of notice alone.") (footnote omitted); Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (The "costs of administration" would likely "reduce substantially" a recovery of less than a dollar and "[f]or some class members, in addition, this would be offset by a substantial counterclaim.").⁴

⁴ In making this calculation, it is important to note that, as the Second Circuit observed in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968), "courts in the past have been able to fashion procedures in order to deal with the distribution of millions of dollars in damages to thousands of small claimants." The court specifically cited Illinois Bell Tel. v. Slattery, 102 F.2d 58 (7th Cir.), cert. denied, 307 U.S. 648 (1939), in which "[o]ver 85% of the claims were for less than \$25 and refunds were made to more than a million people." 391 F.2d at 567. This efficient claims administration was structured over fifty years ago, well before the advent of computer technology.

What is new and different under the proposed rule is that it would mandate a cost/benefit calculus in which individual benefit is to be weighed against class transaction costs as a routine component of analysis in all cases. Indeed, the Draft Note expressly states that "[h]igher [levels of individual relief] should be demanded if the legal issues are complex or complex proceedings will be required to resolve the merits" ⁵ Draft Note at 10. Thus, the proposal would encourage courts to refuse certification on a ground which, from the inception of Rule 23, has been regarded as militating in favor of class treatment in particular cases. The very purpose of the Rule would now become a suspect circumstance.

Further, the proposed revision ignores yet another essential purpose of the class action device: deterrence. As courts and commentators have noted, "[c]lass actions were designed not only to compensate victimized members of groups who are similarly situated when this compensation is feasible, but also to deter violations of the law, especially when small individual claims are involved". 1 Newberg on Class Actions § 4.36 at 4-159 (citations omitted). See also Dolgow v. Anderson, 43 F.R.D. 472, 487 (E.D.N.Y. 1968) ("By making real the threat of exposure and civil liability, the class action also serves to [deter similar wrongdoing]."); State v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 493 (N.D. Ill. 1969) ("Upholding the national class action will . . . discourage future conspiracy violations.").

However, without regard to the deterrence function of class actions, the Draft Note states that a salutary effect of the new rule would be "a retrenchment in the use of class actions to aggregate trivial individual claims." Draft Note at 10. 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. Under such

⁵ This statement makes clear that individual recoveries are to be measured not only against aggregate costs associated with class procedures but with all costs of litigation.

circumstances, the rule would leave no room for the following common sense analysis in support of certification of a class against the wrongdoer:

The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.

In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971).

Finally, after review of the Advisory Committee Draft Minutes, pp. 26-27, the Section is concerned by the refusal to re-word the proposed rule so as to make clear that it would not permit a consideration of the merits on a class certification motion. The Section believes that such a merits consideration would create a host of problems, turning certification motions into cumbersome proceedings and prejudicing the rights of litigants. As recognized by the court in Lamb v. United Security Life Co., 59 F.R.D. 25 (S.D. Iowa 1972):

if held before discovery a [merits] hearing could contribute little, and after would be self-defeating and unnecessarily duplicative of trial. In neither case could it insure that plaintiffs would prevail, and if limited to those cases where matters were marginally frivolous, would require the same efforts to determine the threshold question of frivolity. Moreover, in every case an evidentiary hearing would provide an additional discovery device not contemplated by the Federal Rules of Civil Procedure, and would raise serious questions as to the subsequent use at trial of evidence adduced in such a proceeding (i.e., impeachment, use in lieu of testimony, etc.).

Id. at 40 (emphasis in original) (footnoted omitted). See also Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968); Cannon v. Texas Gulf Sulfur Co., 47 F.R.D.

60, 65-66 (S.D.N.Y. 1969); Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 347-48 (D. Minn. 1971).⁶

The Section 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.

THE FEASIBILITY OF INDIVIDUAL LITIGATION-PROPOSED RULE 23(b)(3)(A)

Proposed subparagraph 23(b)(3)(A) would add as an additional factor in assessing whether a class action is superior to individual litigation "the practical ability of individual class members to pursue their claims without class certification". The Section opposes this change as unnecessary and likely to create distortions in certification rulings.

Current Rule 23(b)(3)(A) requires consideration of "the interest of members of the class in individually controlling the prosecution or defense of separate actions."⁷ The Advisory Committee's Note that accompanied the Rule upon its adoption stated that, among other things, courts should consider whether such interests in separate litigation were "theoretic rather than practical". Advisory Committee's Note to 1966 Amendments to Rule 23, 39 F.R.D. 98, 104 (1966). The Advisory Committee's Note adds that "[t]he burden that separate suits would

⁶ Further, as the Fifth Circuit long ago held, requiring class representatives to make a showing as to the prospects for success on the merits prior to trial "would have the effect of modifying the current law on summary judgment in cases where the only possible method for plaintiffs to proceed is by class action." Miller v. Mackey Int'l, Inc., 452 F.2d 424, 428 (5th Cir. 1971).

⁷ Proposed subparagraph 23(b)(3)(B) would slightly revise this provision, requiring consideration of "class members' interests in maintaining or defending separate actions". The Draft Note does not explain the change. However, to the extent it is intended to require consideration of all the possible reasons why class members may favor individual litigation, rather than just "control", the Section supports it.

impose on the party opposing the class, or upon the court calendars, may also fairly be considered." Id.

Thus, under the present formulation of Rule 23(b)(3)(A), as amplified by the Advisory Notes, courts already consider feasibility of individual litigation, together with the interest in such litigation, as a factor in determining whether to certify a class.⁸ However, courts balance this consideration with other factors that may support use of the class action device.⁹

The Draft Note clarifies the extent to which the proposed revisions are designed as a departure from current practice by asserting they are intended to "sharpen the distinction between the aggregation of individual claims that would support individual adjudication" and those that would not. Draft Note at 5. Indeed, the Draft Note encourages courts to give diminished consideration to factors such as the efficient use of judicial resources when individual

⁸ Indeed in a number of cases certification has been denied, at least in part, on that ground. See, e.g., Zimmerman v. Thomson McKinnon Sec., Inc., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,733 (S.D.N.Y. Oct. 11, 1989), (securities fraud action); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970), (mass tort action); In re Arthur Treacher's Franchise Litig., 93 F.R.D. 590 (E.D. Pa. 1982) (antitrust action).

The Seventh Circuit's recent decision in In re Rhone-Poulenc Rorer Inc., 51 F.3d at 1300, is another example in which the possibility of individual litigation was cited in a holding denying certification. However, the court's emphasis was on the possible adverse effect of many large claims against an entire industry. Id. As noted above, the court in Copely Pharmaceutical, 161 F.R.D. at 460, criticized this aspect of the holding in Rhone-Poulenc, asserting that it did not provide "a legal basis to deny class certification". The Draft Note does not state that this economic effect on a defendant should be considered in applying its proposed rule and, from a policy perspective, such consideration has been criticized on both deterrence and efficiency grounds. See 1 Newberg on Class Actions § 4.43 at 4-177.

⁹ See, e.g., Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1196 (6th Cir. 1988) (court granted certification after noting that "[t]he procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense"); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 489-90 (N.D. Ill. 1969) (court noted that denial of certification by another court in a similar case had resulted in an unending multiplicity of lawsuits that, together, were "inimicable to economical adjudication"); Lubin v. Sybedon Corp., 688 F. Supp. 1425, 1463 (S.D. Cal. 1988) (notwithstanding defendants' argument that the class members could proceed individually, "the court finds that a class action will provide the most fair and efficient adjudication of this case").

litigation is feasible. Id. at 8. The effect of the new rule, therefore, will be to unreasonably narrow, not expand the analysis courts currently undertake.

The Section does not believe that there is any compelling justification for this result. The Draft Note portrays the proposed Rule as one that is intended to benefit absent class members, asserting that in some instances certification has caused a "problem" or that the Rule has been applied in "troubling settings", particularly in the context of mass tort actions. Draft Note at 6. As discussed in the Draft Note, "one example" of this "problem" is when:

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.

Id. However, the Advisory Committee's paradigmatic problem is fully susceptible to resolution by already existing provisions of the Rule.

The situation the Advisory Committee describes is a classic example in which one set of class members may have interests in conflict with another set. If a reasonable possibility of conflict is presented, Rule 23(c)(4)(B) permits use of sub-classes and Rule 23(a) mandates proper representation of all class members. Thus, Rule 23(a)(3) would require that at least one plaintiff representative have claims that are typical of those who sustained serious personal injuries and Rule 23(a)(4) would require that such a plaintiff be able to adequately represent such class members.¹⁰

¹⁰ Further, while the Draft Note casts doubt on the efficacy of the right to request exclusion from a (b)(3) class under Rule (c)(2), Draft Note at 8, those who have the "practical ability" to maintain individual actions presumably have the same ability to retain counsel to determine whether they should do so.

When the Draft Note turns from the above hypothetical to the type of class that courts ordinarily consider when presented with applications for certification, the danger and inutility of the proposed rule become more glaring. The Draft Note refers to "[m]ore complicated variations of this problem . . . when different persons suffer injuries that are similar in type but that vary widely in extent." Draft Note at 6. The example provided by the Draft Note, securities fraud actions, routinely involve classes comprised of small shareholders, large institutional purchasers, and other investors with holdings and purported damages that "vary widely in extent." As to such classes, courts have uniformly concluded that despite the presence of some members of the class for whom individual litigation is feasible, certification is appropriate "to ensure judicial efficiency and consistent judgments" Scholes v. Moore, 150 F.R.D. 133, 138 (N.D. Ill. 1993). See also In re Revco Sec. Litig., 142 F.R.D. 659, 669-70 (N.D. Ohio 1992).

Nonetheless, the Draft Note suggests that courts should consider excluding from the class definition individuals and entities who could separately litigate their cases, without regard to whether they even have an interest in doing so. Draft Note at 6-7. The result would be the fragmentation of litigation. Large damage claimants would be compelled to bring separate actions to protect their interests, even if they would otherwise have preferred to remain as members of the class. Further, there will likely be inconsistent judgments and resolution of the class action may not bring peace to the defendants, thereby rendering settlement more difficult. Since the Rule currently permits (b)(3) class members to either intervene in the action to control its prosecution or to exclude themselves, there does not seem to be any purpose in risking the adverse consequences that will likely follow adoption of this proposed revision to the Rule.¹¹

¹¹ Curiously, the Draft Note also acknowledges that "victims who could afford to sue alone may be ideal representatives if they are willing to represent a class," id., apparently deferring to (continued...)

Further, the Section objects to the emphasis in the Draft Note on the size of an individual's damage claim as the proper means of determining whether separate litigation is feasible. Draft Note at 6. Unmentioned is the fact that there is often an enormous disparity in class litigation between the financial resources of plaintiffs and defendants. Also unmentioned are the substantial costs usually associated with class litigation, a factor that is often related to the financial resources of defendants and the complexity of issues raised in such cases. Thus, as courts have noted:

The death knell may also sound upon a claim, which upon the surface in dollar amount is substantial, when the heavy costs of litigation dictate its abandonment as a matter of economic reality, even though it may have merit.

duPont Glore Forgan, Inc., 69 F.R.D. at 488. See also State v. United States Steel Corp., 44 F.R.D. 559, 572 (D. Minn. 1968) ("[I]t is extremely difficult to bring an antitrust action against six major steel fabricators without the financial aid made possible by the class action device.").

Finally, the Section is concerned about the likely adverse consequences of the combined effect of both proposed Rule 23(b)(3)(F), which would encourage courts to decline certification if individual claims are too small, and proposed Rule 23(b)(3)(A), which would

¹¹ (...continued)

the considered judgment of Congress as expressed in the Private Securities Litigation Reform Act of 1995, which provides that the presumed "most adequate" class representative is the claimant who has the "largest financial interest in the relief sought by the class". § 101(a), 15 U.S.C. § 77z-1(a)(3)(B)(iii)(bb) and (cc); and § 101(b), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(bb) and (cc). This observation clearly implies that large damage claimants are most capable of monitoring the action and protecting the interests of the class. That being so, it makes little sense to cut them adrift from all other class members. See Elliott Weiss & John Beckerman, Let The Money Do The Monitoring: How Institutional Investors Can Reduce Agency Costs In Securities Class Actions, 104 Yale L. J. 2053 (1995) (arguing that claimants with largest claims are in the best position to assure that class action device operates properly); John Coffee, Class Wars: The Dilemma Of The Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1406-07 (1995) (The development of networks of injured victims to oversee the settlement process and communicate with class members in mass tort class actions "is likely to happen only when the class is defined to include 'high stakes' plaintiffs with present claims.").

provide the same incentive if such claims are too large. Requiring courts to determine the amount of individual claims that are "just right" risks decisions that arbitrarily cut off the ability of many potential class members to obtain relief and causes the courts and all litigants to suffer substantial inefficiency costs.

MATURITY OF RELATED LITIGATION - PROPOSED RULE 23(b)(3)(C)

Current Rule 23(b)(3)(B) requires a court, as part of its "superiority" analysis, to consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class". The Advisory Committee suggests modifying this provision, as proposed Rule 23(b)(3)(C), in several respects. The most significant is the addition of the "maturity" of such litigation as another factor for consideration.¹²

The Section supports this revision relating to maturity of actions, but only to the extent it is more carefully limited in a separate sub-paragraph of Rule 23(b)(3).

The Draft Note reveals two purposes for this change. First, "maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment." Draft Note at 9. However, those who have retained counsel and commenced individual actions, and whose actions are nearing or at trial, are in the best position to make an informed decision as to whether they wish to exclude themselves or obtain the benefit of class-wide representation. Thus, given the right of exclusion, class certification of a similar action poses no threat to such individual actions.

¹² The other proposed changes include: (1) adding the word "related" before the word "litigation" and deleting the words that limited the required consideration to actions arising from the same "controversy", and (b) deleting the focus on other litigation "already commenced". The first revision apparently stems from the advent of mass tort litigation in which class members may have been affected by a common causative agent but did not experience that agent as part of a single event. The second revision makes clear that courts may consider other litigation "without regard to the time of filing in relation to the time of filing the class action." Draft Note at 9. The Section supports both proposed revisions.

The stage of a particular action should make no difference to a court's consideration of the extent to which there is a sufficient interest on the part of the class as a whole in maintaining individual suits. As the Fourth Circuit held, "[c]lass certification cannot be defeated simply because a few claimants . . . feel that they would fare better by pressing as quickly as they could their individual suits than they would if the suit were to be prosecuted for the benefit of all claimants." In re A.H. Robins Co., 880 F.2d 709, 746 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1990).

The Draft Note expressly states that the second purpose is rooted in the experience of mass tort litigation. The Draft Note states that the claims in such actions may "involve highly uncertain facts." In particular, the Draft Note states:

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.

Draft Note at 7.

The Section acknowledges the validity of this comment but believes that general application of the proposed rule will generate unforeseeable results, many of which may be detrimental to the purposes of Rule 23 class actions. The example provided in the Draft Note refers to empirical proof, developed in the field of science or medicine, directly determinative of the element of causation.¹³ The prospects of later development of such a definitive and reliable resolution of an element of a claim, available exclusively by the work of an independent

¹³ This true as to at least class-wide causation. The defendants in many mass tort cases will have defenses that go to the issue of individual causation.

outside agency, is less likely in other areas of litigation. However, without limitation upon the rule, an entire branch of discovery and motion practice may be spawned by this one new factor.

Further, mass tort cases differ from other areas of class action litigation in two important respects. In mass tort cases, as compared to other types of class actions, (a) individual actions are more likely to be feasible, and (b) the injury to each class member (assuming class-wide injury did not occur as a result of a single event) will have occurred, and may continue to occur, at different times. Thus, deferring class certification until "maturity" has been reached in mass tort cases is not as likely to result in expiration of the statute of limitations as against the entire class. In sum, use of the "maturity" factor in non-mass tort class actions may risk unalterable prejudice to the rights and claims of absentee class members.

Since there is no evidence of a need for this provision in non-mass tort cases, the Section suggests that the "maturity of related actions" factor be added as a separate subparagraph of Rule 23(b)(3) and expressly limited to mass tort class actions. The Draft Note should emphasize that this factor must be applied in conjunction with current Rule 23(b)(3)(A) relating to the interest in and feasibility of individual litigation. Also, the Draft Note should delete all references to the above-noted first purpose of the proposed revision.

SETTLEMENT CLASSES - PROPOSED SUBSECTION 23(b)(4)

A. The Proposed Change

Proposed subsection 23(b)(4) expressly permits certification of a settlement class. By its terms, the proposed revision contemplates that the settlement class would encompass claims not otherwise subject to certification under Rule 23(b). Specifically, the text of the proposed change is as follows:

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

* * *

(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.

The Draft Note states that the proposed subsection is intended to "confirm[] the propriety of 'settlement classes'" Draft Note at 4. The proposal is further based on the recognition that "settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation." Id. at 12.

According to the Draft Note, the "[c]ertification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement." Id. This limitation is imposed because, in the Advisory Committee's view, the creation of a settlement class by parties "interested in exploring settlement . . . might exert untoward pressure to reach agreement." Id.

The Draft Note further explains that, "[a]s 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." Id. at 11. The predominance and superiority requirements of Rule 23(b)(3) would also need to be satisfied as part of a Rule 23(b)(4) settlement class. However, those latter factors would be "affected by the many differences between settlement and litigation of class claims or defenses." Id.¹⁴

The Draft Note acknowledges certain of the risks posed by the creation of separate settlement classes, some which may not be appropriate for certification at trial. To that end, the Draft Note first recognizes the significance of protecting different sub-classes within a

¹⁴ As an example, certification of a litigation class may be defeated on (b)(3) grounds if it faces choice-of-law difficulties. However, a settlement may be fashioned so that, despite those problems, a court would find under (b)(4) that a class action is superior to any other vehicle for resolving the dispute and the issues relating to the proposed settlement predominate over individual issues. Id.

broadly defined settlement class. In particular, the Draft Note states that "[p]articular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class." Id. at 13. Second, the Draft Note suggests that in "unsettled" areas, 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." Id.

B. Discussion

In recent years, a number of trial judges have been asked by litigants to assist them in resolving disputes of an extraordinarily complicated nature by the use of settlement classes, particularly in the products liability context. However, two recent Third Circuit decisions have called into question the entire practice of certifying settlement classes. See Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996), cert. granted, ___ U.S. ___, 1996 U.S. LEXIS 6586 (Nov. 1, 1996); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 799 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995) ("GM").

The Section believes that the proposal to establish a Rule 23(b)(4) settlement class is necessary to confirm the legitimacy of an already common and useful practice. In particular, the Section agrees that the rule should extend to classes that could not otherwise be certified for trial purposes. The Section further agrees that it is appropriate to limit applicability of the rule to cases in which a settlement has already been reached to eliminate the possibility that untoward pressure will be placed on the parties to reach a settlement on claims that would not otherwise be settled. Moreover, the Section agrees that the proposed rule properly continues to require that a settlement class satisfy the fundamental requirements of Rule 23(a), as well as -- in the context of settlement -- the superiority and predominance requirements in Rule 23(b).

Significantly, the Third Circuit's decisions are not necessarily at odds with the policy considerations animating the proposed revision. The court in GM held:

We acknowledge that settlement classes, conceived of either as provisional or conditional certifications, represent a practical construction of the class action rule. Such construction affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23.

55 F.3d at 794.

While the Third Circuit added that the "concerns raised about the device" could be addressed "by the rigorous applications of the Rule 23 requisites", id., the court's holding was limited to the Rule 23(a) requirements. The court stated that those requirements, which it characterized as "the representational elements", "constitute a multipart attempt to safeguard the due process rights of absentees." Id. at 796. The Third Circuit went no further in its decision, expressly stating that it would "neither concede nor decide" whether the Rule 23(b)(3) factors may be considered in light of a proposed settlement. Id. Thus, there is nothing in the proposed rule that is contrary to the holding in GM.

Later, in the Georgine case, the Third Circuit held that "the 23(b)(3) criteria must also be applied as if the case were to be litigated." 83 F.3d at 618. However, the court expressly added that it was constrained by the provisions of the current rule, adding the following invitation to amendment of the Rule: "the better policy may be to alter the class certification inquiry to take settlement into account" Id.

Finally, while some concern has been expressed regarding class settlements involving "futures" claimants, 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. Indeed, the proposed rule and Note, including the proposed modifications discussed below, would enhance the protections afforded to class members in such settlements.

C. Minor Adjustments to the Proposed Rule

Although the Section supports proposed Rule 23(b)(4), the Section has two suggested additions to the Draft Note, and a minor suggested revision to Rule 23(c)(2) and (c)(3). These changes are intended to address some of the concerns raised by opponents of the proposed revision, as well as in many recent opinions addressing the merits of settlement classes.

First, the Draft Note should state that, as part of the determination of "adequate representation", pursuant to Rule 23(a)(4), the court should take particular care to consider the ability of plaintiffs' counsel to fairly and adequately represent all members of the settlement class, including making a determination whether there is a need to form any subclasses, each of which may need to be separately represented. Cautionary language to this effect easily could be added to supplement the statement in the Draft Note that the court should ensure that "there are no disabling conflicts of interests among people who are urged to form a single class." Draft Note at 13.

This proposed revision is intended to address the concern raised in recent opinions that plaintiffs' counsel may give preference to one sub-class of class members to the detriment of another sub-class. To ensure representation of all individuals potentially affected by the settlement, there should be different counsel or a guardian ad litem appointed to represent different sub-classes in appropriate cases.¹⁵ In addition, in particularly complex actions involving a multiple number of possibly differing interests, the use of a broad and representative committee to either approve or re-negotiate a proposed settlement on behalf of a class should be considered as an effective means to ensure fair and adequate representation of all of its

¹⁵ See, e.g., Ahearn v. Fiberboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995) (court appointed professor as guardian ad litem to protect the interests of future claimants to a settlement).

members.¹⁶ 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 for class members, which fund might otherwise be decimated by attorneys' fees.¹⁷

Second, Rule 23(c)(2) and (c)(3) should be revised to refer to Rule 23(b)(4) for the purpose of clarifying that the right to opt-out described in those subsections has been retained for settlement classes. For the same reason, the Advisory Committee Notes to Rule 23(b)(4) should expressly state that Rule 23(b)(4) retains the opt-out right provided for classes certified under Rule 23(b)(3).

INTERLOCUTORY APPEALS OF CLASS CERTIFICATION DECISIONS - PROPOSED RULE 23(f).

The Proposed Change

Proposed subsection (f) would permit appeals from an order granting or denying class certification in the sole discretion of the Court of Appeals. The suggested revision provides:

(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.

The Draft Note indicates that while subsection (f) is modeled on The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), it departs from that provision in two significant ways. First, it does not require that the district court certify its class certification decision for

¹⁶ See, e.g., In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1101 (J.P.M.L. 1992) (discussing use of plaintiffs' Steering Committee to approve settlement).

¹⁷ See In re "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425, 1435 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994).

appeal; and second, it does not require that: (a) the order involve a controlling question of law as to which there is a substantial ground for difference of opinion, and (b) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

With minor modifications, the Section supports this proposed change but urges that the related Draft Note be redrafted to more clearly articulate the intended scope of the increased opportunity for review of certification orders under the Rule.

Background for the Proposed Change

The general rule has been that class certification orders are not "final" and, therefore, not appealable as of right until final judgment has been entered in the case. Prior to the Supreme Court's decision in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), some courts of appeals carved out an exception to the final order rule referred to as the "death knell" doctrine. In re Master Key Antitrust Litig., 528 F.2d 5, 10-11 (2d Cir. 1975). Courts applying the doctrine held that orders denying class certification were appealable as of right if it were found that individual pursuit of the claims was financially impracticable; i.e., denial of certification would be the "death knell" of the action. Id.

The Supreme Court barred use of the death knell doctrine in Coopers & Lybrand v. Livesay, holding that while an adverse certification ruling may render improbable continued prosecution of some actions, such an order cannot be considered "final" under 28 U.S.C. § 1291. 437 U.S. at 468-69.

Few class certification orders meet both of the conjunctive requirements of § 1292(b). Accordingly, such orders are rarely certified for appeal. Link v. Mercedes-Benz of North America, Inc., 550 F.2d 860, 863 (3d Cir.), cert. denied, 431 U.S. 933 (1977); Luedke v. Delta Air Lines, Inc., 1993 U.S. Dist. LEXIS 17665 (S.D.N.Y. Dec. 14, 1993) ("Normally disposition of a class certification motion is not reviewable by interlocutory appeal.") (quoting

Port Authority Benevolent Ass'n v. Port Authority of New York & New Jersey, 698 F.2d 150, 152 (2d Cir. 1983)); 2 Newberg on Class Actions, § 7.41 at 7-125 (1992) ("requests for certification of class determinations for appeal under [section 1292(b)] have usually been unsuccessful") (citing Sachnoff, Appellate Review of Class Action Decisions After Coopers & Lybrand v. Livesay, in Federal and State Class Action Litigation, Recent Developments 203 (ALI-ABA 1983)).

Stated Reasons for the Proposed Change

Proposed subsection (f), the Draft Note states, is designed to effect only a modest expansion of the opportunity to appeal decisions on class certification. Such an expansion is justified, in the Advisory Committee's view, because of the substantial practical effect of decisions both granting and denying class certification. Adopting the logic of the death knell doctrine, the Draft Note states that when class certification is denied, the plaintiff is compelled to litigate his individual claim in order to secure appellate review of that decision even though his maximum potential recovery may be far less than the costs of litigation. On the other hand, where class certification is granted, a defendant may be forced to settle rather than incur the enormous costs of defending a class action and risk a potentially ruinous judgment. Draft Note at 15. See also Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (certification of a large class can create an "insurmountable pressure on defendants to settle").

Discussion

The Section believes an expansion of the opportunity to seek interlocutory appeals of class certification decisions is appropriate and favors vesting discretion to grant applications for review of such decisions solely with the court of appeals.

We agree that, as a practical matter, decisions denying class certification are often dispositive of plaintiffs' claims because the high cost of litigation of an individual claim for relief

often exceeds the plaintiff's maximum potential recovery. In addition, the substantial practical effect on defendants of decisions granting class certification cannot be gainsaid. Some courts have recognized that at least in certain cases certification may raise the stakes to such an extent that defendants have no choice but to settle the action, regardless of its merit. See, e.g., In re Rhone-Poulenc Rorer Inc., 51 F.3d at 1298-99 (observing that the risk of immense liability following a single jury trial may compel defendants "to settle even if they have no legal liability") (citations omitted). Whether or not this is ever true, the Section believes that certification is clearly a significant factor for defendants in determining whether to settle an action.¹⁸

Finally, while the Section approves of subsection (f), it believes that the Draft Note should be clarified with respect to the continuing applicability of § 1292(b)'s standards. The Draft Note states that the proposed revision represents only a "modest" departure from those standards. They further state that proposed subsection (f) relies "in many ways on the jurisprudence that has developed around § 1292(b)" and that the appellate court's decision is "as broad as under § 1292(b)." Draft Note at 15-16. Indeed, as described in the Draft Note, the accretion of additional appeals the rule is apparently designed to permit in most cases is that which would result by rendering as alternatives § 1292(b)'s conjunctive requirements. Thus, the Draft Note states that "[p]ermission 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

¹⁸ The Federal Judiciary Center commissioned an empirical study of class actions in connection with its proposals for revisions to the Rule. Thomas E. Willgang, et al., An Empirical Analysis of Rule 23 To Address The Rulemaking Challenges, 71 N.Y.U. L. Rev. 74 (1996). The study focused on cases in E.D. Pa., S.D. Fla., N.D. Ill., and N.C. Cal. that were terminated during the period July 1, 1992 through June 30, 1994.

The study noted that in most cases settlement was preceded by active case management, including substantive decisions on the merits of the underlying claim. The study concluded that the prevalence of such case management practices "greatly diminishes the likelihood that the certification decision itself -- as opposed to the merits of the underlying claims -- coerced settlements with any frequency." Id. at 144-45.

certification is likely dispositive of the litigation." Draft Note at 16 (emphasis added). The Section believes this is appropriate. However, the Draft Note creates unnecessary confusion by also broadly stating that the "potentially limiting" requirements of § 1292(b) have been eliminated under the proposed rule.

The Section believes the Draft Note should be recast to unequivocally state that while the two requirements set forth in § 1292(b) are not included in the rule, and therefore courts are not necessarily constrained by either of them, the court's exercise of discretion will generally be informed by considerations relating to one or both of those standards.¹⁹

Finally, the proposed rule provides that application for an appeal must be made "within ten days after entry of the order" denying certification. The Section believes that the amendment should be modified to provide that the ten day period begins after denial of the certification order "or the order denying reconsideration." Such a change will prevent unnecessary applications designed to preserve the right to an appeal.

TIMING OF CERTIFICATION RULINGS - PROPOSED RULE 23(c)(1)

The Advisory Committee proposes revising Rule 23(c)(1) as follows:

¹⁹ With these changes, the Section also believes it would be appropriate to delete the following two sentences:

- (i) "Permission to appeal should be granted with restraint", and
- (ii) "Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion."

These statements are unnecessary given the stated intent to effect only a "modest" expansion of the appeals currently permitted and the suggested clarification as to the guidelines provided by § 1292(b) standards. Additional assertions as to the purported circumscribed nature of the rule may only serve to discourage appellate courts from granting permission to appeal in otherwise appropriate situations.

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.

The Section supports this change intended to, in the words of the Advisory Committee, "confirm[] the common practice of ruling on motions to dismiss or for summary judgment before the class certification decision." Draft Note at 14. The courts in most jurisdictions have held that "a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action." Marx v. Centran Corp., 747 F.2d 1536, 1552 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985). See, e.g., Floyd v. Bowen, 833 F.2d 529, 534 (5th Cir. 1987); Wright v. Schock, 742 F.2d 541 (9th Cir. 1984); Hansbury v. Regents of University, 596 F.2d 944, 950 (10th Cir. 1979).

Nonetheless, at least the Seventh Circuit appears to believe that the Rule as currently phrased does not permit courts to exercise this type of discretion. See Rutan v. Republican Party, 868 F.2d 943, 947 (7th Cir. 1989) (en banc) (Rule 12(b)(6) dismissal without prior consideration of whether the case may be properly brought as a class action "violates [Rule] 23(c)(1), which requires the district court to address the issue of class certification 'as soon as practicable'"), aff'd in part, rev'd in part, 497 U.S. 62 (1990). See also Federal Judicial Center Manual For Complex Litigation, Third § 30.11, at 214 n.671 (1995) (with respect to motions for summary judgment).

The Section believes that the court should have unquestioned authority to determine, in the exercise of its discretion, whether it is appropriate in a particular class action to decide a dispositive motion prior to determining whether the class may be certified. The Section believes that consideration of whether the action has sufficient merit to survive prior to resolving certification issues will in most instances serve two purposes. The first relates to the

goal of efficiency. If a case is dismissed prior to certification, then the cost of sending notice to putative class members will be unnecessary. See Marx v. Centran Corp., 747 F.2d at 1552 ("To require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake.").

Second, to the extent that there is a concern that certification of an unmeritorious action adversely affects the settlement posture of defendants, early use of dispositive motions can act as a screening device without the need for grafting on to the certification rules an inefficient and likely prejudicial merits consideration.²⁰ See, e.g., Miller v. Mackey Int'l, Inc., 452 F.2d 424, 428-29 (5th Cir. 1971) ("Purely vexatious litigation could be halted by a Rule 12 motion to dismiss or Rule 56 motion for summary judgment.").

A principal reason for early resolution of class certification issues is that defendants who succeed in dismissing an action prior to a certification ruling will not obtain the benefit of res judicata as to the nonrepresentative class members. However, where the defendant requests or consents to an early resolution of dispositive motions, and therefore assumes the risks of additional lawsuits, a district court should not be precluded from a ruling on such motions. Wright v. Schock, 742 F.2d at 544.

DISMISSAL OR COMPROMISE - PROPOSED RULE 23(e)

Rule 23(e), as currently phrased, provides as follows:

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.

The proposed revision to the rule would add that (1) a hearing is required by the court before it provided approval for the requested dismissal or compromise, and (2) the

²⁰ See section on proposed Rule 23(b)(3)(F).

mandated notice to class members must precede such hearing and approval. As the Draft Note states, this amendment would confirm the current practice with respect to the settlement of class actions. The revisions would also serve the useful purpose of emphasizing the care courts must exercise in reviewing proposed settlements. As the Draft Note further states, "[a] hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared." Draft Note at 14.

With one qualification, the Section supports these modifications. The purpose of the Rule 23(e) provisions is to protect absent class members from unjust or unfair settlements affecting their rights. Piambino v. Bailey, 610 F.2d 1306, 1327 (5th Cir.), cert. denied, 449 U.S. 1011 (1980); Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408-09, (9th Cir. 1989). However, courts have properly held Rule 23(e) not applicable to situations in which the risk of prejudice to the class is not present. For instance, "[i]nasmuch as an involuntary dismissal presumably could not involve collusion or benefit the representative plaintiffs at the expense of the remaining class members, the protection afforded by giving notice to the absentees is not required". Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 677 F. Supp. 289, 294-95 (M.D. Pa. 1987) (quoting 7B C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d, § 1797 at 345 (1986)). See also Marx, 747 F.2d at 1552; Laventhall v. General Dynamics Corp., 91 F.R.D. 208, 210 (E.D. Mo. 1981), aff'd, 704 F.2d 407 (8th Cir.), cert. denied, 464 U.S. 846 (1983).

In addition, courts also have held that "no prejudice to the class will result from approving plaintiff's motion for voluntary dismissal [pursuant to Fed. R. Civ. P. 41(a)(1), and therefore] no notice to the absent class members is necessary" Larkin Gen. Hosp., Ltd. v. American Tel. & Tel. Co., 93 F.R.D. 497, 503 (E.D. Pa. 1982). See also Berse v. Berman, 60 F.R.D. 414, 416 (S.D.N.Y. 1973). Such voluntary dismissal will not prejudice the rights of

class members so long as no certification decision has been made and the court has been provided with adequate evidence that the plaintiff has not used the class action device to obtain benefits not available to other members of the class; i.e., the dismissal is without consideration.

The Advisory Committee should make clear in the Draft Note that its statement that the revisions to Rule 23(e) are intended to confirm current practice includes limiting the application of the rule to those situations where its purpose would be served. Cases in which there is a voluntary dismissal involving no consideration or an involuntary dismissal should therefore be excluded. Otherwise, the result will be inefficient and wasteful use of judicial resources and the imposition of unnecessary costs on the parties.

The Commercial and Federal Litigation
Section

December 11, 1996

Report Prepared by the
Committee on Class Actions

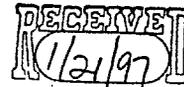
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#2081

CHICAGO COUNCIL OF LAWYERS

CHICAGO LAWYERS FOR THE PUBLIC INTEREST



96-CV-148

January 15, 1997

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Revision of Rule 23 of the
Federal Rules of Civil Procedure

Dear Secretary:

I write on behalf of the Federal Courts Committee of the Chicago Council of Lawyers, a public interest bar association, to comment on the draft revisions to the Federal Rule of Civil Procedure 23.

INTRODUCTION

The opening page of the report of the Advisory Committee on Civil Rules on Rule 23 declares that the present proposal was shaped around the "demands of mass tort litigation," as well as "some issues that arise in small-claims class litigation." There is no doubt that these two categories of class actions shape the popular impression of class actions and grab the biggest headlines. See Thomas M. Burton, "Makers of Blood Products Agree to Offer \$640 Million to Settle Cases Tied to AIDS," WALL ST. J., Apr. 19, 1996 at B6; Sandra Torry, "Going to the Head of the Class Action Settlement," WASH. POST, Apr. 8, 1996 at F7 (discussing settlements where lawyers reaped millions of dollars in fees, while the class received coupons or other trivial relief).

Our Committee submits, nonetheless, that these are the exceptional cases. What is missing from the Advisory Committee's analysis is due regard for the workaday class action litigation that functions well under the present version of Rule 23. One need only skim Newberg's esteemed treatise on class actions to appreciate the broad range of class actions certified to litigate pension rights, securities fraud, civil rights, consumer fraud and insurance claims, among others. Rulemaking modelled after the exceptional cases will splash back on these more common actions, denying litigants and the courts of an effective way to litigate a series of common claims.



Moreover, each of the proposals -- the addition of two new (b)(3) factors, the watering down of the "as soon as practicable" proviso in subsection (c)(1), the establishment of settlement classes, and the introduction of interlocutory appeals -- has the appearance of tilting the table against plaintiffs who seek to litigate (rather than quickly settle) class claims. Although we oppose the proposed revisions to the rule, we also suggest below some changes that mitigate the burdens that these proposals could place on plaintiffs.

Rule 23(b)(3): The revisions to the subsection, read in combination with the Advisory Committee report, are designed to reach two particular types of class actions for monetary relief: (1) high-stakes mass tort litigation and (2) very low-stakes consumer litigation. Once adopted, however, these rules will apply to all cases with class allegations. And in many instances, perhaps unforeseen by the drafters of this rule, the effect will be to drive out useful class actions.

New factors (A) and (F) are tailored to strike a "golden mean" of the appropriate value of class claims. Factor (A), the "practical ability of individual class members to pursue their claims without class certification," will be quickly translated into whether plaintiffs' claims are valuable enough to attract counsel on a contingency basis. In product liability cases for instance, where injuries are often grave, plaintiffs' claims are often high enough to justify separate litigation. The new rule would cut against class treatment of such claims. At the other pole, factor (F) would allow a judge to weigh the "probable relief" to the class against "costs and benefits of litigation." This 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), discussed below).

There are classes that do not fall between these two poles. For instance, each plaintiff may have a high enough stake to pursue his or her own claim under factor (A), but the claim may not be easily susceptible to individual proof, as where there is a pattern of fraud or discrimination. In some cases, there will be a public interest in forcing the defendant to disgorge unjust profits earned through unlawful or tortious skimming of small amounts of money from a large group of people, especially where a fiduciary duty (as under ERISA) is at stake. These possibilities are not necessarily addressed by factor (F), yet they should be considered when courts make class certification determinations. Cases with multiple claims, where some claims are smaller than others, also do not fit neatly into the proposed rule's paradigm.

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It is difficult to project how courts will apply these new standards; after all, it took well over a decade for the 1966 amendments to Rule 23 to accrue their settled meaning. But a possible consequence, if these new (b)(3) factors receive strong judicial support, will be to discourage useful class actions from proceeding.

There is a way to make these changes to subsection (b)(3) a little more palatable and balanced: by stating definitively that no single (b)(3) factor should predominate, leaving it to the discretion of the district court judge to balance the factors accordingly. This is the generally understood meaning of this subsection today, but expressing this approach in the new version of the rule, it may deter courts from focussing myopically on the size of recovery or probable relief to the class, to the exclusion of factors that might favor certification.

Rule 23(b)(4): It is notable that the only proposal likely to expand the availability of class certification is one that the defense bar currently endorses, that of so-called "settlement classes." See Richard B. Schmitt, "The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit," WALL ST. J., July 18, 1996 at A1. Whatever actions the retooled subsection (b)(3) may push out of the federal courts, they will be replaced under new (b)(4) by the wrong kind of class: the quick "sell-out" variety. We cannot improve on the comments already made by others, particularly the Steering Committee to Oppose Proposed Rule 23, about the corrupting influence that this special classification would have on class practice in federal courts, and we strongly oppose its adoption.

The new (b)(4) class removes the brakes and guardrails of subsection (b)(3). It provides no standards to guide district court discretion in this area other than the modest requirements of subsection (a). It also tips the balance in favor of quick, cheap settlements because conditions for certification are more favorable (thus making the federal forum more inviting). Under this provision, defendants eager to obtain a preclusive judgment over a widespread class of claims may remain silent about problems with the manageability of the settlement or the interest that individual claimants may have in controlling their own claims. And Rule 23(b)(4) omits the opt-out procedure mandated for (b)(3) classes under subdivision (c)(2). (While the Advisory Committee Notes state that Rule 23(c)(2) should apply to (b)(4) settlement classes, the text of the rule does not so state.)

It is also utterly unclear what benefit this proposal brings to the administration of justice. Perhaps it will expedite resolution of complex matters, but only at a great cost to unnamed plaintiffs who lack a place at the bargaining table.

Any rule that fosters class settlements ought to provide a lot of protection for unnamed class members -- particularly scrutinizing the adequacy and substantive fairness of the settlement -- yet the proposed (b)(4) class provides no extra protections; indeed, it lessens the modest protections provided by the current rule 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. Finally, there is no apparent need for a new rule specifically addressing settlement classes. As the Advisory Committee Notes state, courts have long allowed settlement classes under current Rule 23, subject to the normal conditions of certification. No persuasive case has been made for a new subsection with watered-down standards.

Rule 23(c): The new version of Rule 23(c) would substitute "when" for "as soon as" practicable for the timing of class determinations. The current version of the rule is widely understood to give priority to class certification, although not invariably so. Rule 23 now provides breathing space for courts to sometimes reject class actions in critically flawed cases, such as where there is an insurmountable affirmative defense or a patent deficiency in the merits. See Cowen v. Bank United of Texas, FSB, 70 F.3d 937, 941-43 (7th Cir. 1995) (named plaintiff failed to state a claim under Truth in Lending Act); Nelson v. Murphy, 44 F.3d 497, 500-501 (7th Cir. 1995) (plaintiffs' claim for injunction moot).

The new language eliminates the priority for certification, leaving the timing of certification in the unrestricted discretion of the district court. This new rule would, we expect, encourage defendants to trump class certification by filing preemptive summary judgment motions on the merits. Such tactics would run counter to the principle ratified by the Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) that courts do not inquire into the merits before deciding the class issue. Sometimes, as in pattern-or-practice employment discrimination cases, the evidence of liability takes years of discovery to develop, and it has long been believed that it would be place too great a burden on the named plaintiffs to have to conduct (and pay for) such merits discovery prior to class certification. This argument is reflected in draft minutes of the Advisory Committee (published 167 F.R.D. at 550-51). There is, in some quarters, vociferous opposition to Eisen (see Bartlett H. McGuire, "Death Knell for Eisen," 168 F.R.D. 366 (1996)) and the Advisory Committee even included (but later withdrew) a revocation of the Eisen rule in its November 1995 draft. Despite the Advisory Committee's decision to step back from the brink on this issue, however, those opposing class

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certification will not hesitate to push the rule to its limits.

This risk 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 (i.e. about issues of fact relating to liability). This would strike a balance, guiding the district court to avoid merits investigations at the early stages of the case, while allowing dispositive motions to proceed in cases (like Cowen and Nelson) where the outcome is essentially preordained.

Rule 23(f): This section provides a special category of interlocutory review for class certification decisions. The new rule even greases the skids, by doing away with the requirement under 28 U.S.C. § 1292(b) that the district court certify that the appeal presents "a controlling issue of law as to which there is substantial ground for difference of opinion." The rule provides no standard to guide the discretion of the court of appeals in granting interlocutory review.

Our Committee finds this proposal difficult to square with the deferential standard of review paid on appellate review of certification orders. See, e.g., Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992), cert. denied, 113 S. Ct. 972 (1993). There is little cause, under this standard, for our courts of appeal to engage in expedited review of these quintessentially fact-bound and discretionary decisions. Interlocutory review might be appropriate if we assumed that district courts are error-prone on the side of certifying classes. But there is no empirical support for this assumption. If anything, shifting the locus of decision-making to the appellate level may have the unintended effect of reducing district court accountability. If the district judges know that their decisions will be instantly spirited up to the appellate courts, the consequences of a "wrong" decision will be minimized and the tough issues can thereby be avoided.

No doubt, it would be tempting and potentially helpful to obtain appellate guidance on class certification, no less so than on other interlocutory issues such as discovery decisions that shape proof at trial. But refusing the temptation, as Judge Frank Easterbrook has written, is the price we pay for a final decision rule. See EEOC v. Mitsubishi Motor Manufacturing of America, Inc., No. 96-3957 (7th Cir. Dec. 16, 1996) ("misleading or inappropriate" communications to a class would have "effects hard to undo at the end of the case . . . but would justify an appeal only if courts of appeals were willing to micro-manage the conduct of all complex cases"). Indeed, in an era where the docket of the courts of appeals is rising faster than that of the district courts, see Judge Richard A. Posner, The Federal Courts:

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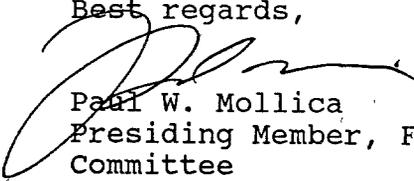
Challenge and Reform at 53-64 (1996), we must ask ourselves: At what cost do we add a new category of interlocutory appeals? What other matters will be given short shrift to make room on the docket for such appeals?

While the Advisory Committee Notes say that "[p]ermission to appeal should be granted with restraint," parties opposing class certification will face irresistible client pressure to pursue appeals whenever class certification is granted. The cost of fighting the order is low, because the issue was recently litigated and defendant's papers are easily and cheaply processed into an appellate brief. The potential benefits to defendant are high, because a favorable decision radically shrinks the scope of liability. And courts of appeal, fully aware of (and fully in sympathy with) the stakes that defendants claim in such cases, will at least occasionally accept appeals earlier rather than later with the merits. See Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) and In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995) (both cases discuss the settlement leverage plaintiffs supposedly enjoy when a class is certified). Conversely, in cases where certification is denied, experience tells us that courts of appeals are not likely to foist class certification on unwilling district court judges. Historically, the number of appellate decisions reversing the denial of class certification is quite small.

To avoid these problems, if this section is to be adopted, the Advisory Committee could consider importing the "restraint" language from the Notes to the text of the rule, to set a standard that resort to interlocutory appeal should be exceptional.

Thank you for considering our comments.

Best regards,



Paul W. Mollica
Presiding Member, Federal Courts
Committee

GOUGH, SHANAHAN, JOHNSON & WATERMAN
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January 15, 1997

96-AP-031

✓ 96-CV-150

Secretary of the Committee
of Rules of Practice & Procedures
Administrative Office of the
United States Court
Washington D.C. 20544

Dear Sir:

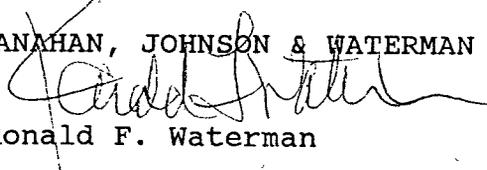
I am writing regarding the amendments proposed to Appellate Rules 5, 5.1 and Form 4, Civil Rule 23, and Criminal Rules 5.1, 26.2, 31, 33, 35 and 43.

First, addressing the proposed revision to Rule 5 of the Federal Rules of Appellate Procedure. I am struck by the fact that the proposed amendment once again substantially clarifies the language of the rule and although it broadens the rule slightly, nevertheless provides a model for clarity as to how the rule applies. I have but one observation--that is Rule 5(b)(1)(B) should be amended striking the word "itself" and inserting the word "presented" so that the rule is internally consistent and so that Rule 5(b)(1)(B) is consistent with Rule 5(b)(1)(A).

Aside from the foregoing comment, I have no other specific textual comment regarding any of the rules. I do again believe that the clarity provided in the provisions to Rule 23(b)(3) also helps clarify and identify more appropriately when class actions can be pursued. I would strongly recommend adoption of these rules subject to the language change proposed above.

Very truly yours,

GOUGH, SHANAHAN, JOHNSON & WATERMAN


Ronald F. Waterman

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1/22/97

96-CV-151

Federal Judicial Center
Research Division



memorandum

Writer's Direct Dial Number:
202-273-4070
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DATE: January 22, 1997
TO: Advisory Committee on Civil Rules
FROM: Thomas E. Willging *TEW*
SUBJECT: Response to Written Statement by William A. Montgomery, Vice
President and General Counsel, State Farm Insurance Companies

This memo is to clarify aspects of the Federal Judicial Center's empirical study of class actions that were discussed in Mr. Montgomery's comments on the proposed amendment to Federal Rule of Civil Procedure 23 and presented to the Advisory Committee at its hearing in San Francisco on January 17, 1997. A copy of that statement is attached. Mr. Montgomery's reference to the FJC data appears to be based on a misimpression about the meaning of our data relating to gross settlement amounts and payouts to class members.

Mr. Montgomery argues that "court-approved attorney fee awards in . . . [class actions] can be far out of proportion with traditional norms." (Montgomery Statement at p. 2) He recognizes that the Federal Judicial Center's recent study did not support his argument, but asserts that our study "did not capture or consider information about actual payouts to class members." This assertion is misleading because generally the amount of the payment to individual class members does not determine the total amount of the settlement. In fact, in most cases studied, the system worked in the opposite direction: the gross amount of the settlement determined the individual payout on a pro rata basis.

While Mr. Montgomery correctly states that we were unable to specify payouts to individual class members, we were able to document the gross amounts of the settlements in the cases studied. Because the gross settlements were generally distributed on a pro rata basis to those members who presented claims, our data correctly represent the aggregate settlement and thus provide the appropriate figure to which attorneys' fees should be compared. In other words, in most cases studied, the fact that some individual class members may not have filed claims did not reduce the gross amount of the settlement. In at least 90% of the settlements studied, the entire fund was distributed to class members and their attorneys. If some

members failed to file claims, their inaction simply increased the pro rata share of the settlement for class members who filed claims. Our data show, in a rather consistent pattern across all four courts that the "fee-recovery rate infrequently exceeded the traditional 33.3% contingency fee rate. Median rates ranged from 27% to 30%." (Final Report at 69).

Mr. Montgomery also asserts that the Federal Judicial Center's study does not provide adequate support for the statement in the proposed comment that the "median individual class member recovery figures reported by the Federal Judicial Center ranged from \$315 to \$528." (Montgomery Statement at p. 4). Again, Mr. Montgomery asserts that the absence of data on individual recoveries precludes this type of statement. Here, Mr. Montgomery's claim is accurate to the extent that the statement indicates that the individual recoveries were actual. Our method of deriving the median individual figures was, as he notes, to divide the net settlement amount by the number of notices sent. The resulting figure would be more precisely referred to as a "potential recovery" than an actual individual "recovery." While Mr. Montgomery's statement on the above point has some validity, it does not support his conclusion that the Advisory Committee Note on this issue should be discarded. The note could be amended by inserting the word "potential" before "recovery." The note validly relies on our data to indicate the size of potential individual recoveries in class actions.

Finally, Mr. Montgomery refers to our study as being based on a "narrow sample" (Montgomery Statement at p. 2) because it was limited to cases terminated over a two year period in four district courts. That conclusion ignores the fact that those four courts were selected because of their high levels of class action activity (407 cases were studied) and their geographic diversity. While one might always wish for a larger, more comprehensive study, the FJC study is by far the largest and most comprehensive empirical study of class actions to date. As Professor Miller stated, systematic empirical data is to be preferred over the "cosmic anecdotes" that have metamorphosed from particular events in individual cases (Miller Statement at p. 2). We encourage further studies, but until such studies are undertaken, the FJC study appears to be the best empirical evidence available.

cc Mr. William Montgomery
Professor Edward H. Cooper

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96-CV-122

WRITTEN STATEMENT

William A. Montgomery, Vice President and General Counsel
State Farm Insurance Companies

Comments On Proposed Amendments To
Federal Rule of Civil Procedure 23
Before the Advisory Committee On Civil Rules,
Committee on Rules of Practice And Procedure
Of The Judicial Conference Of The United States
January 17, 1997 - San Francisco, California

I. Introduction

My name is William A. Montgomery, and I am Vice President and General Counsel of State Farm Insurance Companies. I support the proposed changes to Rule 23 that have been published for comment, and especially the proposed addition of Factor F to Rule 23(b)(3). However, I am proffering some modifications to the language of the Rule and the accompanying notes.

State Farm is the largest writer of auto and homeowner's insurance in the United States, is among the leading writers of life insurance, and has tens of millions of policyholders. The parent company is organized as a mutual, and so is owned by its policyholders. State Farm probably conducts billions of transactions with its policyholders and claimants every year. The Company's size and the national scope of its business has made it a target of plaintiffs' lawyers alleging proposed class actions on a grand scale, with the inevitable accompanying allegations of staggering collective damages assertedly suffered by the proposed class.

As has been reported by other corporate witnesses in regard to their companies, the filing of asserted class actions against State Farm is on the rise. A mere handful of alleged class actions were pending against the Company in the early 1990's, but at present more than 50 are pending. Most of these cases complain of one practice or another which is said to affect a broad group of State Farm policyholders, usually involving relatively small amounts per claim. We dub them "consumer class actions."

While a number of these purported class actions have been filed in state courts, most states' class action rules are virtually identical to Federal Rule 23. Moreover, increasing numbers of consumer class actions are pending in the federal courts because they satisfy federal jurisdictional requirements through aggregate punitive damages claims, supplemental jurisdiction, or both.

Recent experience in facing -- and resolving -- such lawsuits demonstrates that changes to Rule 23 are needed. The new proposed Factor F, which permits courts to weigh the probable relief to individual class members against the costs and burdens of class litigation, 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.

In consumer class actions, even when the Company has believed the plaintiffs' claims were highly questionable, which is most often the case, State Farm from time to time has been constrained to settle. The unpredictability of trial in the face of the claimed aggregate damages, as well as the cost of defense, ordinarily make litigating to the end an imprudent alternative. The class action device provides disproportionate leverage in favor of the plaintiffs' attorney, which is why almost no class actions ever get tried.

On the other hand, small claims class action settlements yield no monetary value to most members of the class. Parties negotiating a settlement typically estimate the size of the class and the potential aggregate value of the settlement to class members. On the surface, if one looks only at the potential value of the settlement consideration made available to the settlement class, the resolution of these cases may appear to provide meaningful recoveries for class members. Likewise, the plaintiff attorney fee awards when measured as a percentage of that same "estimated value" of the settlement may not appear to be unreasonable. In reality, however - notwithstanding extensive individual and published notice - the funds made available to the class largely go uncollected.

Even more troubling, when viewed in terms of the actual recovery that ultimately is collected by the class, the court-approved attorney fee awards in these cases can be far out of proportion with traditional norms. Typically, attorney fee awards are made before the claim administration process begins, so no one knows for certain how many class members will come forward. I am aware that the Federal Judicial Center's recent study did not contain similar findings, but the Center's study appeared to review attorney fee awards in comparison to settlement consideration available to the class, and did not capture or consider information about actual payouts to class members.¹ ("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...Unfortunately, the parties generally did not report the number of claims received. Thus our data on claims received are too incomplete to present." Judicial Center Study, pp. 75-76). Consequently, the Center's figures on the average return to class members, and their analysis of whether payments to plaintiffs' counsel are excessive, contribute little of value to this aspect of the fee award analysis.

The comments of class members requesting exclusion from lawsuits raise further questions as to whether Rule 23 is being abused in the context of consumer class actions. For example, in cases where State Farm's practices in handling claims for repair of vehicles were questioned, we received requests for exclusion with comments including the following:

¹Federal Judicial Center, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Draft, January 17, 1996)* hereinafter "Judicial Center Study", pp. 16, 75-76, 94.

I do not wish to participate in this lawsuit because I feel that State Farm was always fair to me . . . I have no complaint against State Farm for the way in which they handled my claims.

I have been well-satisfied with all the repair work that has been done on my cars over the past 17 years.

Had my car repaired during the term specified and 100% satisfied with State Farm.

Be it understood that I have no pending claims against State Farm Ins. Co. I got complete satisfaction when I was insured with State Farm.

Some of the class members were more forceful in their objections:

I intend to make no claims as the State Farm guarantee [on parts repairs] is better . . . What a goof off way to take everyone's time and money for nothing.

This is frivolous and an unconscionable waste of my premium dollars. Sanctions should be imposed on the bloodsucking parasites.

Not every arguable mistake, misjudgment, or misdeed needs to or should be resolved through litigation in general, much less through class action litigation in particular. The judicial system already entertains individual claims of small value, for those who choose to assert them, through expedited and streamlined procedures of local small claims courts. Moreover, there are other avenues of common relief which may be much more efficient, such as action by regulatory or other law enforcement authorities, or prompt voluntary action by the alleged wrongdoer. The availability of such alternatives should be relevant to the class certification issue, and the courts should be encouraged to deny class treatment for small consumer claims where such other methods can be used to address whatever mistake or improper conduct a defendant is alleged to have committed.

II. The Advisory Committee's Proposals

A. The "Just Ain't Worth It" Factor -- Proposed 23(b)(3)(F)

Factor F, which requires consideration of whether the "probable relief to individual class members justifies the costs and burdens of class litigation,"² addresses some of the unique problems consumer class actions pose. While the commentary occasionally strays, I understand that

²Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, Request For Comment, (hereinafter "Preliminary Draft"), August, 1996, p.42.

the Advisory Committee has determined that the central purpose of Factor F is to "focus on the individual claims being aggregated", a purpose with which I agree. Preliminary Draft p. 25 (Minutes of the April 18-19, 1996 Advisory Committee meeting (the "Minutes")). I recommend that certain parts of the Rule and Commentary be modified or supplemented to clarify and reinforce this underlying purpose and intent of Factor F.

1. Proposed Revision to General Commentary to Rule 23(b)(3)

The general introduction in the draft Note accompanying the proposed changes to Rule 23(b)(3) includes a statement that the Advisory Committee views class actions permitting the litigation of "valid small claims for small amounts" as a "vital core" of Rule 23(b)(3) litigation:

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 small claims court.

Preliminary Draft, p. 46.

I believe this apotheosis of small claims class actions ignores reality, and that the Federal Judiciary Center's study is wholly inadequate support for the Advisory Committee's characterization. As I understand the scope of the study, the Center reviewed the results of class action litigation resolved during a two-year period in four different District Courts. Judicial Center Study, p. 6. From that narrow sample, the Center reviewed settled actions, and calculated the mean recovery figure 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.*" Judicial Center Study, p. 16, n. 31 (emphasis supplied). The Center acknowledged that many class settlements involve a claims procedure, that only those who filed claims would receive payments, and that information as to claims received was incomplete. Judicial Center Study, pp. 75-76. Consequently, the Center did not determine what actual payouts were made to the class members after notice was sent.³

I therefore recommend that the quoted language be deleted altogether.

Alternatively, if the basic passage is to be retained, the word "valid" should be deleted. In referencing "valid" small claims, the Advisory Committee's note could be read to suggest that it is appropriate to take an initial "peek at the merits," as some have put it, when determining

³Such information is available when the Court's record contains reports detailing settlement administration results.

whether a class should be certified. But inquiry into the merits at this stage of litigation is a notion that the Advisory Committee has considered and rejected.

In addition, the citation to the "findings" of median individual class-member recovery figures from the Federal Judicial Center's study are not appropriate here. Mention of the \$315 and \$528 figures could be viewed as acceptance that individual claims in this range should be considered per se certifiable under Factor F -- a blanket statement that the Advisory Committee presumably did not intend to make, given the later commentary to Factor F itself.

2. Proposed Revision to Commentary to Rule 23(b)(3)(F)

The discussion of Factor F in the draft Note appropriately recognizes that not every possible aggregation of small claims is proper for certification under Rule 23, and that the cases inappropriate for class treatment can be identified without any significant preliminary discovery and without consideration of the merits. Information the courts are encouraged to consider under Factor F include the complexity of legal issues or proceedings that likely will be involved in the case, the likely cost of providing notice to class members, and the probable costs involved in administering and distributing any ultimate award to class members. The commentary should also encourage the court to consider such matters as whether the defendant or any regulatory agency had received a substantial number of individual complaints challenging the practice at issue, whether the defendant has already undertaken curative steps, and what relationship, if any, the named plaintiffs have with their counsel -- class actions in which there is little true interest sometimes are filed with the employees and/or relatives of the plaintiffs' counsel as named class representatives. I suggest that the Note be modified as follows:

The value of probable individual relief must be weighed against the costs and burdens of the class-action proceedings. No particular dollar figure can be used as a threshold. Factors the court should consider include whether 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, whether identification of the class members and notice will prove costly, and whether distribution of the award will be expensive, whether the defendant or any regulatory or law enforcement agency has received a substantial number of individual complaints challenging the practice at issue, whether the defendant has voluntarily undertaken curative steps, and what relationship, if any, the named plaintiffs may have with their counsel. It will be difficult to measure these matters at the commencement of an action. The opportunity to decertify later should not weaken this threshold inquiry

Preliminary Draft, p. 50 (proposed modifications added).

The draft Note also properly has cautioned that no bright-line threshold can be set to measure whether the amount of requested recovery to individual class members is sufficient to merit proceeding with class litigation. Nevertheless, there is a passage in the commentary that could be interpreted as so limiting that it virtually writes the Factor out of the Rule:

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.* (Emphasis added).

Preliminary Draft, p. 50

While I agree with the italicized sentence, it should be deleted from the Note, and "small" should be substituted for "trivial" in the second line. The sentence could be read to suggest that Factor F will preclude class certification only in the rare circumstance where lack of class member interest, and only trivial relief, are "near certainties." Use of "trivial", a value-laden word, would undercut the weighing process the court is being asked to undertake.

Another troubling portion of the draft Note suggests that the court weigh the public values that might be served if a particular class action is certified:

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.

Preliminary Draft, p. 50.

During its deliberations on the proposed changes to Rule 23, however, the Advisory Committee considered and rejected a proposed factor providing that the court determine "whether the public interest in - and the private benefits of - the probable relief to individual class members justify the burdens of the litigation." The Minutes note that this factor was modified to eliminate "any explicit reference to public interest" and to weigh instead "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The Minutes explain this change as a reflection that:

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.

Preliminary Draft, pp. 25-26.

The Advisory Committee's decision against including an evaluation of "public values" was correct. To reflect this focus of Factor F on individual claims for relief more accurately, the Note should be revised to provide as follows:

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify ~~must be weighed against~~ the costs, burdens, and coercive effects of class actions that otherwise satisfy in determining whether a particular set of claims satisfies Rule 23 requirements.

3. The Commentary Should Not Be Revised To Include Consideration of Deterrence Value in the Factor F Determination.

A closely related issue that has been raised during the Advisory Committee's deliberations and testimony regarding the proposed Rule changes is whether a court's weighing of the potential benefits of a particular asserted class action under Factor F should incorporate the concepts of "corrective justice" or deterrent value of small claims class actions. Such concepts should not be included for the reasons set forth above. Moreover, any such requirement would improperly encourage the courts to make some evaluation of the merits of the case.

The Minutes explain the Advisory Committee's decision not to include any broad deterrence concepts in the Rule or the Note: "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." Preliminary Draft, p. 26. I agree with the views expressed by another witness as to the redundancy and hindrance class actions can be to the efforts of real law enforcement agencies. See Statement of John L. Hill, December 17, 1996, at pp.3-4.

I also agree with Judge Hill and with William T. Coleman that inclusion of the deterrence concept is beyond the scope of the judiciary's authority under the Rules Enabling Act.

Rule 23 was not intended as a vehicle to promote the prosecution of class actions by self-appointed "champions" of the public interest.

4. Factor F and the Draft Commentary Properly Weigh the Costs and Benefits of Class Litigation Against the Probable Value of Individual Claims.

Several commentators who object to Factor F as drafted have argued that if it is adopted, the court should be encouraged to weigh the likely costs of the litigation against the aggregate claimed damages of the class. Focusing on "aggregate" relief to the class would contradict the valid proposition that "Rule 23(b)(3) is an aggregation device that . . . should focus on the individual claims being aggregated." Preliminary Draft, p. 25.

As my earlier comments make clear, if the court merely looks to the aggregate claimed damages, it will ignore the level of interest of most of the proposed class, and consequently may grossly overestimate the actual benefit of a class action to a large proportion of the individual class members. Such a result would be inconsistent with what the Advisory Committee has said is the underlying purpose of Factor F.

B. Factor A and Alternative Avenues of Relief

Another change proposed by the Advisory Committee is the addition of Factor A to Rule 23(b)(3), instructing the court to consider "the practical ability of individual class members to pursue their claims without class certification." Preliminary Draft, pp. 41-42. This factor points against class certification when an individual plaintiff has a damages claim large enough to permit him to pursue independent litigation. However, this factor should also expressly recognize, both within the Rule and the accompanying Note, that class certification may not be desirable where individual class members can pursue relief through alternative mechanisms. For example, where governmental regulators have at their disposal a heavy arsenal of remedies to redress wrongdoing, the interests of putative class members -- particularly those with relatively small claims -- may be much better served by pursuing relief through administrative proceedings. Moreover, courts should take into account situations where a class action defendant has made voluntary efforts to cure an alleged wrong before certifying a class whose stated goal is simply to achieve what already has been accomplished. Where defendants take pre-suit curative action, or undertake voluntary remedial action after a brief grace period following the filing of the suit, the courts should consider whether any need for certifying the class has been obviated. Thus, the rule should be modified to read:

- (A) the practical ability of individual class members to pursue their claims or otherwise obtain relief without class certification;

In addition, the Note should be modified as follows:

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, when they can obtain relief through administrative proceedings, when a regulatory or other law enforcement inquiry into the matters underlying the complaint already is underway, or when a defendant has agreed to take voluntary remedial action. If individual class members cannot practicably pursue individual actions or otherwise obtain relief, on the other hand, this factor encourages class certification.

Preliminary Draft, pp. 47-48 (proposed modifications reflected).

C. Appellate Review

An increased opportunity for appellate review of orders granting or denying a motion for class certification would be an advance over the present requirement that class certifications cannot be reviewed without the district court first agreeing to such an appeal.

However, the draft Note accompanying the proposed amendment of Rule 23(f) should be modified to make it clear that this change is intended as a material expansion of the availability of appellate review of certification decisions, and to provide for an automatic stay of proceedings while the appeal is pending:

~~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 . . . 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 . . .~~

~~The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings . . . Permission to appeal should not will stay trial court proceedings.~~

Preliminary Draft, pp. 55-56 (proposed modifications reflected)

D. Settlement Classes

The proposed Rule 23(b)(4) would clarify the law regarding settlement class actions by specifically authorizing certification of a settlement class even if that class would not meet Rule 23's requirements for certification of a trial class. The Advisory Committee has explained that this proposal permits certification of a settlement class only where the requirements of Rule 23(a) have been met, and where the parties have agreed to settle. The revision is not to be used as a device to force parties to settle; instead, it is a recognition that the "manageability" criterion of Rule 23(b) preventing certification of unwieldy litigation classes should not stand as a barrier to certification of a settlement class that, by its very nature, will not be tried.

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 that would have been unmanageable as a litigation class.

III. Conclusion

If the class action device is to play a constructive role in today's litigation environment, substantial changes to Rule 23 are necessary to address the problems with current class action practice. While the pending proposals will not be a total cure, I encourage the Advisory Committee to move forward with its proposed changes to Rule 23, with the modifications I have suggested.

#2117



96-CV-
154

LAW OFFICES OF
STEVE ACKERMAN
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TELEPHONE
(312) 454-9300

Jan. 24, 1997

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
Washington, D.C. 20544

Dear Sir,

I am writing regarding proposed revision to Rule 23. I am a lawyer who has a litigation practice and does some Class Litigation.

Proposed (b) (3) (A) 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. This would send the opposite of a deterrent message.

Thank you for your consideration.

Very Truly Yours,


STEVE ACKERMAN

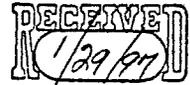
SA/sa

#2217



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OF THE
PRESIDENT

100 SOUTH STREET / POST OFFICE BOX 186 / HARRISBURG, PA 17108-0186 / (717) 238-6715 • FAX (717) 238-1204



JAMES F. MUNDY

January 27, 1997

Peter G. McCabe, Esq.
Secretary of the Committee of Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

96-CV-155

Re: Preliminary Draft of Proposed Amendments to
Federal Rule of Civil Procedure 23

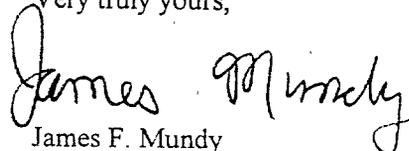
Dear Mr. McCabe:

At its meeting on January 17, 1997, the Board of Governors of the Pennsylvania Bar Association unanimously approved the recommendation of its ABA liaison, H. Robert Fiebach, Esquire, to convey the sense of the Association that it supports the Judicial Conference Advisory Committee on Civil Rules' proposed amendments to Rule 23 of the Federal Rules of Civil Procedure.

The sole exception to that endorsement is the addition of proposed amended Rule 23(f), which would permit a Court of Appeals in its discretion to grant an appeal from an order of a district court granting or denying class action certification. While the Board understands the purpose behind this proposed amendment, we 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 concern could be alleviated with appropriate identified standards.

We appreciate this opportunity to deliver comments to the preliminary draft of proposed amendments to Federal Rule of Civil Procedure 23 and commend the Advisory Committee on Civil Rules on its efforts.

Very truly yours,


James F. Mundy

cc: Vincent J. Grogan, Esq.
Leslie Anne Miller, Esq.
Arthur L. Piccone, Esq.
H. Robert Fiebach, Esq.
Thomas G. Wilkinson, Esq.
Theodore Stellwag
E. Marie Queen

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2/5/97

96-CV-
156

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LAWRENCE MILBERG (1913-1969)

*ADMITTED IN CA
**ADMITTED IN PA

January 24, 1997

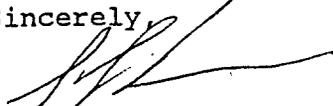
Hon. Paul C. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Dear Paul:

During a recent hearing in San Francisco on Rule 23 changes, I inquired of the General Counsel of Bank America on whether they had any class cases which supported their position that the plaintiffs' lawyers wind up with all the money or words to that effect. He appeared to deny any such knowledge and you had to step in as I kept lowering the amounts of the settlements.

Just so you know that I was not "whistling in the dark", I had some research done at our California office and have been advised that in In Re Bank America Securities Litigation, 85 Civ. 4779 C.D. Calif., the class action was settled for \$21.1 million with the class counsel receiving \$3.7 million in fees and expenses, and the balance going to the class. The derivative case settled for \$39.25 million, and counsel for the plaintiffs received \$5.4 million fees and expenses, with the balance being turned over to the Bank of America.

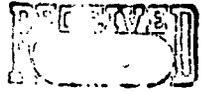
Looking forward to seeing you in Alabama, I remain

Sincerely,

Sol Schreiber

SS/dk

JAN 29 1997

95-CJ-



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

January 31, 1997

Sol Schreiber, Esq.
Milberg, Weiss, Bershak, Hynes
& Lerach
One Pennsylvania Plaza, 49th Floor
New York, New York 10119

Dear Sol:

Thank you for your January 24 letter. I am taking the liberty of including this as part of our record.

Sincerely,

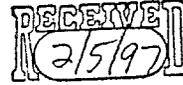
A handwritten signature in cursive script that reads "Paul".

Paul V. Niemeyer

cc: ✓ Mr. John K. Rabiej (w/enc.)

#2208

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96-CV-
157

Jeffrey Petrucelly
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January 31, 1997

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Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
One Columbus Circle, N.E., Room 4-170
Washington, DC 20544

Re: Proposed Amendments to Fed. R. Civ.P.23

Dear Mr. McCabe:

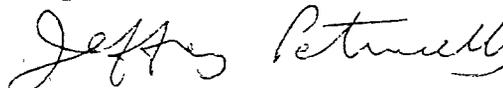
I am writing on behalf of our firm to express our objections to the proposed amendments to Federal Rules of Civil Procedure Rule 23. Principally, we believe that the proposed changes to Rule 23 would foster collusive settlements and improperly restrict small claims consumer class actions.

Second, the changes contain a new provision - Rule 23(b)(3)(F) - that requires judges to consider "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This change would permit wrong-doers to get off the hook, rather than providing a deterrent effect and some small relief for class members.

Finally, we are in support of the testimony prepared by the Trial Lawyers for Public Justice and would ask you to consider their comments thoroughly and carefully.

Thank you for your attention.

Very truly yours,


Jeffrey Petrucelly

JP/mg

cc: Leslie A. Brueckner

#2214

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TRACY C. NEVOLA

2/12/97

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TERENCE D. WATSON
MICHAEL H. WILCK

February 11, 1997

**NY BAR ONLY
**CT BAR ONLY

VIA FEDERAL EXPRESS

96-CV-159

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed amendments to Fed. R. Civ. P. 23

Dear Mr. McCabe:

We represent Summit Bank ("Summit"), a New Jersey banking corporation, in connection with various matters. Summit submits the within comments on the proposal by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Committee") to amend Rule 23 of the Federal Rules of Civil Procedure, as published in the Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil and Criminal Procedure in August 1996.

The proposed amendment to Rule 23(e) states that "[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 has been given to all members of the class in such manner as the court directs." We submit that the proposed amendment require that notice of dismissal or compromise of the action be provided to members of the putative class only if class certification actually has been granted. Mandatory notice of

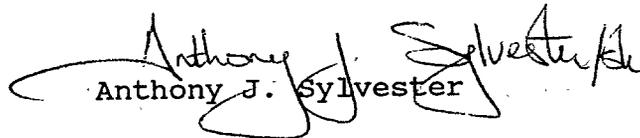
Mr. Peter G. McCabe
February 11, 1997
Page 2

dismissal or compromise to an uncertified class is onerous and unnecessary, since the uncertified putative class members' rights are in no way prejudiced by such a settlement or compromise. Moreover, including such a provision would benefit the putative class representative by eliminating the burden of providing notice to so many potentially uninterested parties.

The proposed amendment to Rule 23(b)(3)(C) adds the concept of maturity to the court's evaluation of the extent and nature of any related litigation involving class members. It is not entirely clear, however, what is meant by "maturity" in this context. The proposed amendment should be clarified to reflect 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.

Thank you for your consideration of these comments. 101

Very truly yours,


Anthony J. Sylvester

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Before the
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
 OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

96-CV-160

In re:
 Preliminary Draft of Proposed)
 Amendments to the Federal)
 Rules of Civil Procedure)

**COMMENTS OF
 THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS**

The Reporters Committee submits these comments in response to the submission of proposed amendments to the Federal Rules of Civil Procedure and the August 1996 request for public comment.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information rights of the print and broadcast media.

PURPOSE OF THESE COMMENTS

The Reporters Committee is greatly concerned about the proposal to amend Fed. R. Civ. P. ("Rule") 23. The proposed subdivision, 23(b)(4), would permit class certification for purposes of "settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial." The Reporters Committee opposes any proposed changes to the federal rules that create new barriers to journalists in their efforts to gather and disseminate the news.

The proposed subdivision will do just that, by encouraging the already increasing use of confidential settlement proceedings and agreements to which the First Amendment and common law right of access may not attach. Media organizations, and the public,

will clearly be affected by information blackouts engendered by such secret settlements.

I. The public right of access may not attach to settlement proceedings and agreements.

The press and the public enjoy a First Amendment and common law right of access to court proceedings and documents. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"); *Nixon v. Warner Communications*, 435 U.S. 589 (1978). It has long been recognized that, by promoting public scrutiny and criticism, press coverage of the court system ensures that trials are conducted efficiently and fairly. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (a responsible press has always been regarded as the handmaiden of effective judicial administration). Because "attendance at court is no longer a widespread pastime," press coverage of court proceedings is instrumental in keeping the public informed about the justice system. *Nebraska Press Assn v. Stuart*, 427 U.S. 539, 587 (Brennan, J., concurring) (the media functions as "surrogates" for the public).

However, court business that is distinct from a "trial on the merits" may be conducted privately, either at a bench conference or in chambers. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (1980); *B.H. v. McDonald*, 49 F.3d 294, 297 (7th Cir. 1995) (Fed.R.Civ.P. 77(b) allows district court judges to conduct proceedings in chambers, as long as the trial upon the merits is held in open court). The Supreme Court has articulated the following two-part test for evaluating

whether the right of access applies to a court proceeding: if there is a tradition of accessibility, and if public access plays a significant role in the functioning of the proceeding at issue. *Press-Enterprise II*, 478 U.S. at 8.

In light of this standard, courts have generally held that the right of access does not attach to settlement negotiations and agreements. *City of Hartford v. Chase*, 942 F.2d 130, 135 (2d Cir. 1991); *In re Asbestos Products Liability Litigation*, 1991 U.S. Dist. Lexis 11985, 19 Med.L.Rptr. 1220 (E.D. Pa. 1991). In *Asbestos Products*, 27,000 asbestos products liability cases from around the country were transferred to a district court in Philadelphia for coordinated or consolidated pretrial proceedings. The judge scheduled a closed meeting for the attorneys to discuss numerous issues, and denied a motion to intervene by *The Philadelphia Inquirer* on the ground that the meeting was primarily a settlement conference. The court speculated that if the meeting was open to the public, the parties would waste time engaging in needless posturing. The Third Circuit rejected the newspaper's argument that the public's interest in tracking the disposition of thousands of asbestos liability cases and the functioning of the court system warranted a grant of access to the meeting.

Similarly, in *B.H.*, a public guardian and two minors challenged a court's decision to hold nonpublic conferences to discuss implementation of a consent decree. The court opined that post-consent decree conferences are somewhat analogous to

settlement conferences in that "both types of conferences essay to negotiate remedies," and that settlement proceedings are historically closed. *B.H.*, 49 F.3d at 300.

In increasing numbers, courts are approving confidentiality orders that restrict the release of information about the terms of settlement agreements.

[Whether intervenors can challenge orders of confidentiality pertaining to settlement agreements] . . . is extremely important in light of the widespread and increasing use by district courts of confidentiality orders to facilitate settlements, and the consequential sacrifice of public access to the information deemed confidential by such orders.

Pansy v. Stroudsburg, 23 F.3d 772, 775 (3d Cir. 1994) (newspaper sought intervenor status to gain access to a secret agreement between a former police department chief and a municipality settling a civil rights action).

As reflected in the Committee Note to a proposed amendment to Rule 23(e) (mandating a hearing before the court may approve a settlement or other "dismissal or compromise" of a class action), parties to a 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." See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure at 54. In most instances, the press would not be in the role of "objector."¹ However, as the Committee recognized, nonparties

¹ There is at least one example where a media organization sought intervenor status for the purpose of objecting to a settlement agreement. In *Purcell v. BankAtlantic*,

may find it difficult to gain access to information pertaining to secret settlements. The effect is to cap the free flow of information to the public.

II. Courts are public institutions and should be open to the public.

The courts are public institutions and their proceedings should be public unless a compelling argument for secrecy can be made. *Johnson v. Greater Southeast Community Hospital Corp.*, 951 F.2d 1268, 1277-78 (D.C. Cir. 1991); *Arkwright Mutual Ins. Co. v. Garrett & West, Inc.*, 782 F. Supp. 376, 381 (N.D. Ill 1991). However, courts treat settlements like "private affairs," and thus deny the public access to information about the proceedings. *B.H.*, 49 F.3d at 298 (the "conflict between the traditional authority of the court to conduct closed conferences and the intuitive desire on the part of the courts to do public business in public").

Secret settlements are particularly troublesome in cases of heightened public concern. For example, the public is greatly interested where at least one of the parties to the action is a public entity. Such cases tend to have important policy implications, and any monetary award will be publicly financed.

85 F.3d 1508 (11th Cir.), cert. denied, 117 S.Ct. 178 (1996), the court held that ABC's interest in defending against a related libel action did not give the network standing to intervene in a securities fraud lawsuit in order to challenge the vacation of a jury verdict and entry of a settlement agreement. ABC sought to intervene because BankAtlantic had filed a libel action against ABC for statements made during its "20/20" news program about the real estate transactions at issue in the fraud case.

Cf. FTC v. Standard Fin. Management Corp. 830 F.2d 404, 412 (1st Cir. 1987) (threshold for sealing is elevated where the case involves a government agency and matters of public concern).

Under the proposed amendment, a class could be certified for settlement purposes only, and access to any resulting settlement proceedings or documents would be closed. Class action litigation often involves issues of great public concern. For example, *In re Cincinnati Enquirer*, 85 F.3d 255 (6th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3468 (U.S. December 27, 1996) (96-1032) involved a class action lawsuit filed in connection with an inmate riot at a state prison. *The Enquirer* sought access to a summary jury trial, a non-binding proceeding conducted to persuade the parties to settle the litigation in accordance with the jury's reaction. The Sixth Circuit held that the media's right of access does not attach to summary jury proceedings because they are a settlement tool rather than part of the trial. *Accord Pansy*, 23 F.3d at 786 (monetary settlement between a municipality and a former police chief); *B.H.*, 49 F.3d at 295-96 (consent decree related to the operation of a state child welfare agency).

III. Because settlement tools are not subject to public scrutiny, they can be overused and abused.

Court-aided settlements play an important role in relieving our overburdened court system. *Pansy*, 23 F.3d at 791. However, as discussed *supra*, public access to court proceedings acts as a check on the administration of justice. In contrast, settlement negotiations and agreements are not subject to public scrutiny.

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. Because they often involve information not in the control of the court and may implicate public concerns, confidentiality orders, when not subject to proper supervision, have a great potential for abuse, and judges should review such agreements carefully and skeptically before signing them. *City of Hartford*, 942 F.2d at 138 (Pratt, J. concurring). Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by those orders. *Pansy* at 785. Without sufficient judicial oversight, secrecy fosters collusion between the parties to "adjudicate their own case based upon their own self-interest" and "control public access to court papers." Cf. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (noting that the court's discretion to issue a protective order over discovery material is circumscribed by Rule 26(c)'s "good cause" criterion, as well as a long-established tradition which values public access to court proceedings) (citation omitted).

As Judge Pratt cogently observed in his concurrence in *City of Hartford*:

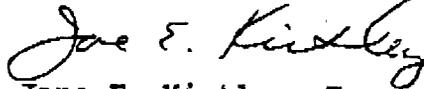
To hide from the public eye entire proceedings, or even particular documents or testimony forming a basis for judicial action that may directly and significantly affect public interests, would be contrary to the premises underlying a free, democratic society.

Id., 942 F.2d at 137.

For these reasons, the Reporters Committee urges the Committee not to submit the proposed amendment to Rule 23(b) to the Judicial Conference.

The Reporters Committee appreciates the opportunity to comment on the proposed amendment.

Respectfully submitted,



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February 12, 1997

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ITT Corporation

Theodore J. Fischkin
Assistant General Counsel
Director - Litigation
Director - Antitrust Compliance

February 11, 1997

96-CV-161

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington D.C. 20544

Re: Proposed Amendments to Rule 23 of the Federal Rules of Civil Procedure

Dear Mr. Secretary:

These comments are submitted on behalf of the Litigation Committee of the American Corporate Counsel Association (ACCA) with respect to the Amendments to Federal Rule 23 as proposed by the Advisory Committee on Civil Rules.

By way of introduction, ACCA is a nationwide bar association consisting entirely of in-house counsel employed in the legal departments of corporations and private sector organizations. Founded in 1982, ACCA is the largest single organization composed of in-house counsel. ACCA has nearly 10,500 members representing more than 4500 private sector organizations. In part, ACCA operates through national committees, each of which represent a distinct area of legal practice or substantive law. The Litigation Committee is one such national committee. The Litigation Committee has approximately 1400 members, who are experienced in the practice of litigation on behalf of their employers. Since many of these in-house attorneys are employed by very large corporations, such experience naturally extends to class litigation.¹

These comments will focus on four of the proposed amendments that, from our perspective, are of particular significance: (1) new subdivision (b)(3)(F), which would provide for a cost/benefit analysis as one of the factors relevant to whether certain classes should be certified; (2) new subdivision (b)(4), which would expressly sanction the concept of settlement classes; (3) amended subdivision (c)(1), which would require class certification decisions to be made "When practicable" instead of "As soon as

¹ The writer of this letter has been actively involved, as in-house counsel, in the defense of numerous class actions and also served as Co-Chair of the November 1995 Northeast Regional Workshop on Class Actions and Other Complex Litigation, sponsored by the Committee on Corporate Counsel of the ABA Litigation Section.

practicable" (the current standard); (4) new subdivision (f), which would provide for permissive interlocutory appeals from orders granting or denying class certification. In our view, these are all worthy proposals, although the latter provision could be improved by more specificity about the criteria for permitting interlocutory appeals.

1. **Subdivision (b)(3)(F)**

This provision would enable a Court to consider, in connection with the certification of a (b)(3) (damages) class, "whether the probable relief to individual class members justifies the costs and burdens of class litigation . . ." According to the Advisory Committee Note, this provision would "effect a retrenchment in the use of class actions to aggregate trivial individual claims." Where the cost/benefit test cannot be met, the Note continues, "a class action is not a superior means of efficient adjudication."

This proposal makes sense because it is logically related to the ultimate issue under Rule 23(b)(3), namely, the relative "superiority" of class litigation. Perhaps more important, this provision is a reasonable means of curing an abuse that brings disrepute upon the courts and the profession. It is often perceived, and it is at least sometimes true, that class actions are little more than "lawyers' lawsuits," where the real parties-in-interest are class counsel and not the class members. This unfortunate condition is most likely to arise where the monetary claims are trivial, and class counsel nonetheless seek to realize substantial fees (via settlement or otherwise). In such cases, the proposed amendment would give judges a means of preventing abuses of the system.

Some have criticized the proposed amendment as erecting an undue barrier to worthwhile small-claimant class actions, such as those that would supposedly serve public policy goals of deterrence and retribution in cases of widespread fraud.² These concerns are overstated, if not misplaced. Deterrence and retribution are functions of the criminal law. Moreover, if a particular class action involving "trivial" individual relief has any virtue beyond fee generation, courts will understand how to recognize such virtue. What the critics of the proposed amendment miss, when they invoke social policy, is that lawyers' lawsuits (which the present Rule tends to encourage) are themselves a social evil. Such lawsuits result in expenditure for litigation costs of large sums of money that could be better spent on product or pricing improvements beneficial to consumers.

2. **Subdivision (b)(4)**

This provision would permit the certification of a (b)(3) class for purposes of effectuating a settlement, even though certain of the requirements for certifying a litigation class might not be met. According to the Advisory Committee Note, this provision reflects the practice of "[m]any courts" and would resolve what is just a "newly apparent disagreement" under which certain courts have held that a settlement class must satisfy

² Coffee, *The Case Against Proposed Rule 23*, *Litigation News*, November, 1996, pp. 4,6.

each and every requirement of a litigation class. That new disagreement essentially stems from the Third Circuit's recent decision in the Georgine case, which the proposed amendment would overrule.³

We support the proposed amendment because it would further the highly important policy of promoting voluntary settlement of disputes. This policy is strongly endorsed by the Courts. As one Court observed, "Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute."⁴ Thus, courts will actively enforce "our nation's strong judicial and public policies favoring out-of-court settlement. Litigants, courts and Congress view settlement as a positive force, indispensable to judicial administration."⁵ This strong policy applies to class settlements, subject, of course, to a district court's obligation to review and approve the settlement for fairness.⁶

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. We recognize, of course, that, in the class context, settlement is not merely a matter of private agreement, and that safeguards are necessary to assure fairness and protect the rights of absent class members. The proposed amended Rule 23 is more than adequate in this regard. In the case of a settlement class, it provides for satisfaction of all subdivision (a) requirements (adequacy of representation, typicality, commonality, and numerosity), makes explicit the requirement of a fairness hearing by the court, and affords all class members notice and opt-out rights.⁷

3. Subdivision (c)(1)

The current Rule provides that class certification decisions shall be made "As soon as practicable..." The proposed amendment would provide that such decisions are to be made "When practicable..." This amendment would conform the language of the Rule to current practice, including the "common" and "useful" practice of "ruling on motions to dismiss or for summary judgment before the class certification decision" (Advisory Committee Note). We support the proposed amendment confirming current practice,

³ Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996). Since the Supreme Court has granted certiorari in Georgine, it may be that the Court will resolve the disagreement in that case and possibly render the proposed amendment moot.

⁴ American Sec. Vanlines, Inc. v. Gallagher, 782 F.2d 1056, 1060 (D.C. Cir. 1986) (incorporating district court opinion).

⁵ Janneh v. GAF Corp., 887 F.2d 432, 435 (2d Cir. 1989), cert. denied, 498 U.S. 865 (1990) (Kaufman, J.).

⁶ Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983) (Friendly, J.).

⁷ In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied, albeit in the context of settlement rather than litigation.

because we believe that 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.

4. Subdivision (f)

This proposed amendment would allow for an interlocutory appeal from orders granting or denying class certification, in the discretion of the pertinent court of appeals, but without the need for a district court certification pursuant to 28 U.S.C. Section 1292(b). According to the Advisory Committee Note, this new right is justified because, *inter alia*, "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Clearly, this rationale is sound. In class litigation, the outcome of a Rule 23 motion is often determinative of how the case will be resolved; in such circumstances, it makes little practical sense to delay appellate review.

We do, however, have some concern that the opportunity for permissive appellate review might be unduly restricted. This concern stems from the absence, in the Rule itself, of any standards for granting the requisite permission, coupled with the statement in the Advisory Committee Note that permission should be granted "with restraint." At a minimum, the proposed amendment should be strengthened by adding a list of factors that could militate in favor of granting permission.⁸

In this regard, the following factors, among others, might be added:

- (a) The certification of a nationwide class - - As indicated above, cases of "potentially ruinous liability" should commend interlocutory review. Such potential liability is often present when a nationwide class is certified.⁹ In addition, when such a nationwide class action entails (as it frequently does) multiple state laws or conduct occurring in multiple states, very serious case management and even constitutional problems may be involved.¹⁰
- (b) The need to resolve a novel or unsettled question or an important conflict in district court decisions - - The Advisory Committee Note recognizes that the resolution of a "novel or unsettled question" may support interlocutory review, but it would seem the better practice to list this factor in the text of the Rule itself. The need to resolve conflicting lower court decisions is analogous to the familiar standard employed by the Supreme Court in considering petitions for certiorari.

⁸ Compare, Rule 10, Rules of the Supreme Court of the United States, which lists the factors the Court may consider in ruling upon a petition for certiorari.

⁹ See, Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir.), cert. denied, 116 S.Ct. 185 (1995).

¹⁰ Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Castano v. American Tobacco Co., 84 F.3d 734, 740-44 (5th Cir. 1996).

- (c) 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 - - This suggestion is derived from Supreme Court Rule 10(a), governing petitions for certiorari. Because of the often dispositive effect (as a practical matter) of class certification decisions, there ought to be interlocutory review of clear abuses, pursuant to the supervisory powers of each court of appeals. For example, interlocutory review should be allowed when the district court's certification decision does not evince the rigorous analysis and detailed findings required by the caselaw, and instead simply parrots the language of Rule 23.¹¹ While such matters may also be entertained via a writ of mandamus, that writ entails an extraordinary remedy which is rarely granted, and it requires additional showings beyond a clear, facial violation of Rule 23.¹² Surely, if the proposed amendment is to be meaningful, it must grant procedural rights beyond those already available under existing law.

CONCLUSION

For the reasons stated above, the proposed amendments covering subdivisions (b)(3) (F), (b)(4) and (c)(1) should be adopted, and the proposed amendment covering subdivision (f) should be adopted with the indicated additions.

Respectfully submitted,



Theodore J. Fischkin
Chair, ACCA Litigation Committee

¹¹ Unfortunately, such decisions are not all that rare. See, e.g., In Re American Medical Systems, Inc., 75 F.3d 1069, 1081-86 (6th Cir. 1996); Castano, supra, 84 F.3d at 739. In addition, we are aware of a district court decision last year which certified a class action against about 40 defendants and in which the court's entire Rule 23 analysis reads as follows: "Based on the evidence adduced at the hearing on the motion for class certification and plaintiffs' substituted motion to certify a [statewide] class, the following class is hereby CERTIFIED pursuant to Fed.R.Civ.P. 23 (b) (3)."

¹² American Medical, supra, 75 F.3d at 1078; Rhone-Poulenc, supra, 51 F.3d at 1294-95.

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February 12, 1997

Peter G. McCabe, Secretary
The Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington, DC 20544

96-CV-162

Dear Secretary McCabe:

As Chair of the American Bar Association's Litigation Section, I am pleased to report that the ABA expresses its general support, with noted exceptions, to the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure recommended by the Advisory Committee in April 1996.

I attach the Recommendation which was adopted by the ABA during the Association's Mid-year meeting in San Antonio, Texas on February 3, 1997. I have also enclosed a supporting Report. The Report, however, is not considered ABA policy.

If you should have any questions, please feel free to call me directly at (214) 651-5580.

Very truly yours,

Barry F. McNeil

Barry F. McNeil

cc: ABA Policy and Administration Office

**AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION
REPORT WITH RECOMMENDATIONS**

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association expresses its general support, with the exceptions noted, to the proposed revisions to Rule 23 of the Federal Rules of Civil Procedure recommended by the Advisory Committee on Civil Rules in April 1996 and approved by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for publication and public comment:

1. The Association supports:
 - (a) proposed revision 23(b)(4) that would authorize settlement classes in the circumstances specified in the proposed Rule change and provided that adequate due process protections are provided for the parties;
 - (b) proposed revision 23(e) that would add a hearing requirement to the Rule;
 - (c) proposed revisions 23(b)(3)(A) and (B) that would focus on the size of individual claims in determining their viability without certification and the individual interest of class members in maintaining separate actions;
 - (d) proposed revision 23(b)(3)(C) that would add "maturity" as a factor in determining the appropriateness of a class under the Rule; and
 - (e) proposed revision 23(c) that would require a certification decision "when practicable" after the action has been brought.
2. The Association opposes the proposed revision to Rule 23(b)(3)(F), which would provide for a balancing of probable relief to individual class members with the costs and burdens associated with class litigation, unless the Rule would further provide for the consideration of the deterrent effect of accumulating small recoveries.
3. The Association supports proposed revision 23(f) that would permit discretionary interlocutory appeals of class certification decisions.

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REPORT

I. Summary

In April 1996 the Advisory Committee on Civil Rules of the Judicial Conference of the United States ("Advisory Committee") proposed revisions to Rule 23 of the Federal Rules of Civil Procedure, concerning federal class actions. The Standing Committee on Rules of Practice & Procedure of the Judicial Conference of the United States published them for consideration and public comment in August 1996. Written comments are due by February 15, 1997.

The proposed rule change contains seven revisions, which the Section of Litigation (the "Section" or "we") urge as Association policy without qualification as to five of the proposals, and with suggested changes as to two of the proposals. The changes and the Section's position are summarized as follows:

1. Permissive Interlocutory Appeals, Proposed Rule 23(f)

This provision provides for a discretionary interlocutory appeal of the class certification decision and is modeled after a 1985 ABA Section of Litigation recommendation. The Advisory Committee proposal protects against unreasonable delay by requiring applications to be made within ten days and provides for no stay of the action unless otherwise ordered. We urge support for this provision as a substantial improvement over current practice and a positive step towards achieving fundamental fairness. In addition, we recommend that the time to appeal begin to run when the court decides a class certification motion or denies reconsideration of the motion.

2. Settlement Classes -- Proposed Rule 23(b)(4)

Designed to reverse two recent Third Circuit cases prohibiting the fact of settlement to be considered in applying Rule 23 standards, this change recognizes the useful nature of settlement classes for Rule 23(b)(3) claims, but proceeds cautiously to limit possible abuses of the settlement class device. We support this provision as a good compromise that allows the continued use of this device while reducing the potential for abuse. On the recommendation of the Tort and Insurance Practice Section, we recommend adding, explicitly, a due process proviso to the proposed rule change.

3. Dismissal or Compromise -- Adding the Hearing Requirement to Rule 23(e)

This proposal makes explicit a requirement that has evolved to be current practice in most courts -- the holding of a hearing to approve a settlement. We support this change as an important protection against collusive settlements, particularly in light of the introduction of the provision expressly allowing for settlement classes for (b)(3) claims. We

believe, however, that the proposed Rule does not properly consider voluntary or consensual dismissals prior to class certification where the court can adequately protect absent potential class members without the need for notice to the proposed class and a hearing on the proposed dismissal.

4. Factor (F) -- Balancing Individual Recoveries with the Costs and Burdens to the System

The Advisory Committee proposal adds an additional consideration for (b)(3) claims -- examining whether probable relief to individual class members justifies the cost and burdens of class litigation. Designed to effect a retrenchment for class actions when relief to individual class members might fairly be characterized as trivial, this change seeks to respond to public criticism of certain settlements which undermines confidence in the judicial system and use of the class action device. While we support efforts to eliminate the potential for abuse of class actions, we believe that the proposed Factor (F) must be modified to include a requirement that the court consider the deterrent effect of accumulating small recoveries to avoid a large windfall to the alleged perpetrator. We also believe that the revision should not be used to fragment claims by eliminating from a class definition those with claims below a certain dollar threshold.

5. The Need for Class Certification and Viability of Individual Claims -- Proposed Rule 23(b)(3)(A) and (B)

Adding additional factors for consideration of (b)(3) classes, these factors focus on the size of individual claims in determining their viability without certification and the individual interest of class members in maintaining their own actions. We support these changes, when applied in the mass tort context. We remain concerned that the full implications in the non-tort context may not be fully realized, but believe that these concerns may be addressed by additions to the Advisory Committee note.

6. Maturity -- Proposed Rule 23(b)(3)(C)

We support the proposed change directing courts to consider the "maturity" of related litigation and also the expanded concept discussed in the proposed Advisory Committee note of considering the maturity of the science relating to dispersed mass tort claims. We recommend, however, that the latter concept, addressed only in the note, should also be incorporated in the text of the Rule.

7. Timing of Certification

We support the proposed amendment requiring a certification decision "when practicable" as opposed to "as soon as practicable" after the action has been brought. This

change conforms to current practice when courts many times consider summary judgment motions and motions to dismiss before deciding whether to certify a class.

II. Background

A. Existing ABA Policy Concerning Class Actions

Apart from technical amendments in 1987, no substantive changes have been made to Rule 23 since 1966. The ABA has on two prior occasions adopted policy concerning class actions. In August 1974 the House of Delegates adopted the following:

Resolved, that no restrictive changes should be made at this time in the provisions of Rule 23 of the Federal Rules of Civil Procedure or in similar state rules, and any consumer class action legislation adopted by a state in the immediate future should be patterned after Federal Rule 23.

Further Resolved, That no other legislative restrictions should be enacted at this time with respect to consumer class actions for damages

In February 1979, the House of Delegates adopted the following:

Be It Resolved, That the American Bar Association is opposed to the enactment of any class action legislation which would contain the following features: transfer to the United States Department of Justice control over private class litigation; transform the class action from a compensatory to a punitive device; adversely affect substantive rights of litigants by eliminating damages; relax or eliminate important procedural rights, such as the right of absentees to receive notice and participate, now provided in Rule 23 of the Rules of Federal Procedure; and substantially increase the burdens of an already overburdened federal judiciary, without concomitant benefit.

Be It Further Resolved, That the American Bar Association stands ready to assist and cooperate with the Department of Justice to address the foregoing.

We believe that the Recommendation and this Report, as well as the proposed rule changes, are not only consistent with these previously adopted policies, but also deal with specific issues not previously addressed by the House of Delegates.

In July 1985, the ABA House of Delegates authorized the Section of Litigation to transmit the "Report and Recommendations of the Special Committee on Class Action

Improvements", known as the Flegal Report for its reporter, Frank F. Flegal, Esquire, to the Advisory Committee on Civil Rules, without either approving or disapproving the recommendations in the report.¹ The Advisory Committee did not take any formal action on the recommendations in the ABA report, but as we understand, believed it wiser to accumulate additional experience before recommending changes to Rule 23.

B. History of the Proposed Rule Changes

In early 1991, the Judicial Conference's Ad Hoc Committee on Asbestos Litigation recommended that the Advisory Committee consider amending Rule 23 to accommodate the demands of mass tort litigation in light of the experience of the federal judiciary with the problems in the management of asbestos litigation. Courts were then being asked to certify class actions in asbestos cases, notwithstanding commentary to the 1966 amendments which states:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages, but of liability and defenses of liability, would be present affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

See 1966 Amendments, Advisory Note to Subdivision (b)(3) of Rule 23.

In May 1991, the Advisory Committee considered its first draft revision, which incorporated proposals from the Flegal Report, as well as changes designed to accommodate mass tort litigation. Since that time, successive drafts presenting varied approaches have been considered. In apparent recognition that a rule not changed in 25 years would probably not again be changed for some time, the Advisory Committee expanded its consideration to broad reaching revisions to the existing rule and considered an empirical study it requested from the Federal Judicial Center designed to shed light on the use of class actions in many routine settings. See 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).

C. The 1996 Proposed Changes

¹ The Flegal Report, along with the formal action of the ABA House of Delegates, was published in the Federal Rules Decisions, 110 F.R.D. 192 (1986).

Ultimately, the Advisory Committee took final action on April 18 and 19, 1996 by recommending proposed revisions to Rule 23 to the Standing Committee on Rules of Practice and Procedure for publication and comment. Thus, while the current proposed changes appear far reaching to some, the Advisory Committee considered its "minimum changes draft" to be relatively modest compared with the other changes then under consideration.

The proposed changes do not address questions the Advisory Committee considered involving individual notice now not required for (b)(1) and (b)(2) classes, and the adequacy of class counsel and class representatives. The Advisory Committee chose not to adopt a controversial section sought by some to effectuate greater screening of class actions by requiring courts to make preliminary examinations of the merits before certifying a class. The proposed changes also do not make wholesale changes to modify the class action rule to meet the demands of mass tort litigation, preferring instead a more cautious approach.

III. Discussion

A. Permissive Interlocutory Appeals -- Proposed Rule 23(f)

This provision, which provides for a discretionary interlocutory appeal of an order granting or denying class action certification, is essentially the same as originally proposed in the Flegal Report. The provision has appeared, essentially unchanged, in every draft considered by the Advisory Committee since May 1991 and appears to be the least controversial of all the proposed revisions. We believe it is a substantial improvement over current practice.

We recognize that the class certification decision is often determinative not only of the future course of the litigation but, in certain instances, its actual outcome. As noted in 1985 in the Flegal Report, if certification is denied, named plaintiffs are faced with the burden of incurring expenses grossly disproportionate to the potential individual recovery in order to secure appellate review. Conversely, from the defendant's perspective, when faced with an erroneous grant of certification, even defendants sued for potentially weak claims may face "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." Flegal Report, 110 F.R.D. at 211.

Since 1985, with the expansion by the courts of the use of the class action device to deal with the problems of dispersed mass tort litigation, the pressure on a defendant to settle even potentially weak claims in the face of potentially ruinous recovery is even

greater;² a mechanism for interlocutory appellate review of the critical class certification determination is an important step to achieve fundamental fairness. Current practice permits such review only by satisfying the requirements of 28 U.S.C. § 1292(b),³ or the extremely rigorous requirements for mandamus. An appeal cannot be taken under § 1292(b) if the district judge whose decision is challenged does not provide the required certification. Moreover, there are many who believe that utilizing the mandamus procedure to review class certification decisions stretches that procedure beyond the scope for which it was originally intended.

The proposed change establishes an appropriate balance by creating an important procedural right without unnecessarily exposing the system to unreasonable delay

² As the court stated in Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996):

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. ...

In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle whereas individual trials would not. (Citation omitted.) The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.

See also In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

³ The text of 28 U.S.C. § 1292(b), providing for interlocutory appeals, provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for 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.

through routine meritless applications. Applications must be made promptly (within 10 days), and hopefully will be decided promptly by the court of appeals. Moreover, there is no stay of the action unless otherwise ordered by the district court or court of appeals. Thus we support the proposed change.

Finally, from a technical standpoint, the short time period to apply for an interlocutory appeal under proposed Rule 23(f) may cause problems for practitioners when they believe that the trial judge may have overlooked a controlling fact or point of law that led to an erroneous result. In that unusual circumstance, the attorney should be encouraged to return to the district judge for reconsideration, rather than be forced to file a prompt application to the court of appeals under Rule 23(f) within 10 days. Accordingly, the provision should be altered to provide for the 10 days to run from the order granting or denying class action certification or denying reconsideration of such a determination.

B. Settlement Classes -- Proposed Rule 23(b)(4)

Through the introduction of a new section (b)(4), this change recognizes the useful nature of settlement classes for Rule 23(b)(3) claims, but proceeds cautiously to limit possible abuses of the settlement class device. We believe that this provision is a good compromise that allows the continued use of this device, despite recent adverse decisions, while reducing the potential for abuse.

Courts and practitioners have found the settlement class device useful and have used it with increasing frequency. However, recent cases in the Third Circuit have called the practice into question. In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995) (fact that case would be settled and not proceed to trial would not relieve plaintiff from satisfying all Rule 23(a) requirements for class certification as if case were to proceed to trial); Georgine v. Amchem Products, 83 F.3d 610 (3d Cir. 1996) (fact of settlement could not be used in considering whether the (b)(3) factors of predominance and superiority were satisfied).⁴ These two decisions require parties settling as a class to meet all the Rule 23(a) and (b) requirements for class certification as if the case were proceeding to trial. Problems of manageability, for example, stemming from choice of law problems that the court would not face in administering a settlement, would still preclude class certification under these recent Third Circuit decisions.

⁴ But see In Re Asbestos Litigation, 1996 WL 421990 at 8 (5th Cir. July 26, 1996):

Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied.
[Citations omitted.]

In contrast, the proposed rule permits a court to consider the fact of settlement when determining whether the requirements of predominance and superiority are satisfied, but limits the applicability of new (b)(4) to certification under (b)(3). The fundamental Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation would still be applicable, just as if the cases were proceeding to trial. The proposed settlement provisions of (b)(4) would not apply to settlements under Rule 23(b)(1) or Rule 23(b)(2). The Rule limits the special consideration of settlement to situations where the parties already have reached settlement, appropriately preventing the district court from using this new rule as a device to "encourage" a reluctant defendant to settle claims that otherwise would not be certified.

The use of settlement classes has been criticized for creating potential for collusive settlements. This potential can be minimized through an examination by the court of the fairness of the settlement and by requirements that members of the class receive notice of the settlement and have the right to opt-out, and, through the new explicit requirement in proposed Rule 23(e), that the court hold a hearing on all proposed settlements.

One commentator has stressed the importance of the right to opt-out of a settlement class and posited that the proposal does not presently provide for the right to opt-out of (b)(4) classes.⁵ We believe that such right would exist under the current proposed draft, which simply adds an additional category to consider for claims for certification under Rule 23(b)(3), and was clearly intended to retain the opt-out right. Nevertheless, Rule 23(c)(2) and (c)(3) could easily be amended to confirm the opt-out right for (b)(4) classes by additionally referring to subdivision (b)(4) whenever those rules refer to an action maintained under subdivision (b)(3). We also believe the draft note could 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.

C. Dismissal or Compromise -- Adding the Hearing Requirement to Rule 23(e)

By making explicit a requirement that has evolved to be current practice in most courts -- the holding of a hearing to determine whether the court should approve a settlement -- we believe that the proposed rule stresses an important protection to help prevent collusive settlements. The express mandate is particularly important in light of the introduction of the new proposed subdivision (b)(4) allowing settlement classes for (b)(3) claims.

⁵ J. Coffee, Class Action "Reform": Advisory Committee Bombshell, New York Law Journal, p.1, col.1 (May 21, 1996).

We believe, however, that the proposed rule was drafted with only a settlement or voluntary dismissal of a previously certified class in mind and does not sufficiently focus upon a voluntary or consensual dismissal prior to class certification. While notice to the class, the right to opt-out and hearing before the court to approve a settlement should be afforded with respect to all settlements, we believe that pre-certification notice to a proposed class and a court hearing are not necessary for the court to approve a voluntary or consensual dismissal under Rule 23(e). With respect to pre-certification dismissal, the court can usually require sufficient assurances to protect against collusion. In these circumstances, the expense and delay of notice to a proposed class and a court hearing are not justified. The proposed rule should be amended to make this distinction.

D. Factor (F) -- Balancing Individual Recoveries with the Costs and Burdens to the System

We understand that the proposed addition of subparagraph (F), examining whether probable relief to individual class members justifies the costs and burdens of class litigation, is intended to effect a retrenchment for class actions where the relief to individual class members could fairly be characterized as trivial. The Advisory Committee perceives that the current rules have led to some settlements where the low recovery to individual class members did not justify the cost and burdens of the litigation to the system as a whole. A related concern is that attorneys' fees in such cases are sometimes substantial, and publicity concerning such settlements undermines confidence in the judicial system and the use of the class action device.

We recognize that there has been much public criticism of recent settlements in which class members were to receive nominal recoveries or coupons of dubious value, while substantial fee awards were sought by counsel. Such criticism and the perceived abuses reflected in such cases can undermine respect for the integrity of the judicial system as a whole and for practicing lawyers in particular.

While we support efforts to eliminate the potential for any abuses which lower the public's perception of the practicing bar, we do not support proposed factor (F) without a modification that requires judicial consideration of the litigation's probable deterrent value. This modification would incorporate the potentially important impact of deterrence that exists when wrongful conduct is challenged through the aggregation of small individual claims that would each not support separate actions, while still vesting in the court broad discretion in deciding whether or not to certify.

In addition, as a separate matter, we believe that the language of this proposed revision should not be used to fragment claims by eliminating from the definition of a class, otherwise certified, all claimants below a certain dollar threshold. While we do not believe

this is the intent of the proposal, expanded language in the Advisory Committee note could eliminate this possible ambiguity.

E. The Need for Class Certification and Viability of Individual Claims -- Proposed Rule 23(b)(3)(A) and (B)

These proposed changes, introducing a new factor (A) and altering the old (A) as the new (B), add additional factors to consider in the court's determination under (b)(3) as to whether the class action is superior to other methods of adjudication. These factors focus on the size of individual claims in determining their viability without class certification, either as individual actions or through other means of aggregation, and the individual interests of the class members in maintaining their own actions.

These changes appear to have been developed to control the expanding use of the class action device to accomplish aggregation of mass tort claims. To the extent they are designed to protect individual plaintiffs with substantial individual claims from having others control their destiny without their participation, we believe the proposed changes are helpful to achieve fairness and protect the rights of individual claimants. We, however, are concerned that the full implications of these changes in the non-tort context may not be fully realized.

For example, we believe that these changes should not be read to permit the fragmentation of claims that might previously have been certified as a single class to eliminate those claimants from the class, through the class definition, that may be considered too big or, under proposed subdivision (F), too small. Thus, in a securities class action that otherwise would meet all the requirements of Rule 23, these changes should not be read to require a court to eliminate from the proposed class those at both ends of the class whose individual claims may be considered too large or too small. We believe the Advisory note should be amended to confirm that this is not the intended effect of these provisions.

F. Maturity -- Proposed Rule 23(b)(3)(C)

We support the proposed change in the language of Rule 23(b)(3)(C), directing courts to consider the "maturity" of related litigation, and also the expanded concept discussed in the proposed Advisory Committee note of considering the maturity of dispersed mass tort claims in the court system. We believe, however, that the proposed note may go beyond the text of the proposed rule change and that accordingly, the text of the rule should be revised to include both concepts.

The proposed rule change limits itself to a consideration of the "maturity" of "related litigation involving class members." We agree that it is wise to avoid interfering with the progress of related litigation that may be well advanced toward trial and judgment.

In cases involving dispersed mass torts in particular, the courts may be faced with individual actions with substantial damages progressing toward trial and courts may not want to interfere with those actions.

The proposed Advisory Committee note, however, refers to the broader concept of the maturity of the science supporting certain dispersed mass tort claims. The note refers to the courts gaining experience through completed litigation of several individual claims to determine whether confidence can be had in a class determination. We support this additional concept of taking a cautious view toward class certification when the science supporting claims of dispersed mass injury has not sufficiently developed and remains "immature." Practitioners have noted that better adjudication will follow from deferring class litigation until the science concerning the alleged injury from a particular medical product or device has developed. That concept, however, may presently be beyond the scope of the proposed rule change and should be included in the text of the rule change itself.

G. Timing of Certification

We support the proposed amendment requiring a certification decision "[w]hen practicable" as opposed to "[a]s soon as practicable" after the action has been brought. This change simply conforms the rule to current practice. For example, courts often consider summary judgment motions and motions to dismiss before deciding whether to certify a class. Practitioners and judges have found this sequence of events to be efficient and a rule specifically validating that practice is appropriate.

CONCLUSION

After 30 years of Rule 23 experience, the Advisory Committee has engaged in a rigorous examination of the class action rule. This Section believes the Advisory Committee has acted in a responsible and cautious manner in approaching these issues. With the adoption of the suggestions made in this Report, we believe that the proposed revisions should have a positive impact on class action practice.

Barry F. McNeil
Chair

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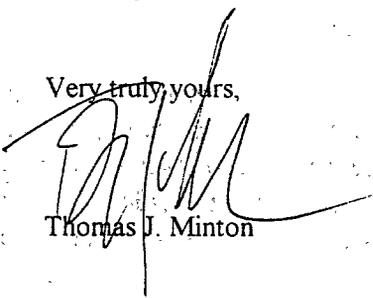
Secretary of the Committee of Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington D.C. 20544

RE: Federal Rule of Civil Procedure 23

Dear Sirs:

Robert Hirshon, Chairman of the Tort and Insurance Practice Section of the American Bar Association, has asked me to send you the enclosed report of our Section on the proposed changes to Rule 23. This report is to be attached as a supplement to the report and resolution of the American Bar Association and Litigation Section. Our report is consistent with the resolution and will help to explain some of the positions taken by the ABA in the resolution. Thank you for your attention to this matter.

Very truly yours,


Thomas J. Minton

cc: Robert Hirshon, Esquire (without enclosure)
Ms. Susan Lynch (TIPS Director)

**REPORT OF THE ABA TORT AND INSURANCE PRACTICE SECTION
TASK FORCE ON CLASS ACTIONS
CONCERNING THE PROPOSED CHANGES TO RULE 23
OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Thomas J. Minton, Esq., Chair

**REPORT OF THE ABA TORT AND INSURANCE PRACTICE SECTION
TASK FORCE ON CLASS ACTIONS
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OF THE FEDERAL RULES OF CIVIL PROCEDURE**

I. Introduction

In August 1995 the Council of the Tort and Insurance Section of the American Bar Association (hereinafter "TIPS") authorized creation of a Task Force on Class Actions and designated Ms. Marianna Smith as Chair.¹ The Task Force's broad mandate was to consider current issues relating to class action litigation, with an eye towards recommendations for reform. The Task Force includes plaintiff and defense attorneys with various class action experience, including small claims consumer class actions, employment discrimination cases, shareholder derivative suits, and mass tort litigation. The Task Force also includes a former federal judge, a state judge, and a law professor.

The Task Force first met in October 1995 and again in February, August, and October 1996. Although the Task Force discussed a broad range of class action issues, the Task Force focused its attention on the Advisory Committee on Civil Rules' proposed amendments to the class action rule. The Task Force sent its Reporter to the Advisory Committee meetings, and discussed successive draft proposals. The Task Force also followed the commentary and debate from individuals and other organizations interested in the Rule 23 amendments.

At its August 1996 meeting the Task Force decided to submit comments to the TIPS Council for approval as the Section's considered views on the proposed Rule 23 amendments, especially because the Task Force's views differ in nature and strength from other ABA sections with an interest in the current class action proposals. This report embodies the Task Force's majority and minority positions relating to six specific amendments to the class action rule. While the Task Force generally supports many of the Advisory Committee's proposals, several members have raised concerns about the Advisory Committee's proposed language, or the impact of specific proposed amendments on class action practice.

¹ The members of this Task Force are: Mr. Michael F. Baumeister; Mr. James K. Carroll; Mr. William T. Barker; Mr. Jim R. Carrigan; Mr. Francis H. Hare, Jr.; Ms. Lynn M. Luker; Hon. Rodney A. Peoples; Mr. Jeffrey M. Rubin; Ms. Theresa Pike Majors; Ms. Debra P. Rezabek; Ms. Suzelle M. Smith; and Mr. Robert A. Wooten, Jr. Professor Linda S. Mullenix of the University of Texas Law School served as reporter to the Task Force. With the election of Ms. Marianna Smith to the ABA Board of Governors, Mr. Thomas J. Minton became Chair of the Task Force in August 1996.

II. The Development of the 1996 Proposed Rule 23 Amendments

The proposed amendments to Federal Rule 23 currently are working their way through the rulemaking process, with the public notice and comment period ending February 15, 1997.² The proposed amendments reflect the considered efforts of the Advisory Committee on Civil Rules, over the past four years, to amend the existing federal class action rule. The class action rule has been part of the Federal Rules of Civil Procedure since their adoption in 1938. The Supreme Court and Congress have amended the rule once in 1966, and Rule 23 has not been amended for thirty years. During this period there have been efforts to persuade the Advisory Committee to revisit the class action rule, but the Advisory Committee deferred consideration.

Three circumstances coalesced in the early 1990s to influence the Advisory Committee to place the class action rule on the Committee's agenda. First, mass tort litigation -- as a distinct litigation phenomenon -- developed sufficiently to demonstrate tensions with the existing rule for resolving these cases as class actions. Second, public and private discontent with shareholder derivative litigation inspired momentum for possible rule reform, which prompted Congress in 1995 to enact the Private Securities Reform Litigation Act.³ Third, concern about "small-claims" consumer class actions also encouraged the Advisory Committee to begin consideration of possible rule reform.

The Advisory Committee first turned its attention to amending the class action rule in 1991, under the auspices of Chair Judge Sam Pointer of the United States District Court for the Northern District of Alabama. The Advisory Committee's original proposals would have changed the existing class action rule substantially. First, the proposals would have conflated the existing Rules 23(b) classes and conceptually tied all classes to a superiority requirement. Second, the proposed revisions would have allowed judges, in their discretion, to permit an opt-in or opt-out right for all classes. Third, the proposals

² See REQUEST FOR COMMENT, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL, AND CRIMINAL PROCEDURE (Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, August 1996). The Advisory Committee on Civil Rules has held and will be holding public hearings on the proposed class action rule amendments in Philadelphia, Pennsylvania on November 22, 1996; Dallas, Texas on December 16, 1996; and San Francisco, California, on January 17, 1997. All written comments relating to the proposed amendments are due to the Advisory Committee by February 15, 1997.

³ Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22, 1995). The conference report accompanying this legislation indicated the bill was "prompted by significant evidence of abuse in private securities lawsuits" and that the Act "implement[ed] needed procedural protections to discourage frivolous lawsuits." See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31-32 (1995).

would have required notice for all types of class actions. Fourth, the proposals would have placed greater emphasis on the ability to certify "limited issues" classes.⁴

In June 1992 Judge Pointer withdrew these draft proposals from the Standing Committee on Practice and Procedure and referred the draft back to the Advisory Committee for further consideration. In fall 1993 Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit became the Advisory Committee's new chair. The current Rule 23 amendments were developed during Judge Higginbotham's tenure.⁵ In this period the Advisory Committee moved from a wholesale rule revision to a more "minimalist" approach to revamping the existing class action rule.⁶ Consequently, the current proposals do not recommend any amendments to Rule 23(b)(1) and (b)(2) classes. Instead, the proposals largely focus on amendments to the Rule 23(b)(3), the so-called "opt-out class."

The Advisory Committee has recommended five significant changes to the current rule. First, the Advisory Committee has recommended adding two new factors that a judge may take into account in deciding whether to certify a Rule 23(b)(3) class. Second, the Advisory Committee has recommended authorizing a new (b) category of maintainable class, a (b)(4) "settlement class." Third, the Advisory Committee has recommended a relatively minor language change relating to the timing of a judge's class certification decision. Fourth, the Advisory Committee has recommended that the rule specifically require prior notice and a fairness hearing for all class action settlements. Fifth, the Advisory Committee has proposed adding a new provision for interlocutory appeal of class certification decisions.

During the drafting process, the Advisory Committee received an array of opinions commenting on the wisdom and advisability of the proposed revisions. Generally, the practicing bar has voiced concerns about the real-world consequences of these changes, based on experience under the existing rule. Plaintiff and defense lawyers, organized bar associations, interest-group lobbyists, and judges have capably educated the Advisory Committee concerning how the proposed rules will affect class action practice and client interests. The academic community also has assessed the effects of the proposed amendments, but generally has been more concerned with questions relating to the

⁴ See PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO FEDERAL RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (Advisory Committee on Civil Rules, 1991). See also, Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U.L. Rev. 13, 32-35 (1996)(discussing the Advisory Committee's original proposals to amend the class action rule).

⁵ Professor Edward Cooper of the University of Michigan Law School has served as the Advisory Committee's Reporter.

⁶ See Appendix A for the proposed amendments, along with the proposed Advisory Committee Note to accompany the amended rule.

constitutional and statutory allocation of rulemaking power, Article III justiciability issues, and the scope of judicial discretion.⁷

III. Discussion of the 1996 Proposed Rule 23 Amendments

The Task Force generally endorses the Advisory Committee's minimalist approach to amending the class action rule at this time. The following sections consider each proposed amendment, beginning with those proposals that evoked consensus and general support, with some minor disagreement. The latter sections consider the Rule 23 proposals that generated considerable competing views among Task Force members. These sections indicate the nature and strength of these different perspectives.

A. Proposed Rule 23(f), Providing for Interlocutory Appeal of Class Certification Decisions

The Advisory Committee on Civil Rules has proposed adding a new subsection (f) to the existing class action rule to provide for a means of interlocutory appeal from a district judge's order either granting or denying class certification. The Task Force⁸ almost unanimously endorses this proposal, with one dissenting view,⁹ as a sound rulemaking solution to the burgeoning problem of using mandamus as a back-door method to obtain interlocutory review of orders granting class certification. As indicated below, the Task Force recommends additional language to the proposed rule.

⁷ See e.g., Letter of the Steering Committee to Oppose Proposed Rule 23, to the Standing Committee on Rules of Practice and Procedure (May 28, 1996)(letter in opposition to proposed Rule 23 signed by 129 law professors).

⁸ The TIPS Task Force on Class Actions considered the Advisory Committee's proposal relating to new Rule 23(f) at its February 2, 1996 meeting and assigned this proposal to a subcommittee for comment. On February 9, 1996, the TIPS Appellate Advocacy Committee referred this proposal to its standing Subcommittee on Rules of Procedure, for the same purpose. The two subcommittees functioned as a single body and this report reflects the comments of their joint report, submitted March 19, 1996. All members of the joint subcommittee unanimously supported the comments recommendations of that body.

⁹ For a discussion of this problem, see e.g., *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995). Task Force members generally agree that the writ of mandamus is an extraordinary procedure that is ill-suited to effect appellate review of certification grants or denials. Nevertheless, in the dissenting view, improper grants or denials of certification, ensured by the "abuse of discretion" standard on appeal, are properly dealt with under current procedures such as motions for reconsideration, request for certificates of appeal under 28 U.S.C. §1292 and mandamus.

In part because of the need for appellate guidance to determine the implications of the changes to a now somewhat settled procedural mechanism, and in part because the Advisory Committee perceives that orders certifying or refusing to certify classes have fundamental, and possibly irreparable, impact on the parties, the Advisory Committee proposes to grant appellate courts discretionary authority to allow appeals from such orders. It would do this by adding a new subsection (f) to Rule 23, providing:

(f) 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.¹⁰

The draft Advisory Committee Note explains that this procedure is intended to be modeled on 28 U.S.C. § 1292(b), but without the requirement of district court certification. The district court would, however, be encouraged to provide advice on the desirability of an appeal, presumably by commenting on that subject in an opinion accompanying the order regarding certification. The same procedures for seeking permission to appeal would be used.

The Note describes the intent as being a "modest expansion" of the availability of appellate review. "Permission to appeal should be granted with great restraint [M]any suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings."¹¹ But denial of certification may leave a plaintiff with no viable route to appellate review where the actions cannot be economically pursued as an individual action. Conversely, a defendant may feel forced to settle by the risks created by certification, even though there is good reason to doubt the propriety of that certification.

In underscoring the "modest" character of this proposal, the Note offers the following discussion of the standards to be applied in passing upon requests for permission to appeal:

Courts of appeals discretion is 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 year of experience with the new class-

¹⁰ See Appendix A for this proposal in the context of the entire proposed rule amendments, including the Advisory Committee Note relating to this proposal.

¹¹ *Id.*

action provisions as they may be adopted into Rule 23 or enacted by legislation [such as the recent securities law changes]. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.¹²

The Task Force generally supports the desirability of permitting appellate review of orders regarding class certification, essentially for the reasons the Advisory Committee has articulated. Task Force members also generally agree that the Advisory Committee's Note comments relating to § 1292(b) are appropriate, as is the suggestion that permission to appeal almost always will be denied. Task Force members supporting this rule change further agree that district court judges should be encouraged to express an opinion on the appropriateness of an appeal from the judge's certification order.

The Task Force supports making such review discretionary with the appellate courts, to confine interruptions of litigation by appellate proceedings to situations where there are important values to be served by appellate review. However, the Task Force believes that it would be desirable to articulate more fully standards for the exercise of discretion in allowing appeals.¹³

The Task Force further recommends that the language of the proposed rule be revised to allow review of orders "granting or denying a request for class action certification or modifying or revoking or refusing to modify or revoke a certification previously granted." (new language underscored). The additional language is inspired by 28 U.S.C. § 1292(a)(1), which provides for review of orders dealing with injunctive relief. The concept is that, because certification orders have injunction-like potential for inflicting irreparable harm on parties before final orders permit review, orders with respect to modification or revocation have similar potential and should be equally reviewable. Piecemeal appeals will be prevented in most cases by the fact that permission to appeal is discretionary and the discretion is likely to be very sparingly exercised when dealing with post-certification orders.

Proposed subdivision(f) does not have unanimous support among Task Force members. A dissenter suggests that where the district court has exercised its discretion and a motion to reconsider has been denied, existing § 1292(b) sufficiently protects either party seeking review of district court orders granting or denying class certification. In

¹² *Id.*

¹³ To this end, the Task Force recommends that a study be made of the cases in which such review has been allowed under existing mechanisms (such as mandamus) and of cases in which standards are set forth for the exercise of discretion under § 1292(b) and other avenues of discretionary review, in the hope that the cases would assist in better defining the factors to be considered in deciding whether to allow review.

rare cases, mandamus has been successfully used to gain an immediate appeal. Thus, this dissenter questions whether the proposed procedure is better than the existing one.

B. Proposed Rule 23(e) Amendment, Requiring Hearing and Notice Prior to Class Settlement Dismissal

The Advisory Committee has proposed revising Rule 23(e) to provide that no class action shall be dismissed or compromised without a *hearing* and court approval, and only *after* all class members have been given notice of the dismissal or compromise.¹⁴ The central revisions, then, are the requirements of notice to class members and a fairness hearing, prior to dismissal. These proposed changes are intrinsically procedural and do not effect substantive law or rights.¹⁵ Task Force members generally agree that the proposed Rule 23(e) revisions are sound and merely embody actual practice in most -- although not all -- federal courts.

The Task Force believes that the current class action rule already provides adequate protection to absent class members, but that in codifying these practices and requiring them of all class dismissals, the rule enhances due process protection. Furthermore, Task Force members agree that the requirements of prior notice and a fairness hearing additionally buttress judicial protection against possibly collusive settlements, which is especially important in light of the Advisory Committee's proposal for a (b)(4) "settlement class," discussed below.

The Task Force endorses the Advisory Committee's draft Rule 23(e) revisions as written and agrees that the notice and hearing requirements apply to certified class actions. Task Force members discussed whether Rule 23(e) also needed to be amended to indicate that the notice and hearing requirements *do not apply* to pre-certification dismissals. Thus, litigants may file a class action lawsuit but then dismiss the action prior to a district court's class certification decision. Under the rule, pre-certification notice to a proposed class and a court hearing are not necessary for the court to approve a voluntary or consensual dismissal. The Task Force believes that there is no need to further amend Rule 23(e) to distinguish and clarify these situations, or to state that a hearing is not required for pre-certification dismissals. Indeed, there is significant support for a suggestion to the Advisory Committee that it include mention of this in its Note.

¹⁴ See Appendix A for the text of this proposal in the context of the rule.

¹⁵ Two central benchmarks of procedural due process are the requirements of notice and the opportunity to be heard. See *e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

C. Proposed Rule 23(c)(1), Relating to Timing of the Class Certification Decision

The Advisory Committee has proposed changing the language of Rule 23(c) to require that district courts determine whether a class action may be maintained *when* practicable after the commencement of an action brought as a class. The central change substitutes the language "*when*" for "*as soon as*."¹⁶ This proposed revision clarifies a timing requirement and as such is intrinsically a procedural or "housekeeping" provision, similar to numerous timing provisions scattered throughout the federal rules.

The Task Force unanimously endorses this proposal and agrees that changing the Rule 23(c)(1) language from "as soon as practicable" to "when practicable" codifies current practice. In addition, this changed language provides district court judges with needed flexibility in timing the certification decision, so as to allow for resolution of other possibly dispositive pre-trial Rule 12 motions, or summary judgment.

D. Proposed Rule 23(b)(3) Opt-Out Class Factors

The Advisory Committee has proposed revising the list of four factors that judges may take into account when determining whether a proposed Rule 23(b)(3) opt-out class meets the additional requirements of "predominance of common issues" and "superiority."¹⁷ In addition to modifying the language of the existing four factors, the Advisory Committee has proposed adding two new factors to the list that judges may consider when assessing certification of a (b)(3) opt-out class.¹⁸ New factor (C) would permit the judge to assess the maturity of a proposed class with reference to related litigation.¹⁹ New factor (F)²⁰ would permit the judge to balance the probable relief to class claimants against the burdens and costs of resolving the dispute through a class action.

Task Force members generally agree and support proposed new factor (C), but recommend modifying the "maturity" factor specifically to include material currently set forth in the Advisory Committee Note. Task Force members substantially disagree about the wisdom of proposed factor (F), and this disagreement is reflected in the following discussion.

¹⁶ See Appendix A for the text of this proposal in the context of the rule.

¹⁷ See Appendix A for the text of these proposals in the context of the rule.

¹⁸ In addition, the Advisory Committee has suggested reordering the current sequence of factors. *Id.*

¹⁹ See Appendix A for the text of this proposal in the context of the rule

²⁰ *Id.*

1. Proposed Rule 23(b)(3)(C): The "Maturity" Factor

The Advisory Committee has proposed amending Rule 23(b)(3) to add that a district judge, in assessing predominance of common issues and the superiority of a class action, may take into account the "maturity of any related litigation involving class members." This proposed new factor directly derives from federal court experience with the certification of mass tort litigation classes, an experience that has suggested to some federal courts the undesirability of authorizing a class when an immature mass tort exists.²¹ The addition of the "maturity" factor to the list of Rule 23(b)(3) factors essentially reflects a pragmatic wisdom derived from mass tort class certification decisions. Proposed factor (C) therefore would permit judges, in their discretion, to assess whether it makes sense to create a class litigation unit with reference to the track record of other related cases, or to prevent interference with related ongoing litigation.

The proposed (C) makes explicit reference to the maturity of related litigation. The Advisory Committee's Note, however, additionally suggests that class adjudication may be inappropriate "if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis." This suggestion embodies the realization that the state of scientific knowledge in some products liability and mass tort litigation may be insufficiently developed to support the desirability for class resolution of claims. Indeed, this has been a principal concern of many who have urged that Rule 23 be revised on the sides of the Bar. In situations involving "immature" scientific knowledge, development of that science may be better accomplished through individual litigation.

The Task Force generally endorses the Advisory Committee's proposal to add the "maturity" factor to the list of factors judges may assess when making a determination about the suitability of a proposed (b)(3) class action, as well as the language stating this proposition. The Task Force additionally supports the Advisory Committee's understanding that the "maturity" factor involves an assessment of the state of the scientific knowledge underlying class claims.

In light of the foregoing, the Task Force believes that the proposed (C) factor currently does not reflect, or specifically state, the entire basis for the Advisory Committee's recommendation. Thus, the Task Force recommends that the (C) factor be revised to explicitly state the Advisory Committee's intention that district judges be permitted to assess "maturity" not only with reference to related litigation, but also with reference to the state of existing knowledge undergirding the class claims.

²¹ See e.g., *Castano v. The American Tobacco Co.*, 84 F.3d 734, 744-50 (5th Cir. 1996)(discussing the maturity factor in reversing class certification of a class of persons addicted to tobacco products); *In the Matter of Rhone-Poulenc*, supra n., 51 F.3d at ___ (discussing litigation history of related trials involving tainted blood products in reversing class certification of such a class of claimants).

2. Proposed Rule 23(b)(3)(F): The Balancing Test for Small Claims Class Actions

More controversially, the Advisory Committee's proposed new factor (F) would permit a federal judge to assess "whether the probable relief to individual class members justifies the costs and burdens of class litigation."²² Of all the proposed Rule 23 amendments -- apart from the proposed Rule 23(b)(4) settlement class -- this amendment generated the most discussion and disagreement among Task Force members. Ultimately, Task Force members have been unable to reach consensus. In light of this disagreement, the Task Force believes that neither TIPS nor the American Bar Association should support adoption of proposed Rule 23(b)(3)(F).

The formulation of the (F) factor has a long lineage in the Advisory Committee's deliberations. This factor arose from concerns of Advisory Committee members relating to the small-claims consumer class action. Some members believed that the class action rule needed to be saved from abusive lawyers who seek huge profit from class litigation, with little or no benefit to the class they represent. Other Advisory Committee members advocated the value and historical role of the small-claims consumer class action, therefore opposing any language that might license federal judges to reject this particular category of class action.

In attempting to mediate these differing philosophies, the current (F) factor derived from an original proposal to codify a standard permitting judges to "preview the merits" of class claims and in some fashion assess the probable likelihood of success on the merits.²³ When the Advisory Committee rejected this formulation, the Committee proposed and then rejected language embodying the standards for issuance of an injunction. In another drafting attempt, the Advisory Committee proposed, and then rejected, a balancing test which would have permitted a judge to assess "whether the public interest in -- and the private benefits of, the probable relief to the individual members justify the burdens of the litigation."

²² See Appendix A for the text of this proposal in the context of the rule.

²³ The debate whether federal judges may "preview the merits" of class claims in making a class certification decision derives from the Supreme Court's holdings in *Eisen v. Jacquelin & Carlisle*, 417 U.S. 156 (1973). However, recent federal court decisions have suggested that the *Eisen* holding has been misconstrued and misstated, and does not preclude a federal judge from looking beyond the pleadings in making a class certification decision. Several courts instead have recently stated that the class action rule requires a federal judge to examine available information beyond the pleadings, and to make a "rigorous analysis" of the class claims, defenses, etc. See *Castano v. American Tobacco Co.*, *supra* n.21, 84 F.3d at 740; *American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996).

During the Advisory Committee deliberations the proposed (F) factor became known as the "it just ain't worth it" factor, based on some Advisory Committee members' belief that small-claims consumer class actions with low compensation to class members "just ain't worth" the cost and expense of conducting the litigation as a class.²⁴ This view forms the basis of the current proposal that federal judges ought to be able to take the "just ain't worth it" factor into account, through a balancing test, when making a certification decision.

After numerous attempts to formulate language embodying these concepts, the Advisory Committee formulated the current (F) factor, which essentially permits a federal judge to exercise discretion and balance the probable relief to class members against the costs and burdens of resolving claims through the class mechanism. Each of the Advisory Committee's various formulations of the (F) factor, including the current proposed language, formed the basis of extensive policy debate. This debate included discussion as to whether the Advisory Committee had authority under the Rules Enabling Act²⁵ to codify such a principle, on the ground that previewing the merits at the certification stage, or even conducting a balancing test, affected substantive rights.

The basis for the Rules Enabling Act objection to proposed (F) factor is grounded in the argument 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. In essence, objectors to the proposed (F) factor argue that the Advisory Committee has exceeded its authority in making this normative policy decision about these class actions, which is a policy decision entrusted to Congress. Thus, if there is sufficient opposition to small claims class actions, Congress is the appropriate body to make this policy decision through substantive legislation, rather than having the Advisory Committee accomplish this result through rulemaking.

Some TIPS Task Force members endorse the proposed Rule 23(b)(3)(F) factor, or have given it qualified support. These Task Force members believe that the proposed factor enables judges to exercise discretion in evaluating whether the expense and burdens of conducting class litigation are justified in relation to the probable relief to class claimants. In their view, judges ought to be able to assess whether the primary or sole purpose of a proposed class action is the recovery of attorney fees, with little or no foreseeable compensating benefits to class members. Task Force supporters believe that this additional factor will assist federal courts in preserving the class action rule for truly

²⁴ Of particular relevance is the example of the "coupon settlement" in the GMC Pickup Truck Fuel Tank class action litigation. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995).

²⁵ *See* 28 U.S.C. § 2072(b), describing the limits of Supreme Court rulemaking authority: "Such rules shall not abridge, enlarge or modify any substantive right."

meritorious small-claims class actions, while deterring exploitative and abusive attorney initiatives.

Other TIPS Task Force members oppose the proposed Rule 23(b)(3)(F) factor, based on five objections. First, the proposed (b)(3)(F) factor is difficult to reconcile with reformulated Rule 23(b)(3)(A), which permits a judge to consider "the practical ability of individual class members to pursue their claims without class certification."²⁶ The Advisory Committee Note states that subparagraph (A) may be "offset" by the new subparagraph (F), if the probable relief to the individual class members is too low to justify the burdens of class litigation. Task Force members find the relationship of factors (A) and (F) confusing, and are concerned that a judge may use subfactor (F) to "offset" and deny class certification in circumstances where a judge's independent assessment of subfactor (A) would militate in favor of counsel class certification. Even some of the Task Force members who support the proposal are troubled by the confusion that the Advisory Committee Note raises concerning the relationship of the (A) and (F) factors.

Second, some Task Force members are disturbed that the Advisory Committee proposal eliminates any reference to the public interest in evaluating the suitability of a proposed class for certification. Under existing doctrine, class claims may not be aggregated to achieve federal diversity jurisdiction. Therefore, small-claims consumer class actions generally arise under federal law where Congress already has expressed the public interest in providing a substantive basis for relief.²⁷ The proposed Rule 23(b)(3)(F) factor eliminates the public interest completely from the class action rule, and consequently some judges may use subparagraph (F) to restrict certain types of statutory claims, ignoring the concept of the private attorney general that Congress envisioned in enacting substantive legislation.

Third, proposed Rule 23(b)(3)(F) places on judges the burden of performing a relatively unguided cost/benefit analysis that judges are ill-equipped to perform. In the extreme, such analysis may require a judge to conduct a greater analysis of the merits of the case than otherwise would be permissible under existing doctrine.²⁸ Moreover, the proposed formulation of the balancing test is unduly vague and imprecise. Task Force members question what is meant by the term "probable relief," and how judges are to assess this.²⁹

²⁶ See Appendix A for the text of this proposal in the context of the rule.

²⁷ Congress has even capped damages in some statutory class actions, either as a specific sum or as a percentage of the defendant's net worth.

²⁸ See *Eisen v. Jacquelin & Carlisle*, *supra* n.23.

²⁹ Some Task Force members view the proposed (F) factor as a clumsy rendering of the "preview of the merits" concept, and an unfortunate way of re-capturing this issue for the defense.

Fourth, some Task Force members question the extent to which the justice system is burdened by exploitative small-claim class actions, and whether such abusive cases are an exception to the general experience of appropriate small-claims class actions. In addition, these members ask what the burdens of class litigation are, and question whether small-claim class actions are especially burdensome as to merit special attention in the rule.

Finally, Task Force members generally object to the Advisory Committee Note accompanying this proposed amendment, as spreading more confusion and less illumination on the intent and implementation of this proposal.³⁰

E. Proposed Rule 23(b)(4): Settlement Classes

The Advisory Committee has proposed an amendment to Rule 23(b) that creates a fourth type of maintainable class -- the so-called "settlement class." The proposal permits a district court to certify such a class if "the parties to a settlement request certification under subdivision (b)(3) for the purposes of settlement even though the requirements of subdivision (b)(3) might not be met for trial."³¹ Although a majority support the change, a significant number of Task force members have expressed serious reservations about it. As with the proposal regarding (b)(3)(F), therefore, the Task Force does not believe the change should be supported by TIPS as written.

Many Task Force Members believe that the (b)(4) proposal is similar to the proposed Rule 23 (b)(3)(C) factor relating to maturity,³² in that it may be seen as embodying existing practice. Rather than blazing new ground,³³ the proposed Rule 23(b)(4) settlement class is seen as codifying what many federal judges and lawyers believe constitutes long-standing practice under the current rule.³⁴ During 1995-96,

³⁰ In particular, one Task Force member strongly objected to the Advisory Note characterization of the "coercive effects of class actions".

³¹ See Appendix A for the text of this proposal in the context of the rule.

³² See nn.30-32 *supra*.

³³ See e.g., John C. Coffee Jr., *Class Action "Reform": Advisory Committee Bombshell*, N.Y.L.J. at 1 (May 21, 1996).

³⁴ Some members of the Advisory Committee articulated this belief. This appreciation of proposed Rule 23(b)(4) also is congruent with the view that Advisory Committee rulemaking more often is "behind" the practice curve rather than ahead of it. In this view, much Advisory Committee rule revision is for the purpose of codifying existing practice, rather than blazing new ground with untried procedures.

Understanding the concept of the "settlement class" involves an appreciation of the forms that settlement classes may take in current practice. This consideration revolves largely around the timing of the class certification decision.

First, a judge may certify a class action at the outset of litigation (or "as soon as practicable" after the action is brought as a class), after which the parties may settle and

however, the Third Circuit called into question whether existing Rule 23 authorizes certification of settlement classes. See *Georgine v. Amchem Products*, 83 F.3d 610 (3d Cir.), cert. granted, ___ U.S.L.W. ___ (October __, 1996) and *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995). In particular, the *Georgine* court held that a proposed settlement class had to meet the same certification standards as a litigation class, and the fact of the settlement could not itself be used to determine whether the Rule 23(b)(3) requirements of predominance and superiority are satisfied. These decisions prompted the Advisory Committee to draft the current proposal to specifically allow judges to certify such classes under the amended rule, without the settlement class having to meet the same standards as litigation classes. This question currently is before the Supreme Court, on appeal from the Third Circuit's *Georgine* decision.

Under the proposed Rule 23(b)(4) amendment, a judge may certify a settlement class only if the proposed class satisfies the Rule 23(a) threshold requirements of numerosity, commonality, typicality, and adequacy of the class representatives and class counsel. A Rule 23(b)(4) class would be appropriate when the parties already have agreed to a settlement, and since settlement classes are available only to (b)(3) actions, the (b)(4) settlement class would preserve an absent class member's right to opt-out. Generally, the proposed (b)(4) settlement class effectively converts the (b)(3) superiority finding and the manageability factor into the question whether there is a *bona fide* settlement.

Some Task Force members with reservations about the proposed Rule 23(b)(4) settlement class are concerned with the opportunities for collusion that settlement classes present. Thus, by permitting certification of cases which could not be tried as class actions, collusive settlements benefiting defendants and class counsel may be difficult to guard against. When the parties know that the case could not be tried as a class action, plaintiffs's counsel and the class have little leverage to achieve the best possible settlement for all class members. Because of the potential for collusion, some Task Force members

bring the settlement to the judge for review and approval under Rule 23(e). Second, a judge may "provisionally" or "conditionally" certify a class ("as soon as practicable"), after which the parties may settle and bring their settlement to the judge for review and approval under Rule 23(e). Third, a judge may explicitly certify a class for the purpose of settlement: that is, the judge may certify the class and instruct the parties to go forth and negotiate a settlement. Once settlement is reached, the judge will then review the settlement under Rule 23(e). Fourth, the parties may negotiate a settlement, make class certification a term of the agreement, and then take their agreement to the judge for both class certification and approval of the substantive terms of the agreement. This is the "purest" form of settlement class, exemplified by the *Georgine* settlement class, and it is a relatively recent development in federal practice. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

Proposed Rule 23(b)(4) largely addresses the fourth type of class action settlement and permits a judge to certify a class in these circumstances.

suggest that the (b)(4) settlement class ought to include language requiring heightened scrutiny of adequacy of representation in (b)(4) situations.

Moreover, some Task Force members fear that judges will be inclined to certify and approve such settlements and meaningful review will be frustrated because of inherent tendency to approve settlements. Other Task Force members are concerned that settlement classes have the consequence of superseding state tort and contract law, and that settlement classes are inappropriate for mass tort litigation -- especially classes of future claimants with exposure-only latent injuries that are not identifiable at the time of the certification of the settlement class. Furthermore, some Task Force members are especially wary of settlements that counsel might accomplish prior even to filing suit, and suggest that the Advisory Committee Note ought not to grant blanket approval to all settlements classes whenever agreed upon, as the current Note appears to approve.

Task force members who support the proposal believe that current Rule 23 contains sufficient due process protections to permit federal judges to guard against collusive or inappropriate settlement classes and to protect the interests of all class members. These protections include the requirement that the judge makes a finding under Rule 23 (a) of the adequacy of class counsel and the class representatives; the ability of class members to opt-out under Rule 23(b); the requirements of notice and a hearing prior to court approval of a settlement; the requirement that the judge make a determination of the fairness, adequacy, and reasonableness of the settlement; and the ability of dissident class members to appear at the fairness hearing to challenge the settlement on the merits, in an adversarial proceeding. Moreover, the current class action rule permits the federal judge to appoint independent special masters to assist the court in evaluating the fairness and adequacy of the terms of a proposed settlement, and to appoint guardians for the interest of certain absent class members, including future claimants.

Even with these protections, however, there is significant concern among some Task Force members 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. As class members become more diverse, and settlement factors more complex, the incentives for class representatives and class counsel to protect absent members' interests, and their practical ability to do so, are less certain. Even if the aggregate class settlement appears reasonable, the allocation among class members may be skewed. The only meaningful protection against such a result may be a judicial review which is far more intensive and skeptical than is the usual practice now. While there may be situations where unlitigable classes can be proper vehicles for settlement, the lack of clear standards for determining fairness is troubling.

Finally, the (b)(4) proposal is seen by some Task Force members as not necessarily codifying existing practice. Settlement class are commonly approved, frequently by stipulation, without any formal finding that they are litigable as such. However, there is little authority for allowing a settlement to proceed on a class-wide

basis where there may be a substantial, even unrebutted, challenge to certification. Thus, among some Task Force members, serious objections to proposed (b)(4) are informed by the belief that the Supreme Court will soon clarify settlement class procedures and that continued case law development may be a better approach to any reform.

Conclusion

The Supreme Court, Judicial Conference, and Advisory Committee on Civil Rules have not revisited the class action rule since it was last amended in 1966. Thirty years experience under the 1996 class action rule has demonstrated both the value of class litigation and the problems with the existing rule. The Advisory Committee formulated its current proposals after considered deliberation over a four year period, and it is highly likely that the Advisory Committee will not soon reconsider the class action rule. In light of this, as well as the substance of the proposed amendments, the TIPS Task Force concludes that the Advisory Committee has proposed some useful amendments that will assist federal courts in better using the class action rule in appropriate cases, while preserving judicial control and discretion to refuse to certify class actions in inappropriate situations. On balance, many of the proposed amendments are sound codifications of existing practice or sensible modifications to the current rule. Subject to the reservations and recommendations contained in this Report, the TIPS Task Force on Class Actions endorses and supports these proposals, but urges that, due to significant disagreement among its members, ABA support not be given to proposal (b)(3)(F) and (b)(4) as written..



THE COMMITTEE ON APPELLATE COURTS
THE STATE BAR OF CALIFORNIA

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February 4, 1997

David C. Long
Director of Research
State Bar of California
555 Franklin Street
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Re: Secretary Referral re Amendments to Federal Rule of Civil Procedure 23

Dear Mr. Long:

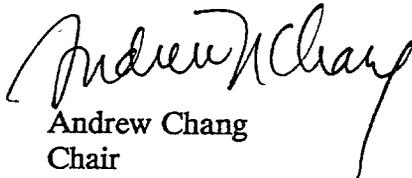
I am writing on behalf of the State Bar Committee on Appellate Courts in response to your Secretary Referral dated October 15, 1996, regarding the proposed amendments to Federal Rule of Civil Procedure 23 relating to class actions.

The Committee on Appellate Courts reviewed these proposed amendments to Rule 23 at its December 1996 meeting. The only change in this Rule that impacts appellate practice is the addition of subdivision (f). New subdivision (f) would provide for a permissive interlocutory appeal from orders granting or denying class certification. This interlocutory appeal would be at the discretion of the Court of Appeals. The Rules governing interlocutory appeals would not apply in these appeals, so that the District Court would not have to certify the order. Nor would filing the interlocutory appeal stay the trial court proceedings.

The Committee supports the addition of proposed subdivision (f) to Rule 23 because an order either denying or granting class certification is a critical order in class action litigation and, at the discretion of the Court of Appeals, should be immediately reviewable. Basically, this amendment creates a statutory writ proceeding for these orders, allowing review at the Court of Appeal's discretion. The amendment benefits both sides in class actions: a plaintiff need not proceed to final judgement on a sole claim before obtaining review if class certification is denied and a defendant has an option besides litigation or settlement when class certification is granted.

Thank you for the opportunity to comment on this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Chang". The signature is fluid and cursive, with the first name "Andrew" and the last name "Chang" clearly distinguishable.

Andrew Chang
Chair

TO: Civil Rules Advisory Committee
FROM: A. Mark Weisburd
Professor of Law, University of North Carolina at Chapel Hill
SUBJECT: Proposed Subdivision b(4) of Rule 23
DATE: February 14, 1997

This memorandum is offered to express my concern at the Committee's proposal to add a new subdivision (b)(4) to Rule 23 of the Federal Rules of Civil Procedure. It seems to me that the proposal raises problems more serious than those it solves.

Initially, I should note that I am strongly influenced in my conclusions by Professor John C. Coffee's article, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUMBIA LAW REVIEW 1343 (1995). In its recounting of numerous instances and types of abuses in class action settlements, Professor Coffee's article certainly suggests that the most crucial problems in class action practice relate more to policing such settlements than to finding ways to facilitate them.

Turning to the proposal itself, it seems to me that it poses due process difficulties which are addressed neither in the Committee Note nor in the draft minutes of the Committee's deliberations. *Hansberry v. Lee* makes clear that the *res judicata* effect of a purported class judgment on absent members of the class depends in part on the adequacy of representation of the absentees by the class representatives and their counsel. Yet some of the justifications offered for (b)(4) surely involve situations in which obvious adequacy questions are presented. Consider, for example, a case in which class members are located in a number of different states, in circumstances such that any adjudication of the case would raise choice of law problems. Obviously, for such problems to exist, the legal rules in some of the relevant states must differ from those in other states. Further, they must differ in a way that could lead to different results depending on whether a given claim were decided under the law of one state or another. After all, if the different state rules do not lead to different outcomes, there really is no choice of law problem presented. But in such a case, what form will a settlement take? Surely no rational defendant would agree to forego whatever advantage it might derive from the rules of those states whose law would favor it unless it received some countervailing benefit in regard to those claims governed by rules that would favor the claimants. From the perspective of those favorably situated claimants, however, their interests are being sacrificed to provide some recovery to other class members whose claims would be evaluated under unfavorable legal rules. How could a settlement negotiated in the face of such an obvious conflict of interest reflect anything other than inadequate representation? This scenario, however, seems not especially unlikely even in the contemplation of the Committee.

A second, less abstract Constitutional problem raised by the proposal is its effect on consideration of the factors relevant to a determination under Rule 23(a). Clearly, the typicality and adequacy of representation factors are of Constitutional stature, in light of *Hansberry*. Yet the clear intent of subdivision (b)(4) is that a standard weaker than that applied to (b)(3) class actions be applied to (b)(4) actions. While the Committee Note is, of course, quite explicit in providing that (b)(4) actions must satisfy all the prerequisites of subdivision (a), 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. Certainly, Professor Coffee's article would

indicate that a distressingly large number of judges deal rather cavalierly with such matters even under the current version of Rule 23; it would be surprising if new language intended to relax certification standards did not exacerbate this problem.

Apart from Constitutional questions, (b)(4) seems extraordinarily vague, and difficult to reconcile with (b)(3). For example, proposed subparagraph F of subdivision (b)(3) seems intended to prevent certification of classes whose members would not benefit from an action purporting to protect their rights. The draft minutes at pages 25-28 indicate that one of the justifications for adding this subparagraph was concern about class actions brought for the benefit of the attorneys for the class, rather than for the benefit of the class itself. Yet (b)(4) suggests that such issues should carry less weight if the parties agree to certify a class for settlement purposes - even though the considerations inspiring subparagraph F would seem as pertinent in a settlement context as in any other. Is the weaker standard under (b)(4) not to be applied to subparagraph F considerations? If not, why does the rule not make this explicit? And how is a judge supposed to decide just what sort of relaxation of standards (b)(4) is intended to authorize, in the absence of any language providing clear guidance?

The most fundamental problem presented by proposed subdivision (b)(4), however, is that it is difficult to imagine it 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. This follows, since the fact that plaintiffs' lawyers would have to agree to a type of certification that would preclude litigation implies that those lawyers would not have much faith in their ability to obtain a (b)(3) certification. Why would a defendant who could make a case disappear choose to settle instead? The only reason I can imagine is that such a defendant would see itself as having avoided a potentially serious problem; in other words, the defendant would have reason to be concerned about suits by class members despite the weakness of the class claim, and would therefore seek to block such suits. Considering Professor Coffee's article once again, it seems impossible to justify a change in the rules that would facilitate such activity.

This memo is not especially profound, but I hope that it is of some use to the Committee.

FAEGRE & BENSON LLP



2200 NORWEST CENTER, 90 SOUTH SEVENTH STREET
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TELEPHONE 612-336-3000
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BRIDGET M. AHMANN
612/336-3353

February 13, 1997

96-CV-165

The Judicial Conference's Advisory
Committee on Civil Rules
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E.
Washington, DC 20002-8003

BY OVERNIGHT DELIVERY

Dear Committee:

Re: Comments on the Proposed Amendments to Rule 23

As practitioners who are involved extensively in class action litigation, we submit these comments in full support of the proposed amendments to Rule 23. As class action litigation has proliferated in recent years, the current version of Rule 23 has been interpreted and applied well beyond what could have originally been envisioned. The proposed amendments provide necessary guidance in certain critical areas where the courts, understandably, have not always been consistent.

One such area is that involving settlement classes. Recent decisions by the Third Circuit in 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) and Georgine v. Amchem Prods., 83 F.3d 610 (3d Cir.), cert. granted, 117 S.Ct. 379 (1996) have thrown this often-utilized device into a state of uncertainty by requiring that a settlement class meet the same certification criteria as a litigated class, apparently without regard to the existence and details of the settlement. Not only does this Third Circuit view run directly counter to the overwhelming weight of existing case law, but it also discourages settlements of complex litigation which would otherwise be a significant drain on resources of the litigants and the courts. The proposed amendment, i.e., Rule 23(b)(4), properly endorses settlement classes and essentially codifies existing caselaw outside of the Third Circuit.

This endorsement of settlement classes is beneficial for all involved. The proposal allows the parties to settle on a class-wide basis before the court has considered or decided the class certification issue. Early resolution conserves judicial resources, saves litigants from costly class discovery aimed only at certification issues, and provides class members with prompt compensation. Moreover, a number of safeguards exist, both within the current Rule and within the amendments, to address the concerns of abuse and collusive

settlements. First, proponents of a settlement class must still satisfy the requirements of Rule 23(a), which insure, among other things, that the class representatives will adequately represent the interests of the entire class. Also, the proposal retains, and indeed strengthens, the requirements for notice to all class members and the opportunity to opt out, as well as the requirements for a hearing and court approval of the class settlement. Each of these procedures, which reflect existing practice, protects against the potential for a collusive settlement at the expense of absent class members.

Another important area which the amendments address involves claims wherein the recovery does not logically justify the burdens imposed by the class action procedure itself. As class action litigation has increased, so has the potential for abuse. In many instances, the recovery for individual class members is so minuscule as to make the whole process appear to be nothing more than a windfall for attorneys (on both sides). These unfortunate, and hopefully few, circumstances unnecessarily burden the courts and also add to the public's cynicism about both the courts and the legal profession. While some courts already scrutinize these types of claims under the "superiority" criteria of Rule 23(b)(3), the express inclusion of such cost-benefit analysis in Proposed Rule 23(b)(3)(F) reinforces the intent that some actions are simply not appropriate for class treatment if the costs and burdens outweigh the probable benefits.

We also support the other proposed amendments to Rule 23.

Very truly yours,

FAEGRE & BENSON LLP



James A. O'Neal

Bridget M. Ahmann*

Other lawyers in our firm also join in these comments:

Ann Marie Hanrahan

John P. Mandler

Winthrop A. Rockwell

* The views stated here are our own, and do not necessarily represent the views of our clients or the firm.

BMA:bhs

M2:20074837.01

RECEIVED
2/18/97

Amoco Corporation

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Chicago Illinois 80601-7125
312-856-5474
Facsimile: 312-856-2039

Stephen F. Gates
Vice President, General Counsel
and Corporate Secretary

VIA FACSIMILE AND U.S. MAIL

96-CV-168

February 14, 1997

Honorable Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. McCabe:

We appreciate this opportunity to express our views about the proposed amendments to Federal Rule of Civil Procedure 23, regarding class actions. Amoco's recent experiences in class action litigation demonstrate the need for significant class action reforms, particularly as to Rule 23(b)(3) damages actions. Consequently, we generally support the proposed amendments to Rule 23, but encourage the rulemakers to go beyond the modest proposals that are the subject of these comments. More specifically, a number of revisions that would provide more rigorous class action standards have been proposed by commentators during the public comment period. These include returning to an opt-in process, deferring class action certification until the conclusion of regulatory action, and requiring class-wide proofs, among other changes. These measures and others deserve serious study as means to achieve greater improvement in class action litigation. As for now, we urge the Committee to move forward with the most widely accepted amendments, such as the provision permitting interlocutory appeals and adopting certification standards (A), (B), and (C) for Rule 23(b)(3).

The class certification standards of the current rule encourage the pursuit of speculative claims for marginal damages on behalf of a largely disinterested class of plaintiffs. For example, Amoco has been subject to class actions vaguely alleging speculative and abstract damages such as anxiety, increased risk or future risk of injury, and diminution of property value without actual damage to the property. 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. Absent a procedural device like Rule 23, which currently favors class resolution of claims to achieve efficiency gains without regard for the merits, these lawsuits could not have been brought. Under these circumstances, the class action mechanism does not achieve efficiency. Rather, it promotes unnecessary

Honorable Peter G. McCabe
February 14, 1997
Page 2

litigation and imposes significant monetary and due process costs on defendants, the courts, and the public.

It is widely recognized that putative nationwide class actions for monetary damages under different state tort law cannot be certified due to jurisdictional, conflict of law, and due process concerns. *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996), *cert. granted sub nom., Amchem Products, Inc. v. Windsor*, 117 S.Ct. 379 (1996), *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995). Yet class plaintiffs' lawyers continue to file nationwide class actions, confident that deep-pocket defendants will find it less costly to pay a large settlement with substantial counsel fees than it would be to defeat class certification or try a certified case. Courts seemingly are unable to stop this practice under the present formulation of Rule 23.

The proposed revisions to Rule 23 touch on many of the concerns we raise above, even if they would not eliminate them. We are especially supportive of the proposed revisions to the class certification criteria in Rule 23(b)(3). Closer examination of the proposed class litigation, as would be required under the recodified certification standards, is appropriate due to the inordinate costs that class actions can impose. We strongly support the proposed revision to Rule 23(b)(3) that would require the court to consider the value of the relief to the class versus the costs of maintaining the action as a class. Imposition of this type of cost-benefit analysis 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 for certification as a class action.

We also strongly support a mechanism for interlocutory review of the class certification decision. Class certification frequently results in settlement under the current system even if the plaintiffs' underlying claims are meritless. Settlement precludes appellate review of the certification decision. Consequently, the class certification decision generally is dispositive of the entire case. Allowing increased opportunities for interlocutory review will relieve some of the pressure to settle and will remove or reduce the unjustified monetary threat posed to a defendant because a trial court erroneously certifies a class.

The proposed amendment to subsection (c)(1), which would direct courts to certify classes "when practicable" instead of "as soon as practicable" also should reduce the pressure to settle by allowing greater factual and legal development of the case before

Honorable Peter G. McCabe
February 14, 1997
Page 3

the certification decision must be made. Such a revision will be an improvement over current practice and we support it. We take no position on the proposed revision in new section (b)(4) that would permit Rule 23(b)(3) settlement classes.

Overall, the proposed revisions to Rule 23 are sound. However, other revisions that would have a higher probability of keeping abusive cases out of the federal courts in the first place should be identified and implemented. The Committee might find fruitful a closer examination of some of the alternative amendments proposed during the public comment period.

We appreciate the delicate balancing of interests that the rulemakers must consider when crafting changes to the civil justice system, and how these interests militate in favor of modest, incremental changes. Amoco does not routinely oppose class certification in every case. However, class action abuses are pervasive and, fair or unfair, reflect poorly on the civil justice system and federal courts. They impose extreme costs on corporate defendants that are unjustified and destructive to the corporation, its shareholders, and the public at large. Far-reaching changes are needed. We urge the Committee to undertake them now, notwithstanding the controversy surrounding many of the proposed revisions.

Thank you for the opportunity to express our views.

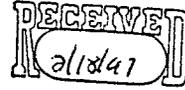
Sincerely,

A handwritten signature in black ink, appearing to be "S. A. [unclear]", written in a cursive style.

O H I O S T A T E B A R A S S O C I A T I O N



PRESIDENT
JOHN B. ROBERTSON
1501 EUCLID AVENUE
7TH FLOOR-BULKLEY BLDG
CLEVELAND, OHIO 44115



February 12, 1997

96-CV-169

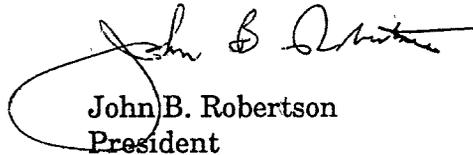
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, D.C. 20544

Ladies and Gentlemen:

The Ohio State Bar Association respectfully submits for your consideration the attached Resolution adopted by our Federal Courts and Practice Committee endorsing the proposed amendments to Rule 23 (b)(3) of the Federal Rules of Civil Procedure.

We appreciate your consideration of our views on this matter.

Very Truly Yours,



John B. Robertson
President

JBR/sc

Encl.

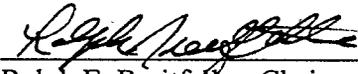
cc: Ralph E. Breitfeller, Esq.
Chair, OSBA Federal Courts and Practice Committee
Thomas M. Taggart, Esq.
Rosemary G. Rubin, Esq.
Denny L. Ramey, CAE
William K. Weisenberg, Esq.

**OHIO STATE BAR ASSOCIATION
FEDERAL COURTS AND PRACTICE COMMITTEE**

RESOLUTION 97-1

The members of the Federal Courts and Practice Committee of the Ohio State Bar Association, attending the January 25, 1997 meeting, unanimously adopted the following resolution:

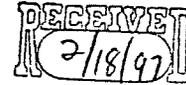
RESOLVED, THIS COMMITTEE ENDORSES THE PROPOSED AMENDMENTS TO RULE 23 (b) (3) OF THE FEDERAL RULES OF CIVIL PROCEDURE.



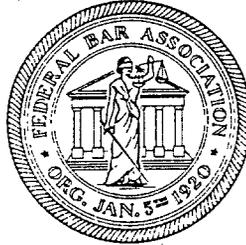
Ralph E. Breitfeller, Chair

#2293

Federal Bar Association



Hon. Dana E. McDonald
1815 H Street, NW
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E-Mail: fedbar@access.digex.net



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Chamblee, GA 30341
(770) 455-1466 • FAX (770) 454-7013

Office of the President

✓ 96-CV-170

February 12, 1997

96-AP-038

96-CR-019

Mr. Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, DC 20544

Subject: Federal Bar Association Comments on Proposed Amendments to the Federal Court Rules.

Dear Mr. McCabe,

I am very pleased to enclose the comments of the Federal Bar Association to the proposed amendments to the Federal Rules of Appellate, Civil and Criminal Procedure. As I know you are aware, the FBA is a professional association of nearly 15,000 attorneys, in both public and private service, whose practices are impacted by these rules.

In assessing the weight to be accorded the FBA's comments, you may wish to know about the broad consideration given the proposals by our many entities. The comments are the product of a special committee chaired by James S. Richardson, the FBA's Deputy Section Coordinator. Mr. Richardson's special committee included virtually every substantive section chair potentially impacted by the proposed amendments, including the following:

The Honorable Joseph Baum
Chief Judge U.S. Coast Guard Court
of Criminal Appeals
Chair, Judiciary Division,
Bar Association

The Honorable Arthur Burnett, Sr.
Associate Judge of the Superior Court of the
District of Columbia
Chair Emeritus, Administration of Justice Federal
Section, Federal Bar Association

Jesse Clark, Esq.
Senior Attorney Advisor, U.S. Court of
Appeals for the Armed Forces
Chair, Criminal Law Committee,
Federal Bar Association

Sydney Powell, Esq.
Powell and Associates
Chair, Appellate Law and Trial Practice
Committee, Federal Bar Association

Wayne F. Pratt, Esq.
Assistant United States Attorney
Vice-Chair, Criminal Law Committee,
Federal Bar Association

Janet Richardson, Esq.
Morris, Polich and Purdy
Chair, Civil Rights, Civil Liberties and Civic
Responsibilities Committee, Federal Bar Association

Mark D. Laponsky, Esq.
Semmes Bowen and Semmes
Chair, Labor and Employment Law Section,
Federal Bar Association

Jeffery T. Morris, Esq.
Sable Markoff and Guskey
Pittsburgh, PA

Charles W. Bobinette, Esq.
Uthoff, Graeber, Bobinette, & O'Keefe
Chair Federal Rules of Procedure Committee,
Federal Bar Association

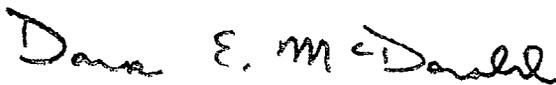
James S. Richardson, Sr.
Senior Attorney Advisor U.S. Court of Appeals for
Armed Forces
Deputy Section Coordinator, Federal Bar Association

In addition to the consideration given to the proposed amendments by the Special Committee and the constituencies the members represent, the FBA also distributed the proposed amendments to each of its nearly 100 active chapters for comment.

In general, the FBA has endorsed the proposed amendments, and recommends formal endorsement by the Rules Committee of the Judicial Conference. However, the FBA does register its opposition to the addition of Subsection (f) to the class action rule, Rule 23 of the Federal Rules of Civil Procedure.

The FBA is very appreciative of the opportunity to participate in the process by which the proposed amendments are being considered by the Conference. If we may be of further service to your Committee, please do not hesitate to call on the FBA.

Sincerely,



Dana E. McDonald
President

Encls.

February 12, 1997

Please Reply To: Jim Richardson,
Deputy Section Coordinator
450 E. St. NW
Washington DC 20442
(202) 761-1454
Fax: (202) 761-7005
E-Mail: richjk@erols.com

**SUBJECT: FEDERAL BAR ASSOCIATION COMMENTS ON PROPOSED
AMENDMENTS TO THE FEDERAL COURT RULES.**

OVERVIEW

Most of the amendments proposed in the preliminary draft are either technical in nature, designed to eliminate duplication of process within the present rules or simply codify what has become existing practice. In those cases the Committee endorses the proposed changes. The exception is the proposed amendment to Federal Rule of Civil Procedure 23, which appears to constitute substantial change (particularly with regard to interlocutory appeal of class certification). The Committee concludes that the changes to this rule, while on the whole advancing the administration of justice, deserve special consideration. Therefore the endorsement of the Federal Bar Association as to the rule should be qualified as expressed below.

FEDERAL RULE OF APPELLATE PROCEDURE 5

The Committee recommends that the FBA support Proposed Federal Rule of Appellate Procedure 5. At present Appellate Rules 5 and 5.1 are essentially duplicative. The differences between the two rules is so insubstantial that combination of the two rules is clearly in the interests of justice. Moreover, as the Committee report notes, adoption of one rule for all appeals (whether interlocutory or final) eliminates the necessity for adoption of additional rules in the future should new statutes or rules authorize additional appeals.

It also should be noted that other changes in the rules (*e.g.*, subdivision (d)) promote the administration of justice by clarifying existing practice as to calculating time for the date of notice of appeal.

PROPOSED FORM 4

(APPLICATION FOR PERMISSION TO PROCEED *IN FORMA PAUPERIS*)

Proposed Form 4 should be adopted without change. The form, while long, is not so complex that the average appellant cannot understand and complete it. The information requested is relevant and the questions are straight forward. It does not appear that any party who truly needs to proceed *in forma pauperis* will be discouraged from doing so by the information requested. No further comment is required.

FEDERAL RULE OF CIVIL PROCEDURE 23 (CLASS ACTIONS)

The proposed amendments to Federal Rule of Civil Procedure 23 reflect the long standing debate in the profession concerning the expansion of class action litigation. Much of the public believes that such suits tend to benefit only the attorneys who bring them, and provide little if any benefit to the persons on whose behalf the litigation is brought. *See, e.g.,* Smith and Lideman, "Legal Billing, Is the Meter Broken," *The Wall Street Journal*, January 27, 1997. Nonetheless, it

is clear that class action litigation does serve a valid purpose and allows small claimants whose injuries deserve redress the opportunity to seek recovery,

In general the Committee believes that the proposed amendments, with the exception of subsection (f), which grants permissive interlocutory appeal, should be adopted. Each subsection will be separately discussed.

Subsection (b)(3) setting forth the factors on which a district judge determines whether the action should be maintained under Rule 23 advances two significant goals, protecting those who have been truly injured and who deserve redress, while preserving the rights of those potential plaintiffs whose cause of action may go forward by individual lawsuit free of the control of outside persons. The description of the factors to be considered in such cases appears to ease the burden on district judges (or magistrate judges when such issues are assigned to them for consideration) in determining whether certification of a class is appropriate.

Proposed factors A and B are strongly endorsed by the Committee. The Committee believes that in cases where potential class members have justiciable causes meeting the monetary limitations of federal litigation, the right to proceed individually should remain unimpaired. Forcing those cases into a class action, while having some appeal in terms of judicial economy, adds little to the claimants' ability to recover or to protect their legal rights. On the other hand, the practical ability of small claimants whose economic or other harm cannot in any other manner be compensated is protected. While discouraging class certification the proposed factors do not eliminate the potential for such action were a district court finds it warranted. As Mr. Jeffery Morris observed in his comments, proposed amendments will insure that "meritorious and legally simplistic proceedings in which the claims of the individual members are small, . . . will not necessarily be blocked from proceeding." Proposed factor C (a modification of former factor B) appears to warrant endorsement. The most important change to this factor is the consideration of whether the claims of the class as a whole are mature. 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.

Likewise, proposed factor F is endorsed. 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 noted above that such actions benefit only the attorneys who invoke the Rule to maintain them. At some point, the individual relief (*e.g.*, a 2 cent per 1000 KWH rise in a utility rate affecting industrial customers which is then passed on to consumers in the form of a very marginal increase in the cost of a given product) is so miniscule that the federal judicial system should not be required to entertain it.

Subdivision (b)(4) creating a "settlement class" in such litigation appears to warrant adoption. The proposed amendment reflects a practice adopted in several recent cases. *See* the cases cited in the Committee report. However, because a number of courts have taken an opposite tack, and have held that a class cannot be approved for settlement if it could not be approved for trial purposes, the Committee believes that codification of the practice is warranted.

The Committee also believes that the interests of individual members are protected by the rule. A settlement class cannot be certified unless the parties have in fact reached a settlement. The prohibition on certifying a settlement class where the parties (are any subgroup thereof) are merely exploring settlement, appears to adequately protect the interests of those who would not wish to compromise their claims. Likewise, the requirement to provide notice of the settlement class and the right to opt out are consistent with the right of the individual class member to go his own way.

The amendment to subdivision (c) of the rule changing the language of the rule from "As

soon as practicable after the commencement of an action" to "When practicable" is endorsed. This change forces an early decision on the question of whether the litigation should be certified under Rule 23. As the report on the rules suggests, this decision was not always (or even often) made "as soon as practicable." The practical effect of the present practice has already effectively translated the language of the rule into "when." The language change reflects the current practice of ruling on many issues related to class actions.

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. It appears that this amendment will not adversely affect judicial assets.

However, the Committee opposes subsection (f), which would amend Rule 23 to provide for interlocutory appeals. The Circuit Courts of Appeal are presently inundated with cases. The case loads range from about 300 to 400 per judge per year in some Circuits to over 1000 per judge per year in the Eleventh Circuit. 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. The report on the preliminary draft itself notes "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." For these reasons the Committee believes that the Federal Bar Association should not endorse adding this subsection to the rule.

FEDERAL RULES OF CRIMINAL PROCEDURE 5 AND 26.2 (PRELIMINARY HEARINGS AND PRODUCTION OF WITNESS STATEMENTS)

The Committee concludes that the proposed amendments should be adopted. The additions to the rules reflect changes to other rules (e.g. Rules, 32, 32.1 and 46) regarding disclosure and discovery. As the report on the rules suggests, the compelling need to test the credibility of witnesses should be extended to preliminary proceedings. The interests of both the United States and the accused at such hearings are strong, and resolution of that question as early as possible promotes judicial economy and public confidence in the criminal justice system. In particular, Mr. Clark and Mr. Richardson (members of the Staff of the Court of Appeals for the Armed Forces) note that military practice has long sanctioned early disclosure of witness statements with no diminution in the ability of the government to prosecute its cases. Indeed, the disclosure of witness statements at an early stage eliminates disputes over compliance with discovery requests and often (as with civil litigation) prompts pleas of guilty when the strength of the government's case is measured by the accused.

FEDERAL RULE OF CRIMINAL PROCEDURE 31 (POLLING OF THE JURY)

The proposed amendment to Federal Rule of Criminal Procedure 31 should be supported. The present rule provides for polling of the jury but describes no method for accomplishing this task. Historically the conduct of the poll was in the discretion of the trial court. However, there has been a clear preference for individual polling. See *United States v. Miller*, 59 F.3d 417 (3d Cir. 1995)(citing case). This historic objection to the method has been that polling does little to insure that a single juror has been improperly coerced into voting one way or the other. Conversely, individual polling substantially reduces post-trial efforts to overturn the verdict on the ground that a juror was coerced into voting for a conviction. *United States v. Miller*, 59 F.3d at 420. Finally, the ABA Standards for Criminal Justice, § 15-4.5, recommend that individual polling of the jury be conducted when requested.

FEDERAL RULE OF CRIMINAL PROCEDURE 33

(NEW TRIAL)

The proposed amendment to Federal Rule of Criminal Procedure 33 should be supported. The proposed amendment establishes a more date certain for the filing of a motion for a new trial. Currently the rule provides that such a petition may be filed within two years of the date when an appellate court issues a "final judgment." This results in great disparity in the running of the time for an appeal. As amended the rule would set the time as being two years from the announcement of the verdict. This will remove the inconsistency in the filings and also brings the rule into conformity with other rules governing post-conviction motions.

**FEDERAL RULE OF CRIMINAL PROCEDURE 35(b)
(CORRECTION OR REDUCTION OF SENTENCE)**

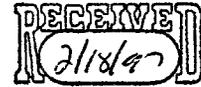
This proposed amendment should be adopted. The rule is designed to allow a court to determine whether a defendant's assistance to the government in a given case is substantial, irrespective of whether the assistance is provided before or after his conviction. At present, United States Sentencing Guideline § 5K1.1 permits a correction or reduction for assistance after sentence has been imposed where the government files a motion under Rule 35(b). However there is no formal mechanism for aggregating assistance which has occurred before conviction and continues afterwards. The change to the rule will eliminate the temporal break, and allow a court to determine whether "on the whole" the assistance was "substantial" regardless of when it was rendered.

**FEDERAL RULE OF CRIMINAL PROCEDURE 43(C)
(PRESENCE OF THE DEFENDANT NOT REQUIRED AT CERTAIN
PROCEEDINGS)**

This amendment should be supported. The rule clarifies the necessity of the presence of the defendant when certain actions on the sentence are heard. The proposed amendment makes clear that the defendant need not be present when the sentence is reduced under rule 35(b). However, it will continue to require the presence of the defendant when a hearing on sentence is conducted on remand from an appellate court under Federal Rule of Criminal Procedure 35(a). Because proceedings to reduce or correct a sentence under rules 35(b) and (c) can only inure to the benefit of a defendant, the necessity of his personal appearance seems superfluous. The proposed amendment will also be applicable to rehearings under 18 U.S.C. § 3582(c) where retroactive changes to the sentencing guidelines benefit a defendant by reducing his sentence thereunder, on motion by the Bureau of Prisons to reduce a sentence for "extraordinary and compelling reasons." As the Committee notes, these proceedings are analogous to those under Federal Rule of Criminal Procedure 35(b), as it existed prior the Sentencing Reform Act. In such proceedings the defendant was not required to be present.

Very Respectfully,

James S. Richardson, Sr
Chair and Recorder



WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D. C. 20036
202 588-0302

96-CV-171

February 14, 1997

Honorable Paul V. Niemeyer, Chair
and the Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendments to Rule 23 of the
Federal Rules of Civil Procedure

Dear Judge Niemeyer and Advisory Committee Members:

The Washington Legal Foundation (WLF) writes to express its strong support for the proposed changes to the class action rule, Federal Rule of Civil Procedure 23. The proposed changes reflect the Advisory Committee's recognition that class action litigation has grown exponentially over the past two decades, with disastrous consequences for defendants, the judiciary, and the public. A large portion of this growth has been fueled by spurious lawsuits, pursued by unscrupulous plaintiffs' attorneys who represent only their own interests and are the only ones that stand to gain financially from the suit. WLF believes that the changes proposed by the Advisory Committee will go a long way toward correcting the distorted incentives imbedded in the current structure of Rule 23, while continuing to protect the ability of legitimate groups of plaintiffs to bring their claims as a class.

In addition to supporting all of the proposed changes, WLF joins many of the other commentators in urging the Advisory Committee to consider returning class actions brought under Rule 23(b)(3) to "opt in" class actions rather than "opt out" class actions. This would reduce the ability of a few plaintiffs' lawyers to bring suit on behalf of purported classes of thousands of individuals, the vast majority of which know nothing about the lawsuit and are not interested in participating in it.

Interest of Washington Legal Foundation

WLF is a non-profit, public interest law and policy center with supporters in all fifty states. Over the past twenty years, WLF has participated as *amicus curiae* in hundreds of cases and administrative proceedings affecting the broad public interest at the United States Supreme Court and in other federal and state courts at all levels. In particular, WLF has devoted substantial resources, through litigation and publishing, to promote civil justice reform, including reform of the class action system, and to publicize the costs to society as a whole from the abuses

of the current tort liability system. *See, e.g., BMW of North America, Inc. v. Gore*, 116 S. Ct. 415 (1996); *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994); *The Dow Chemical Company v. Mahlum*, No. 28600 (Nev. Sup. Ct.) (*Amicus curiae* brief filed August 16, 1996); John B. Isbister, *Courts Should Intensify Scrutiny of Mass Tort Class Action Lawsuits* (Washington Legal Foundation, 1996); Arvin Maskin and Peter A. Antonucci, *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Foundation, 1994); Victor E. Schwartz, et. al., *Multiple Imposition of Punitive Damages: The Case for Reform* (Washington Legal Foundation Working Paper No. 61, 1995); Stephen M. Turner, et. al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation Working Paper No. 50, 1992); Catherine L. Clifton, *Supreme Court Should Not Enrich Class Action Lawyers In Shareholder Suits* (Washington Legal Foundation, 1995); Matthew J. Iverson, *Product Liability Litigation Creates Biomaterials Availability Crisis* (Washington Legal Foundation Legal Backgrounder, 1996); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Foundation Legal Backgrounder, 1989).

In addition, WLF has been actively involved in protecting consumers of legal services from the abuses of the class action and contingency fee compensation systems. In particular, WLF initiated its SCALES project (an acronym for "Stop the Collapse of America's Legal Ethics"), a multi-state, multi-faceted effort to contain the litigation explosion and to improve the professional standards of America's lawyers. As part of its SCALES project, WLF has petitioned the state bar authorities of all fifty states to adopt reform proposals designed to reduce lawyer abuse of the contingency fee system by requiring lawyers to inform potential clients of all their rights prior to signing a contingent fee contract. WLF's proposals required that attorneys take specified measures to obtain a client's "informed consent," including providing the client with a written contract that informed the client that the contingent rate was not set by law, but was negotiable between the lawyer and client, and informed the client as to what extent, if any, the client could be liable for any compensation to the attorney. In response to WLF's petitions, several state bar authorities have adopted some or all of the reforms proposed by WLF.

Discussion

I. INTERLOCUTORY APPEAL PROVIDES A MUCH-NEEDED MECHANISM TO REVIEW IMPROPER CLASS CERTIFICATIONS

WLF strongly supports Proposed Rule 23(f), which provides for interlocutory review of an order granting or denying class certification.

For all practical purposes, the decision on certification effectively determines the outcome of 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. The adverse consequences of losing a class action are simply too great to risk, and defendants opt to settle even those class actions that they believe ultimately could be won.

The Fifth Circuit succinctly explained this dynamic:

In the context of mass tort class action, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. . . . In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as legalized blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted). Indeed, in one recent study of all types of class actions, the authors determined that once a class is certified, the case is two to five times more likely to be settled than to be resolved by motion or at trial. See Thomas Willging et al., *An Empirical Analysis of Rule 23 To Address The Rulemaking Challenges*, 71 N.Y.L. Rev. 74 (April-May 1996).

Currently, interlocutory review of a certification decision is difficult, if not impossible, to obtain. Those few courts that have used the *mandamus* procedure to effect review, see *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995), have been criticized for doing so, and many courts refuse to use the *mandamus* procedure in this manner. See, e.g., *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) ("this circuit . . . has not looked favorably upon granting extraordinary relief to vacate a class certification"). Thus, the vast majority of defendants have no way to seek relief from an order granting certification of a class.

Through its proposed amendment, the Advisory Committee has clearly recognized the importance of the right to appeal a certification decision. For this reason, WLF believes that the suggestion in the commentary that such appeals "should be granted with restraint" is misguided. Appeals courts are well aware of the breadth of their discretion under 28 U.S.C. § 1292, and have decades of experience in deciding when to grant interlocutory review. There is simply no reason to qualify the important reform implemented by proposed Rule 23(f), and WLF believes that this language should be stricken from the final commentary.

Finally, WLF believes that the Advisory Committee's suggestion that the case may be stayed while an appeal of the certification decision is pending is a good one, but that it does not go far enough. WLF believes that a stay should be granted automatically once permission to appeal the certification decision is granted. In such a situation, no purpose is

served in proceeding with costly and time consuming discovery -- the expense of which is far greater than in an individual case and which is borne largely by defendants -- that may ultimately not be necessary.

II. COURTS SHOULD WEIGH THE PROBABLE RELIEF TO CLASS MEMBERS AGAINST THE ENORMOUS COSTS AND BURDENS OF CLASS CERTIFICATION ON THE DEFENDANTS AND THE COURTS

WLF believes that the addition of a "cost-benefit" analysis to Rule 23(b)(3)(F) is a very important addition to Rule 23.

Much of the recent proliferation in class action lawsuits has been from so-called "nuisance" suits that assert claims for a very small amount of damages on behalf of thousands of purported class members. The horror stories of individual class plaintiffs that receive insignificant recoveries while their attorneys go home with multiple millions of dollars in fees abound. See "*For Plaintiffs; Lawyers, There's No Place Like Home Depot*," The Wall Street Journal, A17 (Feb. 12, 1997) (discussing \$81.5 million settlement of discrimination suit against Publix Super Markets in which the individual plaintiffs will receive several hundred dollars while their attorneys pocket \$18 million). A recent study found that more than one-half of all settled class action lawsuits resulted in no distribution to individual class members after paying the attorneys' fee and costs and expenses. See *Empirical Analysis of Rule 23*, 71 N.Y.L. Rev. 74.

These claims are discovered, manufactured, and pursued by the only constituency that stands to profit from them -- the attorneys that dream them up. The current structure of Rule 23 encourages attorneys to act like entrepreneurs, scouring the Federal Register, agency dockets, the stock pages, and newspaper and magazine articles for possible causes of action. In stark reversal of the traditional notion of attorney/client representation, 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 addition of the cost/benefit element in subsection F is necessary because the certification of a class imposes tremendous costs on both the defendants and society as a whole. As discussed above, the pressure to settle even meritless or small damage class actions is enormous. The payment by defendants of multiple millions of dollars either to settle or to fight a class action where the actual damage to each individual class member is minimal ultimately costs consumers and shareholders far more than any benefit to class members. See "*Math of a Class Action Suit: 'Winning' \$2.19 Costs \$91.33*," New York Times (Nov. 21, 1995). In addition, the burdens on the judiciary in terms of time and expense spent monitoring these cumbersome class actions is great. These burdens on all sectors of society should not be tolerated where the individual recoveries for class members would not be significant.

Again, WLF believes that the Advisory Committee unwisely undercuts the important and necessary reform it has proposed by referring in the Draft Note to the "public value" of "small claims" classes. There is, in fact, little if any such public value to pursuing

aggregated claims for small amounts of money; these claims are valuable only to attorneys. 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. Contrary to the suggestion in the testimony of some commentators, the primary purpose of our system of tort liability is to compensate the victim, and not to punish the defendant. If the damage to individual class members is insignificant, no public purpose is served by imposing the tremendous costs of a class action lawsuit on the defendants, the public, or the judiciary.

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, rather than to this Committee. As Judge Posner explained in *In re Phone Poulenc Rorer*, 51 F.3d at 1302, issues of broad public policy are primarily the province of the legislature and the executive. Class action litigation, in contrast, involves private disputes between individual litigants. The judiciary's only role is to decide the case efficiently and fairly when the litigants have a sufficient interest in the outcome to justify proceeding. Inherent in this notion is the principle that courts should have the power to determine that some individual claims are so insignificant as to not be worth the costs of class action litigation in the federal courts. The proposed Rule 23(b)(3)(F) does a straightforward and excellent job of making this principle explicit. The Draft Note should be revised to be consistent with the proposed rule.

III. SETTLEMENT CLASSES SHOULD BE ALLOWED EVEN WHERE THE SAME CLASS COULD NOT PROPERLY BE MAINTAINED FOR TRIAL

WLF supports the proposed Rule 23(b)(4) making explicit a court's discretion to certify a class for settlement purposes where that same class might not be suitable for certification for trial.¹ As the commentary to the Proposed Rule recognizes, new subsection 23(b)(4) will simply make the text of Rule 23 consistent with the current state of the law in all but the Third Circuit.

In addition to being favored by nearly every federal court in the land, this new subsection is powerfully supported by the public policy favoring the compromise of civil litigation. See, e.g. *McDermott, Inc. v. Amclyde & River Don Castings Ltd.*, 511 U.S. 202, 114 S. Ct. 1461, 1469 n.22 (1995) ("public policy wisely encourages settlements"); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the

¹ WLF believes that it would be prudent for the Advisory Committee to defer any action on this portion of its Proposed Rule until after the Supreme Court issues its ruling in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted sub nom., *Amchem Prods., Inc. v. Windsor*, 65 U.S.L.W. 3352 (U.S. Nov. 1, 1996). WLF offers its comments here on this portion of the Proposed Rule because it is likely that this will be the only public comment period that the Advisory Committee will have on Rule 23(b)(4).

courts and, presumptively, the parties to the compromise in question possessed the right to thus adjust their differences.”) (citations omitted). Any other construction of Rule 23 improperly treats settlement as a disfavored mechanism. Without Proposed Rule 23(b)(4) (or the current interpretation of existing Rule 23 by all but one circuit), most defendants would refuse even to consider a class settlement. Under a scenario where settlements could only be approved for all litigation purposes, every class settlement submitted to a district court for approval would presuppose a stipulation *by the defendants* that the class can be certified for litigation under Rules 23(a) and (b). If the class was then certified but the settlement for any reason was not ultimately approved by the court or otherwise not consummated, the law of the case would hold that the case could be maintained as a class action. The defendant would thus be locked into a class action that it otherwise adamantly would have opposed. The mere possibility of such an outcome would discourage defendants from considering a class settlement at all.

Moreover, Proposed Rule 23(b)(4) is consistent with the admonition that, in construing Rule 23, courts should disregard “interests that may be theoretic rather than practical.” *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 104 (1966). Many issues of “commonality” under Rule 23(a)(2) or “predominance” under Rule 23(b)(3), which might prohibit a class from being tried as a national class action, would be wholly theoretic where class certification is addressed in the context of a settlement. Similarly, criteria such as the difficulties likely to be encountered in the management of a class action, *see* Rule 23(b)(3)(D), are irrelevant when the decision is solely whether to resolve the case rather than to litigate it.

It is important to emphasize that the Proposed Rule 23(b)(4) does not preclude a court from using the existing elements of Rule 23(a) to probe whether the settlement is fair to class members, whether members have been adequately represented, or whether improper conflicts of interest exist. These core notions of fairness will still be applicable to Rule 23(b)(4) class settlements and can be adequately considered by the courts. The Proposed Rule 23(b)(4) will simply make explicit the fact that the court is not required to pretend that the case is going to trial when deciding whether to certify a class for settlement.

IV. CLASS ACTIONS SHOULD NOT BE CERTIFIED WHERE THE INDIVIDUAL CLASS MEMBERS HAVE THE ABILITY TO MAINTAIN THEIR ACTIONS WITHOUT CERTIFICATION

Proposed Rule 23(b)(3)(A) would require a court to consider, when making a decision whether to certify a class, “the practical ability of individual class members to pursue their claims without class certification.” WLF strongly supports this new language.

The addition 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. WLF believes that class certification is inherently less desirable -- and clearly not “superior” -- where individual class members are capable of pursuing relief through

mechanisms other than a class action. In this sense, Proposed Rule 23(b)(3)(A) is consistent with the existing language of Rule 23(b)(3), which directs the court to focus on the existence of "other available methods for the fair and efficient adjudication of the controversy."

As the Draft Note correctly recognizes, the new language in subsection A complements Rule 23(b)(3)(B), which emphasizes that in many types of cases, such as personal injury and other actions, where the alleged damages may be substantial, individuals have a significant interest in controlling the prosecution of their own cases. Class certification deprives these individuals of this control and thus is clearly not "superior" to other methods of adjudicating the controversy. As the Draft Note points out, opt out provisions may not be sufficient to protect these individuals as they may not have retained individual counsel prior to the running of the opt out period.

With its direction to courts to focus even more closely on the ability of individuals to bring their claims outside of the class action context, Proposed Rule 23(b)(3)(A) is an important addition to Rule 23.

V. COURTS SHOULD CONSIDER THE MATURITY OF THE LITIGATION AS A FACTOR AFFECTING THE CERTIFICATION DECISION

In Proposed Rule 23(b)(3)(C), the Advisory Committee has added "maturity" of "related litigation" to the factors to be considered in a certification decision. WLF strongly supports this addition.

This notion flows from the well-recognized principle that, particularly 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. *See, e.g. Castano*, 84 F.3d at 748-49 ("Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units -- even single-plaintiff, single-defendant trials -- until general causation, typical injuries, and levels of damages become established."); *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577, 578 (E.D. Tex. 1996) (citing *Castano*). As the courts and this Advisory Committee have recognized, any other result may place a defendant in the grossly unfair position of being faced with a several hundred million dollar class action based on a wholly novel and untested tort theory. As discussed above, such a claim may be little more than legalized blackmail as the defendant can not realistically bear the risk of testing the theory in court.

VI. THE COMMITTEE SHOULD CONSIDER REPLACING THE "OPT OUT" PROVISION OF RULE 23(B)(3) WITH AN "OPT IN" REQUIREMENT

Finally, WLF joins several of the other witnesses that have submitted comments to this Advisory Committee² in urging the Committee to consider replacing the opt out provision of Rule 23(b)(3) with an opt in requirement.

Many of the current abuses of the class action system -- lawyers continually inventing new and more exotic theories of liability; lawsuits brought where the individual damages are very small and only the lawyers will profit; 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.

Imposing an opt in requirement would require that lawyers represent real clients who are truly interested in pursuing a cause of action before it could be filed on behalf of a class. Such a requirement would be eminently fair both to those citizens who do wish to pursue damage claims as part of a class and to those who are uninterested in pursuing any claim or who wish to proceed individually.³ WLF believes that implementing an opt in requirement would be the most effective and efficient method to curb the abuses of class action litigation and return Rule 23 to its legitimate and intended purposes.

Conclusion

WLF believes that the proposed changes to Rule 23 represent important and essential reforms to the current system of class action litigation and WLF supports all of the Advisory Committee's proposed reforms. In a few instances discussed above, WLF believes that the Draft Note accompanying a change improperly undercuts the clear language of the proposed change, which will lead only to confusion and uncertainty in the courts. For this reason, WLF

² See, e.g., Statement of Alfred W. Cortese, Jr. on Proposed Amendments to Federal Rule of Civil Procedure 23, Nov. 22, 1996, at 5; Letter of Nissan North America, Inc. Re: Proposed Amendments to Civil Rule 23, January 16, 1997, at 6; Statement of Lewis H. Goldfarb to the Advisory Committees on Civil Rules on Proposed Amendments to Fed. R. Civ. P. 23, January 17, 1997, at 12.

³ Obviously, there are issues raised by opt in classes, such as the accuracy and efficacy of solicitations to potential class members, but WLF believes these may be relatively easily addressed by the Committee and the courts.

Honorable Paul V. Niemeyer, Chair

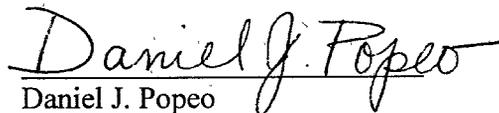
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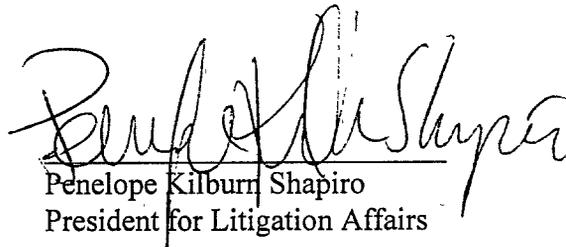
recommends that those portions of the Draft Note be revised to be consistent with the text of the proposed reforms. Finally, WLF believes that the Committee should consider an additional reform -- imposing an opt in requirement to replace the opt out provision of the current Rule 23.

WLF commends the Advisory Committee for its evident hard work in developing the proposed amendments, and appreciates the opportunity to present its views to the Committee.

Respectfully submitted,



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**COMMENTS ON THE PROPOSED CHANGES
TO FEDERAL RULE 23 OF THE FEDERAL RULES
OF PRACTICE AND PROCEDURE**

February 18, 1997

Submitted by:

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INTRODUCTION

Certificate Clearing Corporation ("CCC") recently became aware of the proposed amendments to Federal Rule 23 of the Federal Rules of Practice and Procedure. While CCC feels Rule 23 is fundamentally sound, we would like to comment on the proposed changes to Rule 23 and propose further changes to Rule 23 designed to enhance the efficacy of the current system. CCC believes that this committee should be particularly sensitive to the plight of the unrepresented class members in non-monetary settlements, otherwise class action settlements will be increasingly and appropriately viewed as consumer scams. Poor class action settlements, particularly non-monetary settlements, risk undermining the integrity of a fundamentally sound system.

When the rare opportunity occurs to change Federal rules, the changes should not be marginal. CCC is less concerned with the proposed changes than the changes we feel necessary that are not proposed. In this discussion, CCC will briefly examine some of the problems associated with notices of pendency sent to class members, obtaining information about class action settlements, objecting to class action settlements, and problems that inevitably develop after the court has approved the settlement. Finally, CCC will propose some simple remedies to the problems facing class action settlements.

BACKGROUND

CCC is a market maker in consumer class action settlements in which the class members receive discount certificates or coupons. As a market maker, CCC buys discount certificates from class members for cash at a negotiated price. CCC then resells the settlement certificates. CCC's income is derived from the difference between the negotiated purchase price and the negotiated sales price for the discount certificates.

In 1993, CCC created the first organized secondary coupon market in In re BMW M5 Litigation, 91 CH 04192 (Il. Cir. Ct. February 9, 1993), hereinafter "M5." The M5 settlement awarded a \$4,000 freely transferable coupon to each original purchaser of the BMW M5 automobile. The coupon granted the bearer a discount off the purchase or lease price of a new BMW vehicle for thirty months. As part of the settlement negotiations, the plaintiff's attorney requested that BMW allow CCC a chance to create a secondary market for the coupons.

The secondary market provided a cash alternative to those individual class members who did not want to purchase or lease a new car from BMW. The M5 settlement proves that class members would not have transferred their coupons but for the endorsed presence of CCC. A very significantly few number of class members redeemed their coupons against the purchase of a new BMW automobile. Without the option of a secondary market, most class members would have received nothing for the release of their claims against the defendant, BMW. Only seven percent of the BMW M5 class redeemed the coupon themselves, somewhat more than a typical non-transferable coupon redemption award. Only a handful of class members transferred their coupons to someone other than CCC. However, over fifty percent of the class was able to receive monetary value by selling their coupon directly to CCC.

Since the M5 settlement, CCC has successfully created secondary markets in such class action settlements as Johnson, et. al. v. Nissan, No. 730558 (Cal. Sup. Ct. March 14, 1994) "Nissan," Princeton Economics Group, Inc., v. AT&T., No. L-91-3221 (N.J. Super.Ct. March 17, 1995) "AT&T," Weiss v. Mercedes-Benz of North America, Inc., Master File No. 93-96 (D.N.J. December 22, 1994) "Mercedes-Benz," and Dismuke, et al. v. Edina Realty, Inc., Court File No. 92-8716 (D.Minn. February 1, 1995) "Edina."

DISCUSSION

I. PROBLEMS ASSOCIATED WITH NOTICE SENT TO CLASS

MEMBERS

A. **Confusing Language in the Notice**

Notices of pendency generally create more confusion than clarity. The language of the notice usually involves so much legalese that class 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. Because of this confusion, a tremendous number of class members throw away their settlement documents and effectively forgo any chance of receiving an award for relinquishing their rights under the settlement.

In other cases, such as Edina, the onus was on class members to secure their class action award. In Edina, a twenty page notice was sent to class members explaining the class member's requirement to "opt-in" if they were to receive a settlement award. Only those who correctly completed and sent in the Proof of Claim form accompanying the Notice received an award, a mere 6,000 out of 42,000 potential class members.

The language in notices needs to be tailored to the audience receiving it. 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. Simplified and improved notices will better inform potential class member and contribute to better settlements.

B. Mailing the Notice to Class Members

Mailing notices to class members should and could be easily improved if simple procedural requirements were introduced. In AT&T, 220, 000 notices were mailed and 40,000 returned by the U.S. Post Office. Plaintiff's attorneys in that case pursued the returned mailers through normal postal procedures and half of the missing class was located. However, in most settlements, plaintiff's attorneys rarely demand, and naturally fewer defendant's offer to attempt even the simplest means of locating the missing class members.

In Laughman v. Wells Fargo, 96-CV-925 (D. Ill. January 31, 1997) "Wells Fargo," a class action settlement involving non-transferable coupons, 208,000 notices were sent by first class mail on December 20, 1996. About a month later, 18,000 pieces were returned as undeliverable. 9,000 class members decided to "opt-in" to the class. During the fairness hearing on January 31, 1997, there was no mention by the defendant or the plaintiff's attorney that any attempt to contact missing class members had been, or would be, pursued.

Plaintiff attorneys must be responsible for locating missing class members. In most settlements, class members, by default, release defendants of future claims. If a reasonable duty is not placed on the plaintiff's attorney to find class members, many consumers will unknowingly relinquish their rights simply because no party used the resources available to find them.

II. OBJECTION PERIOD AND ITS PROBLEMS

A. Objecting to Settlements with Valueless Coupons

Many settlements are miserably flawed. Defendants, by design, will settle as cheaply as possible. Cost effective settlements often appear as non-monetary coupon settlements. These

settlements frequently deserve objections. Unfortunately, very few potential class members have the legal acumen, economic incentive or desire to object to settlements. Often, class members that receive notice and think they are being sued. Other class members are never found. Some class members mistakenly believe they actually will get something of value from their non-monetary award. Whatever the case, it isn't hard to understand why a class member about to receive a \$150 non-transferable coupon, redeemable against a product they have no desire to buy, would be unwilling to spend thousands of dollars to submit a legal objection that may or may not receive attention from the court and respective attorneys.

CCC often discovers settlements from notices published in newspapers. When notice is discovered, there is often little time to object to poor settlements because the time allotted for objections is very short. Class counsel and defendant (one time adversaries, now contracted parties) have a strong economic incentive to make this process as difficult as possible. For example, CCC recently objected in Wolf v. Toyota, C94-1359-MHP, C94-1377-MHP, C94-1960-MHP (D.Cal. September 16, 1996) "Toyota." Toyota is a "transferable" class action coupon settlement whose objection deadline was February 3, 1997, 75 days after mailing of the Notice. There was no public advertised Notice in any periodical that we are aware of. CCC attempted numerous times to get the Third Amended Settlement Agreement from the plaintiff's counsel. After contacting counsel by phone, facsimile, and U.S. mail for at least 25 days, CCC finally received the agreement by mail on or after January 20, 1997. This was hardly enough time to fashion a properly prepared objection.

To address these problems, the time allotted for objections needs to be increased and access to public information needs to be more easily accessible. The increased time for objection will allow class members the opportunity to assess their options and object to unworthy

settlements. Better access to settlement information is important because class members and other interested parties must be able to make an informed decision whether to oppose the settlement or accept it as fair, reasonable, and adequate. If class members and other interested parties are not privy to that information, then class action settlements will remain closed door agreements where plaintiff's attorneys release the valuable rights of the unrepresented class member for no value.

B. Issues with Discovery

To file an effective objection, the granting of discovery requests is critical. In the In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 808(3d Cir.), cert denied, 116 S.Ct. 88 (1995) "GM," General Motors and class counsel's expert witness, Dr. Simonson, did a survey of GM class members. Judge Yohn, in approving the settlement, relied on Dr. Simonson's survey and said that the objectors, like CCC, should have presented their own survey if they disagreed with Dr. Simonson. Ironically, Judge Yohn denied CCC's limited discovery requests designed to conduct their own survey.

CCC has learned that the scope of discovery allowed by the court often determines the value that will flow to the class member. Defendants oppose discovery and often settle quickly and cheaply to avoid public exposure. However in the objection phase, discovery demands that a certain amount of public exposure may be necessary to develop a thoughtful and justifiable objection.

IV. POST-SETTLEMENT PROBLEMS

Ensuring class member value in non-monetary class action settlements, especially and particularly coupon settlements, is an eternally vexing problem for the courts. Unlike a monetary award, settlement relief for the harmed class member in a non-monetary settlement does not end

once the award appears in the mailbox of the class member. Importantly, for the individual class member, the process of realizing the class member's award just begins. Since very few class members ever receive any value from a poorly devised coupon settlement, many class members feel cheated not only by the defendant, but now also by class counsel (who, of course, received a monetary award for the non-monetary class award) and the judicial process. Since defendants deplore coupon redemption that doesn't result in an incremental sale of their liking, defendants often engage in subterfuge of the settlement. The defendant almost always denies the alleged conduct and the judicial gridlock begins. To insure that a class member can realistically achieve a monetary benefit from a coupon award, rules must be in place that require clarification of unclear settlement terms and probable points of contention before settlement approval.

Because coupons resulting from class action settlements usually have a finite time horizon, the judicial process is inherently incompatible with poorly designed coupon settlements. Defendants can, and do, easily take advantage of our often slow moving judicial process. By the time a contentious issue is brought in front of the court, and it has completed its judicial cycle, the coupon has either expired or time value has erased much, or all, of the coupon's value. Moreover, the uncertainty this brings to the market undeniably chills redemption, often irreparably, destroying the value to the class. The committee's proposed changes to Rule 23 do not address, but should address, the vagaries of the post-settlement period in non-monetary settlements.

A. Defendant's Power over the Terms of the Settlement

In coupon settlements, the defendants by default usually become the administrator of the settlement. Defendants dictate the rules of redemption and reimbursement for the coupons. Because the actual cost of a coupon settlement to the defendant is contingent upon the overall

redemption of the coupons, defendants are receptive to settling class actions with discount coupons knowing that all the mechanisms are in place for the defendant to control the coupon redemption rate, and therefore the defendant's cost of the settlement. If the defendant determines that the redemption rate is too high, the defendant simply changes the redemption and reimbursement process to lower its costs.

Defendants must be forced to accept predetermined court approved redemption rules. Then, class members can receive the value they bargained for.

B. The Unresponsive Nature of the Plaintiff's Attorney

Plaintiff's attorneys rarely intercede on behalf of the class member when the defendant chills the secondary market for coupon redemption. It is simply not in their economic interest to do so. Class counsel has almost always received their "award" and any intervention on their part is considered pro bono. The plaintiff's attorney takes a sink or swim attitude as he or she turns his or her attention to the next settlement.

C. The Court can not Effectively Monitor these Types of Settlements

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. For example, in the AT&T case, issues were brought to the court's attention in the first months of the coupon's life that will not ultimately be decided until long after the coupon has expired. Courts do not have the resources, ability or economic interest to monitor and solve all the unavoidable issues that invariably surface as the coupon redemption process unfolds.

A possible remedy to the problems associated with the post-settlement period would be the required introduction of an independent, third party administrator. The administrator would

create the rules of coupon redemption, communicate the rules to the class members, and monitor the disputes regarding the terms of the settlement. If the administrator can not settle certain issues surrounding a settlement, then the court can then intervene, assert its authority, and adjudicate disputes over the settlement.

REMEDIES

It is not reasonable to complain about the above problems of class action litigation under Federal Rule 23 without providing some possible solutions. Below is a list of remedies categorized as general class action litigation. The list is far from exhaustive.

General class action remedies:

- 1) Create clear and understandable notices which describe the litigation and the class member's options;
- 2) Make plaintiff's attorney more accountable for finding class members who may be absent or do not receive the original notice of pendency;
- 3) Create mechanisms which keep plaintiff's attorneys accountable for the duration of the class action litigation, 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;
- 4) In the notice and/or settlement agreement clearly describe the future claims being released by the class member;
- 5) Create an independent administrator to handle questions, processing class member claims, create the rules of redemption and arbitrate disputes;
- 6) Allow full discovery and public access to information regarding class action lawsuits to facilitate fully informed objections, if necessary;

- 7) Extend the time frame in which parties may object to class action settlements

CONCLUSION

CCC is not an expert on the intricate complexities surrounding rule 23 of the Federal Rules of Civil Procedure. Yet, CCC's practical experience with class action lawsuits provides insight about how Rule 23 practically functions for unrepresented class members. Because of the inadequacies of proper notice and the unavailability of timely information about class action settlements, class members are at a disadvantage. In CCC's experience, these settlements display a growing disregard for the integrity of the legal system and constitutes a fraud on the court.

We appreciate the opportunity to address the committee with some of our thoughts on the proposed changes to Rule 23 and hope to more formally address the committee at a later date.

Respectfully submitted on this 18th day of

February, 1997



Brian Blockovich,
Assistant General Counsel
Certificate Clearing Corporation

#2282

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2/18/97

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*ALSO ADMITTED IN GEORGIA

February 15, 1997

WRITER'S DIRECT DIAL

96-CV-173

Mr. John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of U.S. Courts
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Transmitted via Facsimile

Dear Sir:

We are writing to submit our comments to the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure.

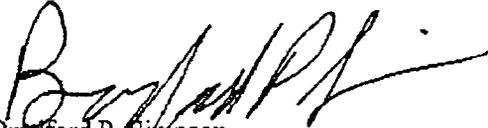
First, regarding the proposed amendments to Rule 23(b)(3), we feel that this rule should remain largely unchanged. We are particularly troubled by any implication that "small claims" class actions may not be certified under the proposed amendments.

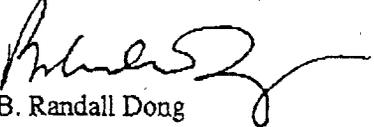
Second, regarding Rule 23(h)(4), special emphasis should be added to the proposed Rule to ensure that no collusion occurs. It is imperative that this rule retains an opt out provision.

Third, regarding Rule 23(f), we strongly oppose this amendment. If this amendment should go forward we would urge an amendment which required the pre-trial discovery and procedure to continue while the request for appeal is under consideration and while Class Certification is on appeal. Without such a change this rule simply becomes a tool for delay in the repertoire of the defense counsel.

As to the remaining proposed changes to Rule 23 we support these wholeheartedly. Thank you for your consideration.

Respectfully submitted,


Bradford P. Simpson


B. Randall Dong

Marjorie E. Powell
ASSISTANT GENERAL COUNSEL

PhRMA

February 12, 1997

RECEIVED
2/18/97

Secretary of the Committee of
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

96-CV-174

RE: Proposed Changes to Rule 23 of the Federal Rules of Civil Procedure

Dear Secretary:

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading research-based pharmaceutical and biotechnology companies, which are devoted to inventing medicines that allow patients to lead longer, happier, healthier and more productive lives. Investing nearly \$16 billion a year in discovering and developing new medicines, PhRMA companies are the source of more than 9 out of 10 prescription drugs used in the United States.

PhRMA's members are parties to class action litigation involving various legal issues, including product liability, antitrust, and other areas of law. PhRMA members have strong opinions about the process of class certification and the need for a reasonable procedure to obtain review of disputed issues that arise in the context of class certification. Among all of the proposed changes, PhRMA members have focused on, and urge the Committee to adopt, the proposed change to Rule 23(f), allowing interlocutory appeal of class certification at the discretion of the court of 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. Indeed, the Advisory Committee's own finding that, until very recently, *none* of the massive classes certified as classes had gone to trial demonstrates that companies are forced to give serious thought to settlement when faced with an unappealable district court class certification decision.

The proposed change in the Rule, however, should not be grudgingly allowed. To that end, PhRMA urges the Committee to modify the comment that "[p]ermission to appeal should

Pharmaceutical Research and Manufacturers of America

Committee on Rules and Practice
February 12, 1997
page 2

be granted with restraint." Page 55. Because the proposed rule grants appellate courts the discretion to accept or deny an appeal of a class certification decision, appellate courts would retain their power to determine whether to grant an appeal. Presumably, appellate courts can distinguish between cases that do, and do not, justify the allocation of the resources of the appellate court. They do not need to be cautioned to accept appeals sparingly from decisions about class certification.

Sincerely,

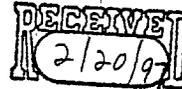
A handwritten signature in cursive script that reads "Marjorie E. Powell". The signature is written in black ink and is positioned to the right of the typed name.

Marjorie E. Powell

#2290 National Association of Railroad Trial Counsel

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February 17, 1997

96-CV-175

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Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

In Re: Comments on Report of Proposed Changes to Rule
23 of the Federal Rules of Civil Procedure

EXECUTIVE COMMITTEE

William A. Brasher
Chairman

Dear Mr. McCabe:

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Richard V. Wicka

At an Executive Committee meeting held in New York on December 6, 1996, the National Association of Railroad Trial Counsel ("NARTC") considered the proposed changes to Rule 23 of the Federal Rules of Civil Procedure. The NARTC's Rules Committee, of which I am chairman, presented the pros and cons of the proposed changes and recommended that our organization endorse those changes. The Executive Committee, which was properly empowered to act for the NARTC, voted unanimously in favor of the recommended changes and authorized me to send you this report.

We appreciate your giving us an opportunity to have a voice in your Rules modification process.

Best regards.

Very truly yours,

WOODS, ROGERS & HAZLEGROVE, P.L.C.

William B. Poff

cc: Henry M. Moffat, Esq.

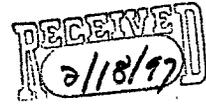
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American Council of Life Insurance

Phillip E. Stano
Senior Counsel, Litigation



96-CV-177

February 14, 1997

The Honorable Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Comments on Proposed Changes to Federal Class Action Rules

Dear Mr. McCabe:

The American Council of Life Insurance is the nation's largest nonprofit life insurance trade association, consisting of 557 life insurers which write approximately 88% of the life insurance in force in the United States. We appreciate the opportunity to comment on the proposed changes to the federal rules of civil procedure pertaining to class action litigation.

We support the proposed amendments to the federal rules of civil procedure regarding class action litigation suggested in Sheila Birnbaum's January 3, 1997 correspondence to the Honorable Paul V. Niemeyer, Chair and the Advisory Committee on Civil Rules. Given this country's out-of-control legal system, Ms. Birnbaum's proposed changes in federal court class action rules constitute reform whose time has come. The following is a brief review of the recent devolution in this country's legal climate which has resulted in a predatory legal system consuming legitimate business.

There are few restrictions on plaintiffs' lawyers soliciting clients to develop mass civil litigation. Scott R. Bickford and Lee Paula Hamilton, *Restricting Lawyers' Solicitation of Victims*, The Brief, Fall 1995, at 8. The classified ads are no longer limited to assisting individuals in finding jobs, selling cars or obtaining mates, but constitute weapons in civil litigation. See Advertisement entitled "Attention", *Plaquemine Post*, January 30, 1997; Advertisement entitled "Attention! Life Insurance Policyholders," *Miami Herald*, Oct. 30, 1995, at 27. See *ATLA Advocate*, Dec. 1995, at 5 (classified ads seeking information on approximately fourteen insurers to facilitate litigation); *ATLA Advocate*, April 1996, at 5-6 (same). See also *ATLA Advocate*, Nov. 19, 1995, at 4 (classified ads seeking information on fourteen life/health insurers in order to facilitate litigation).

Rule 11 sanctions and imposing liability on counsel for excessive costs under 28 U.S.C. § 1927, two means of reining in excessive behavior by members of the plaintiffs' bar, are remedies rarely granted by courts.

Lawyers are putting technology to new uses in order to solicit clients. 800 numbers are no longer primarily used to order merchandise, but are now employed to order lawsuits as well. See Advertisement entitled "Attention Life Insurance Policyholders" found in the Birmingham News, Sep. 10, 1995. See also advertisement entitled "To Certain New York Life Policyholders Who Are Residents of Louisiana," found in the Times-Picayune (New Orleans), Oct. 19, 1995.

Law firms now solicit clients on the Internet. Gary Taylor, *Eyes of Texas are Upon Internet 'Ads'*, Nat'l L. J., Nov. 6, 1995, at A6 (noting at least 300 law firms nationally that post "home page" sites on the Internet World Wide Web where a company or group can convey information electronically).

The awarding of excessive compensatory and punitive damages has been widely reported. See e.g., Beverly P. Kraft, *\$500M Funeral Home Award Upheld*, Clarion-Ledger (Jackson, Miss.), Nov. 21, 1995, at 1B (\$500 million award against funeral home chain, including \$400 million in punitive damages, upheld by trial court). In one small Southern state alone, punitive damages verdicts in one year exceeded one-fifth of a billion dollars. See *amicus curiae* brief filed by Business Council of Alabama in *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996) (filed March 23, 1995):

In the most recent calendar year [1994], punitive damage verdicts in Alabama totaled more than \$200 million These numbers understate the total impact of punitive damages because they do not account for 'shadow verdicts' in the form of pre-trial settlements in similar cases. For every case that reaches a verdict, scores of others settle before trial for amounts dictated in large part by verdicts in previous similar cases. Recent Alabama statistics indicate that pre-trial settlements occur in 97% of all civil cases.

Id. at 5.

A comprehensive study of the U.S. tort system from 1930-1994 concluded that

tort costs have grown almost four times faster than the U.S. economy over the past 64 years . . . The U.S. tort system is by far the most expensive in the industrialized world . . . substantially higher than that of any other country studied and two and a half times the average.

Tort Cost Trends: An International Perspective (1995) Tillinghast-Towers Perrin at 3.

Not surprisingly, prohibitive legal expenses have been incurred by insurers. John E. Morris, *Double Indemnity*, Am. Law., Sep. 1995, at 85 (Citing one defense law firm which "raked in \$31.6 million in fees from the top 20 life insurance companies last year . . .").

A new ERISA horror --the availability of punitive damages -- is now confronting insurers. See *Jefferson-Pilot Life Insurance Company v. Weems*, U.S.S.C No. 95-209 (Aug. 4, 1995) cert. denied, (Nov. 6, 1995) (case remanded to Alabama trial court with instructions from the Alabama Supreme Court that ERISA authorizes recovery of punitive damages or other extracontractual damages and that plaintiff is entitled to a jury trial on claims brought under § 1132(a)(1)(B)). See *Weems, et al. v. Jefferson-Pilot Life Ins. Co., et al.*, Case No. 1920981 (May 5, 1995).

Insurers, threatened with "betting the company" on one unpredictable jury verdict, have entered into huge class action settlements. (Panko Ron, Conduct Becoming, Best Review (Life/Health Edition) December 1996 at 45. Discusses seven class action settlements by life insurers totaling at least \$700 million.) These huge settlements merely add to the plaintiffs' bar feeding frenzy and possibly finance the next round of litigation.

Non-life insurer proposed class action settlements have involved generous plaintiffs' attorneys fees and ludicrous class benefits. Sandra Terry, *Going to the Head of the Class Action Settlement*, Washington Post (Business section) April 8, 1996 at 7 (\$1.75 million legal fees/class members' benefit: coupons exchangeable for cereal boxes; \$4 million legal fees/class members' benefit: Bronco II vehicle warning stickers (settlement rejected by federal court); \$9.5 million legal fees/class members' benefit: coupon worth \$1,000 to buy a new truck (federal court rejected settlement)). See *In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 822 (3rd Cir. 1995) ("Given our skepticism of the settlement's value generally . . . we are much less sanguine that the \$9,500,000 fee actually constitutes an acceptable percentage of the class recovery.") See Phillip Rawls, Consumers \$1, lawyers \$1.5 million, The Birmingham News, April 30, 1996 at 1C. (Discusses class action lawsuit judgment of \$1 in alleged price-fixing scheme resulting in federal court approval of \$1.5 million attorney fees for plaintiffs' attorneys.)

Multibillion dollar corporations can and have been destroyed by class action litigation. Joseph Nocera, *Fatal Litigation* (pts. 1 & 2), Fortune, Oct. 16, 1995 at 60, Fortune, Oct. 30, 1995, at 137. Shelia L. Birnbaum and J. Russell Jackson, *As Congressional Tort Reform Stalls, Appellate Courts Address the Certification of Nationwide Classes in Product Liability Lawsuits*, Nat'l L. J., Oct. 15, 1995, at B4.

Class action and other litigation has become a terrible financial drain on the insurance industry. Stephen Gillers, Professor of Legal Ethics at New York University, describes the plaintiff's bar as "Peopled by lawyers who are permanently hungry. They're like red ants at a picnic. There are an unlimited number of them, and if the food is good, they'll keep coming at you." Wisner, Benjamin. Tobacco's Trials, The Washington Post Magazine, 15, 19. (December 8, 1996). Class action litigation was recently described as "a multi-billion dollar business of looting companies" Boot, Max, Stop Appeasing the Class Action Monster, The Wall Street Journal at A15 (May 8, 1996). At least one class action lawsuit involving "vanishing premium" or other market conduct issues has been filed against an ACLI member company every three days of the past year. Pinotek, Steven, Whew!, National Underwriter, Life and Health/Financial Services Edition, June 3, 1996 at 41.

The possibility of **enormous** and **unjustified** punitive damages raises questions about whether the explosion of high stakes litigation against insurers has become a "solvency" issue. In October 1996, First National Life Insurance Company of Montgomery, Alabama was placed into rehabilitation proceedings by the Alabama Insurance Commissioner due to its inability to pay a large punitive damages award rendered against it. See *DeBellis et al. v. First National Life Insurance Company*; (Montgomery County, Alabama Circuit Court-Civil Action No. 96-1849.) One of Alabama's largest life insurers is fighting to avoid having to defend against hundreds or thousands of individual punitive damages lawsuits in class action litigation presently pending before the United States Supreme Court. *Adams v. Robertson* (U.S.S.C. No. 95-1873 *cert. granted.*) In *Robertson*, an extremely generous class action settlement involving 400,000 policyholders is under attack by approximately 400 individuals who wish to opt-out of the settlement and pursue individual lottery-type actions for punitive damages.

A third life insurer settled class action litigation brought against it by agreeing to pay a pro rata payout equal to ten percent (10%) of its capital and surplus to plaintiffs and their attorneys. When approving the class action settlement, the federal district court noted that **"it is likely that [the insurer] would become insolvent if it were required to pay all claims in full . . . an imposition of punitive damages would further hinder [the insurer's] ability to continue its business and serve current policyholders."** *Hearth et al. v. First National Life Insurance Co. of America*, U.S.D.C.-M.D. of Fl. (Tampa Div.); Case No. 95-818-CIV-T-21A, February 12, 1997 Final Order and Judgment at 9. (Emphasis added.)

The insurance departments that regulate the solvency of the insurance industry are now being misused by the plaintiffs' bar to provide financial and market conduct data that threaten the solvency of the very companies being regulated. After presenting a paper at the 1996 meeting of the American Bar Association's Tort and Insurance Practice Session, a deputy director of the Illinois Insurance Department was described as having "solid evidence that 'more and more attorneys are requesting us [regulators] to provide market conduct information as a source for class action lawsuits.'" Goodmundsen, Vance, Regulation of Insurance Transactions on the Internet, 15 JIR 150, 157 (1996).

The Honorable Peter G. McCabe

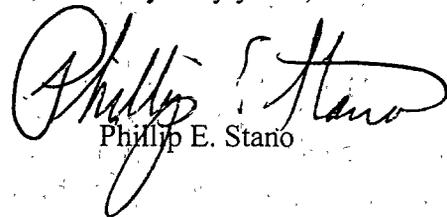
Page 5

February 14, 1997

These trends and developments cannot continue without having severe adverse consequences for consumers, the life insurance industry in particular and the business community in general. The judicial system is intended to serve justice. Instead, it is being used to serve up legitimate businesses to the fortunate, and undeserving few, who win the litigation lottery. ACLI, therefore, urges you to adopt common sense reforms of the federal class action rules to contain the abuses discussed above.

We stand ready to answer any questions you may have regarding the above. Thank you for the opportunity to present our views on this important tort reform measure.

Very truly yours,



Philip E. Stano

/kt

cc: Mark Elam
Nikki McNamee
Roy Woodall
Reese Boyd

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**STATE BAR OF MICHIGAN
United States Courts Committee**

**Comments on Proposed Amendments to Rule 23
of the Federal Rules of Civil Procedure**

The Committee on United States Courts of the State Bar of Michigan has reviewed the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. The Committee has decided to comment only on proposed Rule 23(b)(4). Before formulating a position on the proposed amendment, committee members reviewed several published articles, both for and against the proposed amendment.

Proposed Rule 23(b)(4) would allow a court to certify a "settlement" class even though the same class would not be certified for purposes of litigation, because the proposed class would not meet the requirements of Rule 23(b)(3) for trial. The Committee strongly opposes the proposal on both theoretical and practical grounds. Analytically, the proposal undermines the integrity of the class action rule. The class-action device must be approached by courts with caution, as the rights of absent litigants may be affected or even forfeited by certification of the class. To this end, the present rule contains certain prerequisites, set forth in subsection (a), designed to insure that the rights of absent class members will be adequately represented. In addition, the action must satisfy one of the three alternative requirements of subsection (b). No less than the prerequisites set forth in subsection (a), the subsection (b) requirements are designed to insure the integrity of the class action, by making sure that the class members, both named and absent, share such a community of interest that the named parties will be fair representatives of the interests of absent members. As a distinguished commentator put it nearly fifty years ago, "the ideal situation for a representative suit is one in which the resemblances among members of the class are strong and the differences among them slight." CHAFFEE, *SOME PROBLEMS OF EQUITY*, 208 (1950) (quoted in 7A WRIGHT, MILLER AND KANE, *FEDERAL PRACTICE AND PROCEDURE*, § 1752 at 17 (1986)).

The proposed amendment would undermine the integrity of the rule by eliminating the requirement that the "settlement class" meet one of the subsection (b) requirements. By definition, therefore, common questions will not predominate, and a class action will not be superior to other available methods of adjudicating the controversy. The proposal would therefore allow a court to adjudicate the rights of absent parties in circumstances where their claims are markedly dissimilar from those of the named plaintiffs because of the predominance of individual issues. 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, such that the court can be assured of the fairness of a representative action. In the absence of such community of interest, the subsection (a) inquiries become less meaningful and the fairness of the class action device is in doubt.

On a practical level, we agree with those critics who argue that the proposal will create undesirable, and even perverse, incentives. Especially in mass tort cases (which often fail to meet the requirements of Rule 23(b)(3) under present law), the rule would provide an open invitation to collusive settlements. Plaintiff's class-action counsel would have an incentive towards quick, but unfavorable, class settlements to recover attorney's fees. Defendants would have an incentive for fast, but inexpensive, settlements to avoid the results of future actions and thereby "buy" res judicata.

We are not comforted by the fact that the rule is permissive, because it contains no guidelines by which a court can distinguish a "good" settlement class from a bad one. A court faced with a properly certified class under present law can rely upon the fairness of a proposed settlement, in part, because the class representative would have no incentive to agree to an inadequate settlement and thereby diminish his or her own rights. By contrast, a class lacking the usual subsection (b) safeguards and certified only for settlement may present contrary incentives, but the rule lacks standards by which the court should exercise its discretion in approving or disallowing class certification.

In short, if a case does not meet the safeguards for class-action treatment, the court should not attempt to affect the rights of absent parties, either through litigation or settlement.

The Committee on the United States Courts adopted this position by a voting majority at its January 8, 1997, meeting, after notice to all Committee members. One member voted against this position, believing that proposed Rule 23(b)(4), together with the other proposed changes to Rule 23, provide the District Courts with needed flexibility for appropriate cases, which should not be sacrificed because of the potential for abuse. All judicial officers abstained. The statement is that of the Committee and does not necessarily represent the policy of the State Bar of Michigan.



THE COMMITTEE ON FEDERAL COURTS
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

M E M O R A N D U M

TO: David C. Long, Director, Department of Research
The State Bar of California

FROM: Laurence S. Zakson, Chair, Committee on Federal Courts
Duane E. Okamoto, Member

DATE: February 28, 1997

SUBJECT: Proposed Amendments to the Federal Rules of Civil
Procedure 23

SUMMARY

This Memorandum analyzes proposed amendments to Rule 23(b)(3), 23(b)(4), 23(c), 23(e), and 23(f) of the Federal Rules of Civil Procedure, pertaining to Class Actions, and states the position taken by the Federal Courts Committee of the State Bar of California ("Committee") with respect to the proposed amendments. The Committee endorses the following proposed amendments to Rule 23 of the Federal Rules of Civil Procedure: Rule 23(b)(3)(A), 23(b)(3)(B), 23(c), 23(e) and 23(f). The Committee also endorses the amendment of Rule 23(b)(4) with a clarifying statement in the Advisory Committee notes. With respect to the amendment of Rule 23(b)(3)(C), the Committee endorses the change with a non-substantive, clarifying amendment. With respect to Rule 23(b)(3)(F), the Committee endorses a significantly modified version of the proposed amendment. Part I of this Memorandum discusses the proposed revisions to each rule and the reasons for the position taken by the Committee. Part II discusses the germaneness of these Rule 23 amendments to the permissible activities of the Committee.

I.

ANALYSIS AND COMMENTS

A. Rule 23(b)(3) -- Class Actions Maintainable

General Background

The current Committee Notes to Rule 23 indicate that Rule 23(b)(3) encompasses cases where, although not as clearly defined as in (b)(1)-(2), a class action would achieve economies of time, effort, expense, and promote uniformity of decision as to persons similarly situated, without compromising procedural fairness or causing undesirable results. In general application, Rule 23(b)(3) of the Federal Rules of Civil Procedure has been utilized to aggregate smaller sized claims that may not support individual litigation.

1. Rule 23(b)(3)(A)

a. Background

Subparagraph A is new. It is an added factor that a court would consider when deciding certification issues of whether questions of law or fact common to members of the class predominate over questions affecting individual members and whether a class action is superior to other available methods to resolve the controversy.

b. Proposed Amendment

As proposed, subparagraph (A) emphasizes and requires, that a court must analyze "the practical ability of individual class members to pursue their claims without class certification."

c. Discussion

This addition is intended to do two things: (1) confirm and encourage the use of class actions to enforce small claims that will not support separate actions, subject to new subparagraph (F), which will be discussed below, and (2) require courts to account for and reflect on the advantages of individual litigation before making a blanket decision to certify classes, (e.g., mass tort claims) even when claims within the class would support separate claims. In other words, this new Subparagraph (A) assists in a reasonable weighing process which would tend to weigh in favor of class certification if individual actions are not practicable (in terms of cost, burden of administration, and

probable relief), and weigh against class certification, if individual actions are practicable.

d. Recommendation: The Committee endorses the addition of Subparagraph (A) of Rule 23(b)(3) of the F.R.C.P.

2. Rule 23(b)(3)(B)

a. Background

Proposed Subparagraph (B) revised current Subparagraph (A). As presently written, Subparagraph (A) requires a court to consider "the interests of members of the class in individually controlling the prosecution or defense of separate actions" when determining whether questions of law or fact common to class members predominate and whether a class action is the superior method of resolving the controversy.

b. Proposed Amendment

The proposed Subparagraph (B) deletes current Subparagraph (A)'s emphasis on the interest of members of the class in "individually controlling" separate litigation and replaces it with a consideration of "class members' interests in maintaining or defending" separate actions.

While both of these versions still require a court to weigh and assess the relative "interests" in participating in separate (as opposed to class action) litigation, such interests¹ of class members may be served by alternatives that do not rise to the level of individual control of separate litigation, but do fall within the parameters of "maintaining or defending" a separate action. For instance, alternatives to certification of the requested class may be (1) certification of a smaller or different class; (2) intervention in a pending action; (3) joinder of separate actions; and (4) consolidation of separate actions.

c. Recommendation: The Committee endorses the revision of Subparagraph (B) of Rule 23(b)(3) of the F.R.C.P.

¹ "Interests" can include such matters as timing of litigation related events; choice of forum; litigation strategy; choice of parties to the action; etc.

3. Rule 23(b)(3)(C)

a. Background

Proposed Subparagraph (C) is a revision of current Subparagraph (B). Presently, Subparagraph (B) requires a court to consider the "extent and nature of any litigation concerning the controversy already commenced by or against members of the class" in order to make its determination about whether it should certify a class action based in part on the predominance of legal or factual questions common to class members and the superiority of certification of a class in order to adjudicate the dispute.

b. Proposed Amendment/Discussion

As proposed, Subparagraph (C) has been amended in several respects from current factor (B). First, the proposed amendment allows a court to consider other litigation as long as it is related and involves class members; it removes the issue of determining whether the other litigation somehow concerns the same controversy by eliminating the phrase, "concerning the controversy" and amending it to read "any related litigation involving class members."

Second, the proposed Subparagraph (C) authorizes consideration of the "maturity" of the related litigation by adding that term. However, this new consideration appears to have two separate, but related aspects: (1) it would emphasize the need to avoid interfering with the progress of related litigation that has already advanced near trial and judgment--thereby discouraging aggregation of a class at that point in time; and (2) it would reflect the need to support class action by experience gained in completed litigation of several individual claims. This latter aspect would apply most often in situations where several claims arise from dispersed events, rather than one mass event. If the results of individual litigation begin to converge, class certification would seem more appropriate. However, where inconsistent results occur, or more information needs to be gathered, class certification would tend to be inappropriate.

Third, the proposed amendment also allows a court to consider litigation without regard to the time of filing in relation to the time of filing the class action, by deleting the phrase, "already commenced." This revision appears consistent with the addition of the term "maturity" discussed above. With this deletion, a court can consider the results of past individual cases in order to weigh a determination or certification. In sum, this revision is likely intended to

broaden and clarify the scope of the court's ability to consider other related litigation involving class members in order to reach a more informed determination regarding certification of a class.

c. Recommendation: The Committee endorses the proposed amendments to Subparagraph (C) of Rule 23(b)(3) of the F.R.C.P. The Committee suggests, however, 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.

4. Rule 23(b)(3)(F)

a. Background

Subparagraph (F) is new. It is added to revisit the use of Rule 23(b)(3) class actions to aggregate trivial or minimal individual claims.

b. Proposed Amendment

As proposed, new factor (F) would require a court to review whether the "probable relief to individual class members justifies the costs and burdens of class litigation" as a factor in determining whether to certify a class based on the predominance of common legal or factual questions and the superiority of certification to resolve the dispute.

c. Discussion

Under this Subparagraph (F), a court would weigh the value of probable individual relief against the costs and burdens of class action proceedings. Clearly, a lower threshold of relief can be used where liability issues are quickly resolved, the costs of class notice are low, and the costs of administering and distributing the award are low. It follows that more complex legal issues, more costly identification of, and notice to class members, as well as more expensive distribution of the award will require more significant relief to justify class action certification.

Apparently, this weighing process would be made for an initial decision on whether to grant class certification. However, this process would remain open to reconsideration and decertification if the probable relief diminishes or the burdens of administration and award distribution increase.

Aspects of this Subparagraph (F) remain somewhat vague and ambiguous. For instance, the scope of "probable relief" is somewhat unclear. If this term is limited to monetary relief only, it may deny class certification for a case that could be settled by providing a significant "benefit" to the class other than monetary relief (e.g., provision of a service, good, etc.) Moreover, Subparagraph (F) does not appear to consider other significant concerns that should be weighed in a certification determination. First, the consideration of "probable relief to individual class members" does not account for the situation where the aggregate class relief is substantial or significant yet the individual claims are small and the administration costs are low. Second, the added factor (F) would not take into consideration the value to the public of enforcement of public policy goals, such as deterring unlawful or tortious conduct by a corporate defendant.

d. Recommendation: The Committee endorses the proposed amendment to Subparagraph (F) of Rule 23(b)(3) of the F.R.C.P. 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.

B. Rule 23(b)(4) -- Class Actions Maintainable

1. Background

Rule 23(b)(4) is new and allows certification of a class under subdivision (b)(3) for purposes of settlement, even though the same class might not be certified for trial. While courts have allowed certification of a class for settlement purposes (see e.g., Weinberger v. Kendrick, 698 F.2d 61, 72, 73 (2d Cir. 1982)), some recent decisions have determined that a class cannot be certified for settlement purpose unless the same class would be certified for trial purposes. (See Georgine v. Amchem Products, Inc., 83 F.2d 610 (3d Cir. 1996).) This amendment would resolve this conflict by requiring certification of a (b)(4) class to meet the requirements of subdivision (b)(3), yet recognizing the differences between settlement and litigation issues of class claims by applying the (b)(3) requirements from a settlement rather than trial perspective.

2. Proposed Amendment

As proposed, new subdivision (b) (4) would allow certification of a class to occur for purposes of settlement if the requirements of subdivision (a) were met (from a settlement perspective), and (1) parties considering class certification are parties to a pending settlement; (2) they make a request for certification under subdivision (b) (3); and (3) their request is for purposes of settlement.

This amendment clarifies that any class certified under subdivision (b) (4) is considered a subdivision (b) (3) class with all the rights afforded to a (b) (3) class, such as notice and exclusion rights. In addition, certification under (b) (4) requires that the predominance and superiority requirements of subdivision (b) (3) also be fulfilled based on the facts as they exist for purposes of settlement. As an example, one court may be able to manage settlement of a class when actual litigation would require several courts, or comprehensive solutions to complex problems may be reached and/or confirmed more readily in a settlement context than through traditional adversarial context active litigation.

3. Discussion

As proposed, the amendment would assist parties to litigation to settle matters as a class in order to promote efficiency, consistency, fairness, and ease on administration and distribution of award burdens. For instance, the amendment would likely protect against the risk of early coercive settlements by requiring that "the parties to a settlement request certification" This phrase would require that a complete settlement agreement exists at the time of the certification request. In addition, class settlement should have the effect of treating similarly situated persons alike, when they would probably receive different treatment through separate actions due to choice of law, local court procedures, proof of individual causation, etc. For clarification purposes, the Committee recommends that the Advisory Note to this section state that the amendment is intended to reverse the effect or interpretation of the Georgine decision cited earlier in this Memorandum.²

4. Recommendation: *The Committee endorses the proposed amendments to Subdivision 4(b) of Rule 23(b) (4) of the F.R.C.P. and recommends that the Advisory Note to Subdivision 4(b) state*

² The Committee understands that the U.S. Supreme Court has recently heard oral argument on the issue of certification of classes for settlement purposes. In light of this, the Advisory Committee may desire to consider the Court's opinion before making any final decision.

Memorandum to David C. Long, Director
February 28, 1997
Page 8

that the amendment is intended to reverse the effect or impact of the Georgine decision. (See Georgine v. Amchem Products, Inc., 83 F.2d 610 (3d Cir. 1996).)

C. Rule 23(c)--Determination By Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially As Class Actions

1. Background

At present, Rule 23(c)(1) requires a court to make a decision "[a]s soon as practicable after the commencement of an action" whether or not a suit brought as a class action should remain a class action litigation. However, a Federal Judicial Study found that in many instances, courts were not making a decision on class action status "as soon as practicable."

2. Proposed Amendment

The proposed amendment seeks to reflect the reality of the situation regarding when courts were making certification decisions. Subdivision 4(c) would be amended by deleting the requirement that the determination whether to certify a class be made "as soon as practicable" after commencement of the action and adds the term "when practicable" to allow for consistency in Rule 23 implementation.

3. Discussion

This amendment appears reasonable for several reasons. First, the amendment reflects the reality of what is occurring at the trial level. Second, the revision is consistent with the proposed addition allowing certification of settlement classes under new subdivision 4(b). Certification of a settlement class under 4(b) cannot occur until the parties have reached a settlement agreement and should not be forced to reach such a settlement "as soon as practicable," but rather "when practicable." Third, the revision supports the practice of courts ruling on motions to dismiss or motions for summary judgment prior to addressing the question of certification. Fourth, to the extent that the new factors as proposed under Rule 23(b)(3) require significant analysis and presentation of evidence, a court should not be placed under pressure to make an early certification decision.

4. Recommendation: The Committee endorses the proposed amendment to Rule 23(c) of the F.R.C.P.

D. Rule 23(e) -- Dismissal or Compromise

1. Background

Presently, Rule 23(e) requires the approval of the court, after notice, for the dismissal or compromise of any class action. However, it is fairly common practice for courts to hold hearings as part of the process of approving dismissal or compromise of a class action.

2. Proposed Amendment

As amended, Rule 23(e) requires that a hearing must be held (after notice of the proposed dismissal or compromise has been given to all class members) as a part of the process of reviewing and deciding whether to approve dismissal or compromise of a class action.

3. Discussion

The hearing requirement has been added to provide protection to class members that may be reduced when parties to the litigation cease to be adversaries for purposes of presenting the settlement or compromise for approval, especially when such a proposed settlement occurs near the commencement of the action.

Under this proposed amendment, hearings would become mandatory before a court dismisses or compromises a class action. A hearing can ensure the court reviews the settlement proposal while allowing the most complete participation of the parties. However, it 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.

In sum, this amended provision would apply to all class actions under Rule 23 and this mandatory hearing requirement would likely best serve and protect the needs of the parties in all class action contexts. For these and similar reasons, the Committee endorses the proposed amendment as written.

4. Recommendation: The Committee endorses the proposed amendment to Rule 23(e) of the F.R.C.P.

E. Rule 23(f) -- Appeals

1. Background

Subdivision (f) is new. Current Rule 23 provides no express provision for interlocutory appeal. Courts of appeal have used mandamus review to address improperly certified class actions.

2. Proposed Amendment

The new provision would allow a court of appeals, in its discretion, to permit an appeal from a district court order granting or denying class action certification under Rule 23 if application is made within ten days after entry of the order. Additionally, permission to appeal would not automatically stay trial court proceedings.

3. Discussion

This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e).³ This provision limits the type of order under Rule 23 to an order granting or denying class certification. This amendment also makes clear that such an appeal is permitted the sole discretion of the court of appeals.

This amendment appears reasonable since without it, an order denying certification may require a plaintiff to proceed to final judgment on the merits of his individual claim in order to ensure an opportunity for appellate review. Such a scenario may not be economically efficient if the costs of litigation far exceed the value of the individual claim. Further, an order granting certification may force a defendant to settle the action rather than risk the costs of defending a class action and incurring potential liability. If the certification decision is worthy of appeal, this amendment provides a low cost method to implement such review. At the same time, making such review discretionary should keep the administrative burden on courts reasonable. Finally, the ten day period to seek permission to appeal and no automatic stay of trial court proceedings should also reduce the risk of disrupting continuing proceedings.

4. Recommendation: *The Committee endorses the proposed amendment to Rule 23(f) of the F.R.C.P.*

³ 28 U.S.C. § 1292(e) states that, "[t]he Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

II.

GERMANENESS

The subject matter of the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure is necessarily or reasonably related to the regulation of the legal profession, and is related to the improvement of the quality of legal services. The proposed changes would govern the procedures for practice in all California federal courts and specified federal administrative agency proceedings. It is important that the amendments be workable for the attorneys who practice in the federal courts on a regular basis. Since the Committee is composed of attorneys who practice in the federal courts, the Committee's input should assist the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in the formulation of these Rules of Civil Procedure that regulate the practice of attorneys who appear before it. To the extent that the proposed amendments make the practice of law more efficient and more fair, they can improve the quality of legal services.

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THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

TO: David Long
FROM: Committee on the Administration of Justice
DATE: March 5, 1997
RE: Proposed Amendment to Rule 23(b)-(f)
Federal Rules of Civil Procedure
Class Actions

RECOMMENDATION: Support with modification of proposed section 23(b)(3)(F) and with exception as to proposed Rule 23(b)(4), for the reasons stated below.

DESCRIPTION OF PROPOSED AMENDMENTS: The Judicial Conference Committee on Rules of Practice and Procedure has proposed amendments to Rule 23(b)-(f) of the Federal Rules of Civil Procedure relating to class actions. In addition to some minor changes, the proposal (1) would add factors to be considered in a court's determination to certify a 23(b)(3) class, (2) would explicitly sanction certification of a class for settlement purposes, (3) would require notice and hearing on dismissal or compromise of a class action, and (4) would permit interlocutory appeals of the grant or denial of class certification at the discretion of the court of appeals. A copy of the proposed amendments is attached.

GERMANENESS: The subject matter is related to the administration of justice in the federal courts.

ANALYSIS:

Rule 23(b)(3).

A (b)(3) class is one of the central means for the courts to aggregate large numbers of claims that would not support individual litigation. To certify a class under this section the court must find that common questions of law and fact predominate over individual questions and that a class action is superior to other available methods for the fair and efficient adjudication of the matter. The section lists a number of matters pertinent to these findings. The proposal would add two factors to the list as new subsections (A) and (F) and would modify other factors.

New subsection (A) concerns the practical ability of individual class members to pursue their claims without class certification. It would tend to discourage (but not prohibit) class certification where individual class members can practicably pursue individual actions. The Committee Note states that the change is motivated by the concern that plaintiffs with large claims would probably have an interest in controlling their own litigation. To a certain extent,

this complements new subsection (B), formerly subsection (A), which concerns the interests of the class members in maintaining or defending separate actions. The changes to new subsection (B) do not appear to be substantive.

New subsection (C), formerly subsection (B) is modified in several respects. The subsection concerns other litigation involving the class members. The former subsection was limited to other litigation concerning the controversy which had been already commenced. The new section broadens the consideration to any related litigation without regard to when it is filed. The subsection is also modified to authorize the court to consider the maturity of the other litigation as well as its nature and extent. The Committee Note states that these changes are motivated by the view that it may be preferable to defer class action litigation until there has been substantial experience with actual trials and decisions in individual actions, particularly in mass tort litigation. Allowing a class action too early in the process may lead to mistaken decisions and settlement terms which offer the class either too much or too little.

New subsection (F) concerns whether the probable relief to individual class members justifies the costs and burdens of class litigation. It is intended to eliminate the use of class actions to enforce trivial claims. The theory is that the judicial process should not be used where there is no prospect of significant benefit to the class members. This factor should probably be modified to include a consideration of the deterrent effect of aggregating small claims to eliminate significant unjust enrichment on the part of the defendant.

As modified, the additional factors appear to be appropriate matters for a court to consider in connection with a determination of whether to certify a (b)(3) class. On balance, they seem to be intended to curtail the use of class action litigation in situations where it may not be appropriate. At the same time, the determination is still left largely to the discretion of the court and is clearly dependent on the facts of the case before it.

CAJ supports the proposed amendments to Rule 23(b)(3) if proposed Rule 23(b)(3)(F) is modified by adding the underlined language as follows:

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

Rule 23(b)(4)

This new section explicitly permits certification of a class for settlement purposes, even though the class might not have been certified for trial. Many courts have already followed this practice, but recent decisions from the Third Circuit have taken a contrary view. The amendment is intended to resolve the disagreement.

The United States Supreme Court granted certiorari in one of the Third Circuit cases, Amchem Products, Inc. v. Windsor, and it heard oral argument on February 18, 1997. It has been reported that the Federal Rules Advisory Committee has put its recommendation on hold pending decision in the case.

Although a majority of CAJ voted in support of the proposed amendment, CAJ recommends in light of these developments that the matter be tabled for further review pending the Supreme Court's decision.

CAJ takes no position with respect to the proposed amendment to Rule 23(b)(4) pending the decision of the Supreme Court.

Rule 23(c)

This section is modified to provide for a determination of class certification "when practicable" rather than "as soon as practicable." Many courts have already interpreted "as soon as practicable" to mean "when practicable." The change sanctions this approach.

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.

CAJ supports the proposed amendment to Rule 23(c).

Rule 23(e)

This section is modified to require notice and hearing for dismissal or compromise of a class action. Most courts already follow this procedure, but this protection should be mandatory in order to reduce the possibility of a collusive settlement.

CAJ supports the proposed amendment to Rule 23(e).

Rule 23(f)

This new section permits interlocutory appeals from the grant or denial of class certification, in the sole discretion of the court of appeals. A determination with respect to class certification can affect an entire case. The courts of appeals should be permitted to hear appeals on the basis of any consideration they find persuasive. The provision should not lead to delay, because there is no stay unless ordered by the district court and because appeals must be taken within 10 days.

CAJ supports the proposed amendment to Rule 23(f).

#1794



United States District Court
Northern District of Ohio
Judge's Chambers
203 U. S. Courthouse & Custom House
Toledo, Ohio 43624

James G. Carr
District Judge

(419) 259-6420

November 21, 1996

96-CV-104

Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the
United States Courts
Washington, DC 20544

Re.: Proposed Amendment to Rule 23

Dear Secretary:

Enclosed please find a copy of an order that I recently entered in a class action case. In that order, I held that a state court's initial approval of a proposed settlement and conditional certification of a nationwide settlement had violated the due process rights of competing class representatives (i.e., the plaintiff in the action pending before me) because the state court had not provided notice and an opportunity to be heard before it initially approved the proposed settlement.

As I read the proposed amendment to Rule 23 and Committee notes, I do not believe that the situation with which I was confronted, and which led to entry of the enclosed order, has been taken into consideration by the Committee. I urge it to give attention to the problems that can arise where more than one class action has been filed against a defendant and the defendant proceeds secretly to negotiate a settlement with one of the class representatives.

Although the existence of such negotiations may properly be kept confidential, I believe, for the reasons expressed in my order, that the rights of other competing class representatives are placed in substantial jeopardy if they are not notified in advance of the filing of the proposed settlement for approval, and then given an opportunity to appear and express their objections, if any, to the proposed settlement before it receives initial or tentative approval.

I would suggest that the proposed amendment be amended to require that notice be given to other plaintiffs who have filed the same or a substantially similar class action against the defendant, and that the court be required, before approving a proposed settlement and conditionally certifying a class, to hear from the competing class representatives. Otherwise, the interests of the class as a whole and the competing class representatives individually are placed at risk.

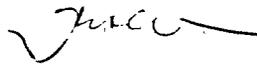
Secretary, Committee on Rules of Practice and Procedure
November 21, 1996
Page two.

Many of those risks were apparent in my case, in which the plaintiff's counsel had rejected a settlement proposal that, at least according to them, was substantially the same as the proposal that was accepted by the state court plaintiff (along with attorneys' fees of \$2,000,000 in a case with fewer than a dozen docket entries). Part of the initial settlement included "giving" the class members something that they already had. The initial hearing lasted a few minutes, and clearly did not include a reading by the judge of the papers that he was asking to approve or the order he was being asked to sign.

I am persuaded that it is absolutely imperative that, if the notion of settlement classes is to be approved, that the interests (which I believe are entitled to protection under the due process clause) of competing class representatives be protected by notice and an opportunity to be heard. The defendant should be required to certify whether other class actions have been filed against it, so that notice may be given to those class representatives. By giving such other class representatives an opportunity to be heard, the court will be relying on the adversary process to provide it with information about the merits and weaknesses of the proposed settlement. On that basis, in turn, the court can reach a more informed understanding before it conditionally approves the settlement and approves issuance of notice to the proposed class, and before, as well, the parties have invested the resources that usually must be expended to give such notice. The time for meaningful judicial intervention and oversight, I submit, is at the outset, rather than later at the "fairness" hearing. By then a court's options are fewer, and the process has developed a momentum that makes rejection of the settlement unlikely in many cases.

I ask, accordingly, that you call the enclosed decision to the Committee's attention. If its members desire to hear from me further on this issue, please advise, though I believe that my views can readily be gleaned from a reading of my order.

Sincerely yours,



James G. Carr
United States District Judge

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Paul F. Romstadt, et al.,

Plaintiffs,

3:94CV7612

v.

Order

Apple Computer, Inc.,

Defendant.

This is a diversity action in which the defendant Apple Computer, Inc. (Apple) has moved for stay of further proceedings (Doc. 95) and the plaintiff Paul F. Romstadt has moved for a preliminary injunction. (Doc. 97). In addition, plaintiff's class certification motion (Doc. 87) is decisional.

For the reasons that follow, defendant's motion to stay shall be overruled, without prejudice

to renew, plaintiff's motion for preliminary injunction shall be overruled, and plaintiff's motion for class certification shall be initially and conditionally entered, subject to revision.

Mr. Romstadt purchased a computer produced by Apple. When he did so, he believed that the computer contained a Motorola 68040 microprocessor with a floating point unit (FPU) to aid in mathematical computations. Contrary to that expectation, the computer had a Motorola 68LC040 microprocessor, which did not have the FPU. In an order entered August 6, 1996 (Doc. 86), I denied Apple's motion to dismiss, and in another order entered on September 3, 1996, I entered summary judgment in favor of the plaintiff and against Apple on Mr. Romstadt's claim under Ohio's Consumer Sales Practices Act, O.R.C. Sec. 1345.02. (Doc. 88). At that point, I anticipated turning to the question of class certification, which had been postponed pending determination of the merits of Mr. Romstadt's claim--it having appeared that such postponement might reduce the expense to all concerned, including Apple.

Unbeknownst to me or the plaintiff or his counsel, Apple had been engaged in settlement discussions in another case arising from the same factual situation. That case, Lizcano v. Apple Computer, Inc., No. C-363-96-F (Dist. Co., Hidalgo Co.), filed in a state court in Texas after this case had been filed, had involved the taking of some depositions, production of documents by Apple, and settlement discussions. According to Apple, settlement as to all matters in dispute--with the exception of attorneys' fees for plaintiff's counsel in that case--was reached prior to entry of the above-referenced orders in this case. The issue of those fees was submitted to mediation, and the parties to the Texas litigation accepted the mediator's recommendation that plaintiff's counsel in that case be paid \$2,000,000 as part of the settlement agreement.

On September 18, 1996, the judge in the Texas case was presented with a stipulation of facts,

a second amended complaint, and a motion to appoint class representative and counsel, approve class and claimant notices, and give preliminary approval to the settlement. After a hearing that appears to have lasted no more than a few minutes, during which the Texas judge was told nothing of significance about the pendency of this case, that Judge asked, "What do you-all want me to sign?" On being referred to "[t]he order, Your Honor. The last document I applied," the court said, "All right. I've signed the order certifying the class action, and the rest of your agreements will be approved by the Court." (Doc. 96, Exh. 16, at 11).

Except for a passing reference to the fact that this case was pending in this court,¹ the Texas judge was told nothing of significance about this case. He was not told that this case began before the Texas case, included the filing of about 90 pleadings, led to entry of the orders referenced above, and involved a consumer protection statute that, according to the parties in this case, including Apple, is substantially equivalent to the Texas statute on which that case is based. The parties did not tell the judge that neither the plaintiff nor his attorney had been given notice of the settlement or its proposed submission for approval. Nor was the judge advised that the settlement was in its material respects similar to a settlement proposal that had been rejected by the plaintiff in this case.²

After the injunction hearing before me on October 14, 1996, Texas plaintiff's counsel and

¹ "The only other thing I'd like to advise the Court of is that there is one other class action that is pending, I believe it's up in Ohio, and we just want to bring that to the Court's attention. However, it is our understanding that that class action has--that it has not been certified and there is no bar to this Court conditionally certifying this class action for purposes of the proposed settlement." (Doc. 96, Exh. 16, at 4).

² I note that, although Apple in this court and the parties in the Texas proceeding have referred on frequent occasion to alleged misrepresentations by Mr. Romstadt's counsel, at no point, to my recollection, has counsel for Apple challenged the plaintiff's contention that the settlement that has been accepted by Texas counsel was the same, or substantially the same, as the settlement that was rejected by Mr. Romstadt.

counsel for Apple appeared before the Texas court--but before a different judge--and conducted further proceedings. As with the original proceedings in that court, no notice was given to Mr. Romstadt or his counsel of those further proceedings.³ Those proceedings appear to have been prompted by concerns expressed by me during the October 14, 1996, injunction hearing.⁴

Because the plaintiff in the Texas case and Apple chose not to inform the participants in this case about the proposed settlement or its submission for preliminary approval, Mr. Romstadt and his counsel did not have an opportunity to appear. Nor were they able to inform the Texas judge about the salient aspects of this litigation and their views on the proposed settlement entry of the order preliminarily approving the settlement.⁵

³ A transcript of the October 18, 1996, hearing in Texas has been filed in this case. (Doc. 106). Though the transcript was faxed later that afternoon to Apple's local counsel in Toledo, the transcript was not filed until on October 22, 1996--four days later. It first came to my attention midafternoon on October 24, 1996, as I was drafting this order--nearly a week after the further proceedings had been held in Texas.

⁴ Among those concerns was, as I had earlier noted during the October 2, 1996, telephone conference, the fact that no notice was to be given of the existence of this case or that I had entered summary judgment on the merits in favor of the plaintiff. Contrary to the representations of Apple's counsel before me on October 14, 1996, its Texas counsel did not seek, during the further proceedings on October 18, 1996, to have such notification included in the class notice. Instead, Apple's lawyer stood by without comment as plaintiff's counsel in the Texas case stated he would be "quite comfortable" if such information were not included in the class notice. (Doc. 106, Exh. at 19). The Texas judge decided not to include that information in the class notice.

I remain of the view that it is unlikely that members of the class can make an informed decision about the proposed settlement unless they are informed that summary judgment has been entered on the merits in favor of a class representative and against Apple. The conduct of Apple's counsel in Texas is, to say the least, troublesome, as I had assumed, in light of the unequivocal representations of its counsel, that steps would be taken to include such information in the class notice.

⁵ The further ex parte proceedings in Texas, though considerably longer than the original hearing in that court, do not resolve the due process violations attendant on the original proceeding and the resulting concerns that I express in this order. Most importantly, neither of the Texas judges has been informed that the proposed settlement is similar in its material details to a

The denial of notice and opportunity to be heard when the proposed settlement and related matters were submitted to the Texas court for its consideration was, in my view, a denial of due process. Mr. Romstadt, whom Texas plaintiff's counsel was undertaking to represent as a member of the class that he was proposing for certification, had, in my view, a due process right to notice and an opportunity to be heard. Texas counsel and Apple had an obligation not to circumvent Mr. Romstadt's due process rights by engaging in proceedings that were, as to him, *ex parte*. The Texas court had a due process duty to provide an opportunity to be heard before it took action that might and, in this case, did jeopardize Mr. Romstadt's interests and those of the class he sought to represent.

Contrary to Apple's contentions, the decision in Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992), does not foreclose the action I am taking here. In that case competing class counsel complained unsuccessfully about the secrecy of negotiations leading to a settlement by other class counsel (who happens to be counsel for Mr. Romstadt in this case). Answering that concern, the court stated, "[t]he law does not require the participation in settlement negotiations of other lawyers representing class members. . . . No requirement exists that either Class Counsel or the Defendants must inform other attorneys, . . . , about their negotiations." *Id.* at 156.

I agree: neither Texas counsel nor Apple had to tell Mr. Romstadt about their negotiations. Once, however, those negotiations resulted in an agreement that was to be presented to the Texas judge, Mr. Romstadt became entitled, as a matter of due process, to be informed about the agreement

proposal rejected by Mr. Romstadt. If anything, the transcript of the further proceedings in Texas underscores the danger that such *ex parte* proceedings pose to other class representatives. That transcript shows: the apparent occurrence of off the record conversations between the new judge and Texas counsel (*id.* at 19) and unawareness on the part of the Texas judge and Apple's counsel of the language that the judge was being asked to delete from the original order (*id.* at 12-13).

and its anticipated submission to the Texas court and to due notice of the date and time of the hearing for preliminary approval. That due process right was not at issue in Bowling, which distinguishes that decision from this case.

Apple contends, in effect, that nothing meaningful occurred as a result of entry by the Texas court of the preliminary and amended orders of approval. In Apple's view, this preliminary event at most sets the stage for the final hearing, at which opponents, including Mr. Romstadt and his counsel, can be heard.

I disagree with Apple's claim that no injury has been done to Mr. Romstadt and the class that he seeks to represent as a result of the denial to them of notice and the opportunity to be heard. If nothing of importance was to occur, or would place any cognizable interest of Mr. Romstadt in jeopardy, why was it necessary to proceed in secrecy? If the settlement was as fair as the Texas parties contend, what danger could result from scrutiny in light of Mr. Romstadt's views?⁶

Most importantly, by denying the opportunity for Mr. Romstadt to be heard, the Texas court thereby failed to learn that the settlement it was being asked to approve had already been rejected in this case. In addition, the Texas court did not learn that summary judgment on the merits had been entered pursuant to a statute that was the equivalent of its own law. Though viewed dismissively by Texas plaintiff's counsel at the later October 18, 1996, hearing,⁷ the existence of that decision, if

⁶ It is no answer to these inquiries to suggest that Mr. Romstadt's views might have slowed the smooth flow of the initial proceeding. The greater the care the court took because of his involvement, the more necessary and useful it would have been for the court to have had the benefit of his participation.

⁷ Plaintiff's counsel in Texas informed the court at the further proceedings on October 18, 1996, that entry of summary judgment on the merits for Mr. Romstadt, in his view, "does not affect this settlement as it relates to the entire class members." (Doc. 106, Exh. at 18).

presented vigorously by the prevailing party, might have changed the judge's view on Apple's potential liability--and thus, the relative value of the settlement. As a result of its unawareness of these facts, among others, the Texas judge was deprived of the ability to inquire about the adequacy of representation that had been afforded (in exchange for attorneys' fees of \$2,000,000) to the plaintiff class.⁸

This complete lack of information about these and other salient aspects of the class and its claims and rights would not have impaired review of the proposed settlement if Mr. Romstadt and his counsel had had notice and an opportunity to be heard. Uninformed and unaware, the Texas judge proceeded without basic facts that might have caused him to unfurl a caution flag and slow or halt the proceedings, rather than going forward without meaningful consideration of what he was being asked to sign and do.

No one, including the judge, appears to have been aware of the view of Judge Friendly that judges to whom proposed settlements are presented for initial approval "are bound to scrutinize the fairness of the settlement agreement with even more than the usual care . . . to meet the concerns, . . . regarding the possibilities of collusion or of undue pressure by the defendants on would-be class representatives." Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982). Moreover, as stated in First Com. Corp. of Boston Customer Accounts Litigation, 119 F.R.D. 301, 307 (D. Mass. 1987), "[t]here also has to be a clearer showing of the settlement's fairness, reasonableness and adequacy,

⁸ I note that, as originally proposed to and preliminarily approved by the Texas court, the settlement included an "offer" of software that was already in the computers that the class members had purchased. Though this error was corrected during the further proceedings in the Texas court on October 18, 1996, it should raise some concern about the adequacy of representation afforded to Mr. Romstadt and other members of the class by Texas counsel--who, while receiving \$2,000,000--were settling the class claims, in part, for something that the class members already had.

and the propriety of negotiations leading to it.”

I am by no means persuaded that the forthcoming final/fairness hearing can or will remedy the injury done by the proceedings in Texas to Mr. Romstadt and the class he seeks to represent. Once initial approval has been given, a certain momentum develops. If not checked, that momentum can easily accelerate to a rush to judgment that bypasses considerations that, under more appropriate circumstances, would cause a court to pause and look carefully at the course it is being asked to take. Because, as Judge Friendly noted in Weinberger, a court’s “disposition of a proposed class action settlement should be accorded considerable deference,” 698 F.2d at 73, the proposed settlement may well come before the court at the final/fairness hearing with an improper degree of presumptive acceptability.

This concern is highlighted by the observation in the Manual for Complex Litigation 240 (3d ed. 1995) that a

court’s role in settlement is limited. . . . The court [at the final hearing] may only approve or disapprove the settlement; it is not empowered to rewrite the agreement between the parties. . . . If [however] the court makes suggestions at the time of the settlement agreement is submitted for tentative approval, the parties may be willing to make changes prior to the time the agreement is submitted to the class members for their consideration. If substantial changes adversely affecting some members of the class are made at the time of the [final] settlement hearing, a new hearing and additional notice may be necessary.

In other words, a judge’s options at the time of initial presentation of a settlement are considerably greater than at the final hearing. When initially presented, and if carefully reviewed, the proposed agreement is more readily alterable. The choice facing the court and parties is not limited to the binary alternatives of approval or rejection. At that point, it is easier for the judge to tell the parties to return to the bargaining table. Moreover, the judge is more likely, if informed at the initial hearing of all pertinent factors because all interested and affected parties are present, to correct

problems or postpone approval. The same impulse will be more difficult to accommodate later, when the judge's only choice, if troubled by some aspect of the proposal, is to reject the settlement entirely.

I note, as well, Professor Arthur Miller's observation that

there really is a serious problem of the judge not having enough information prior to certification to do a completely effective job under Rule 23(e) [relating to notice to a settlement class]. What is clear, is that if the court is going to consider a proposed settlement prior to formal certification, he is advised to demand a full presentation on all of those aspects of certification bearing on an adequacy of representation and class homogeneity.

Miller, An Overview of Federal Class Actions: Past, Present and Future 60 (Fed. Judicial Ctr. 1977).

In making these observations, I do not disregard the presumption that the Texas judge will be attentive to any objections that may be presented to it in the final hearing. Indeed, I decline to issue any form of injunctive relief on the basis, at least in part, of that presumption.⁹

But the context in which those objections will be heard differs materially from the situation that would have existed, if due process had been afforded to Mr. Romstadt and the class at the initial appearances before the Texas judges. When and if Mr. Romstadt appears in the final hearing, he will be the odd man out, an unruly and disruptive protestor standing alone against formidable allies, who have had their mutual assistance pact ratified initially by the judicial officer from whom relief is

⁹ I am also persuaded by Apple's argument in opposition to the plaintiff's motion for preliminary injunction (Doc. 92) that I would be acting in violation of the Anti-Injunction Act, 28 U.S.C. Sec. 2283, if I were to enjoin the Texas proceedings. See, e.g., Roth v. Bank of the Commonwealth, 583 F.2d 527, 533 (6th Cir. 1978) (the Act's "ban is absolute and [its] language is to be taken literally"). I also reject the plaintiff's argument that I can disregard the Act because the Texas court, in its original order, enjoined Mr. Romstadt (though not by name) as a "Settlement Class Member [who was] barred from . . . prosecuting any direct or representative action asserting any Claim, unless and until the Settlement Agreement and Release is terminated according to its terms." (Doc. 92, Exh. C at 5-6). That futile effort (corrected in the amended order entered October 18, 1996) to interfere with my jurisdiction had no more effect than an order that I might enter in return that sought to interfere with the Texas court's exercise of its jurisdiction. I decline to use that aspect of the original order as a pretext for issuing an otherwise improper injunction.

sought.

Though in theory Mr. Romstadt should himself be allied with the plaintiff in that case (and vice-versa), that natural alliance has been severed by Apple. At this point, Mr. Romstadt finds himself in an adversary position, fighting a two or three front war on behalf of himself and the class, on whose behalf he already has rejected the settlement now being offered for final approval in the Texas court. See Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (“[a]s an objector, [plaintiff] was in a adversary relationship with both plaintiffs and defendants”).

The Texas court may, once it hears from Mr. Romstadt in the final/fairness hearing, decline to accept the settlement. But the prospects for that outcome have, in my view, been diminished substantially as a result of the failure to conduct a meaningful hearing prior to entry of the preliminary and amended orders. These circumstances justify the order that I am entering herein.

My perception of the handicap under which Mr. Romstadt will otherwise be laboring in Texas is not lessened by the further proceedings held there on October 18, 1996. Those proceedings were ex parte, and did not, as noted above, cure the deficiencies that marred the submission of the proposed order. Because, in the mind of the participants, my concerns have been addressed and resolved (Doc. 106, Exh. at 32-37), Mr. Romstadt is likely to encounter an even steeper climb in his efforts to prevail on his objections to the settlement.

Other courts have expressed similar concerns with in response to actions similar to those taken by Apple in the Texas proceeding. Thus, in In re Federal Sykwalk Cases, 97 F.R.D. 370 (W.D. Mo. 1983), the court was confronted with a situation in which objectors to its class certification order entered secretly into a settlement agreement with the defendants and obtained, without notice to other class representatives or their counsel, an order preliminarily approving the settlement and certifying

a congruent class from a state court. Though the court in Skywalk (which later vacated its opinion) addressed itself to the issue of the defendant's contempt of court, it noted that "havoc" would result from allowing the "defendants to make an end-run around its supervisory authority" and be "nearly irreparable." Id. at 377.

Similarly, another district court stated in Breswick & Co. v. Briggs, 135 F. Supp. 397, 403 (S.D. N.Y. 1955), that defense attorneys in a shareholder derivative action had acted improperly when they procured a settlement with counsel other than the lawyers representing shareholders in the proceeding in that court. Declining to enter an order staying the state court proceeding, the federal court ruled that the defendants, as a result of their "inequitable" conduct, would not be allowed to reap the benefit of their state court settlement. Moving directly against the party responsible for wrongful conduct, the court held that it would bar the defendants from asserting res judicata on the basis of the state court judgment. The court pointed out that the "sole thrust of this determination is against the persons of the defendants; they are not in equity entitled to utilize a judgment based on a settlement negotiated behind the backs of the active plaintiffs here." Id. at 403.

The concerns expressed in Skywalk and Breswick arise in this case as well. The defendant, after having a settlement rejected by one class representative, secretly undertook to get judicial approval for the same settlement with counsel for another class representative.¹⁰ Apple was able to pick and choose among its adversaries, who were, at least in theory, representing the same client. Then, by engaging in ex parte proceedings without notice to another known, active, and partially successful class member, the Texas parties procured approval for a proposed settlement that had been

¹⁰ The record does not indicate whether Texas plaintiff's counsel was aware that he was agreeing to a proposal that had been rejected by Mr. Romstadt and his lawyers.

rejected by Mr. Romstadt.

To remedy the denial of due process, I shall, first, enter an initial and conditional order of class certification, which shall be subject to revision on further consideration. Next, I express herewith my anticipation that any judgment entered in the Texas proceeding shall not have, as to any class member in this proceeding, res judicata or similar effect unless such class member has taken advantage of the Texas settlement by affirmatively accepting one of the items being offered to the class members in that case. I shall, finally, overrule Apple's motion to stay these proceedings, without prejudice.

This order is subject to being amended or vacated, depending on further developments. If the amended order entered in the Texas court is vacated and a hearing is scheduled whereby Mr. Romstadt and his counsel are given an opportunity fairly to be heard and present their objections, this order shall be vacated and further proceedings in this case shall be stayed. In that manner, the denial of due process, to the maximum extent possible, will be remedied, as the right to be heard fully and fairly will have been restored without further disadvantage to Mr. Romstadt and the class he represents. He will not be confronted by the steep hill that otherwise awaits him if that order is not vacated and such opportunity is not afforded to him--the field will have been leveled.

If that order is not vacated (and I am not ordering the Texas court to take such action, just as I am not ordering Apple or the Texas plaintiffs to do anything), I will proceed forthwith with further proceedings in this case to: 1) determine whether to make my class certification order final, and if so, to proceed to do so in accordance with Rule 23 and prevailing case law;¹¹ 2) set this case

¹¹ I wish to make clear that I have not decided that final class certification is or may be appropriate. For now, I am entering an initial conditional order that is as coextensive with the Texas class as, according to my understanding, I can issue. See, e.g., Toledo Metro Federal Credit Union v. Ted Papenhagen Oldsmobile, 56 Ohio App. 2d 218 (1978). Such order is, in my view, the only way that I can protect the class represented by Mr. Romstadt from further injury as

for a hearing on class damages or other relief; and 3) take such other action as shall appear to be appropriate in the interests of the class or classes that may be certified.

Apple contends that no federal court has ever done what I am doing. It appears to be correct--plaintiff has not cited and I have not found an exact precedent for my action. On the other hand, I have found no case which stands for the proposition that I cannot do what I am doing. Nor, for that matter, have I found a case in which a defendant so successfully turned looming defeat into victory by secretly having a rejected settlement offer accepted as a class settlement.

For support for this decision and approach, I turn first, to the irrefutable proposition that "[t]he opportunity to be heard is an essential requisite of due process of law." Richards v. Jefferson County, U.S. , 116 S. Ct. 1761, 1765 n.4 (1996). An ex parte proceeding does not afford due process to persons who are affected by the outcome of such proceeding. A "State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard." Id.

Under the Full Faith and Credit Act, 28 U.S.C. Sec. 1738, "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding is presumptively entitled to full faith and credit under the express terms of the Act." Matsushita Electric Indus. Co., Ltd. v. Epstein,

U.S. , 116 S. Ct. 873, 878 (1996). However, as noted by Justice Ginsburg in that case, a "state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause." (Id., 116 S. Ct. at 884-85 (Ginsburg, J., concurring in part and dissenting in part)).

a result of the due process violations inflicted on him and it by Apple and the proceedings in Texas.

I understand full well that Richards and Matsushita involve final judgments, while this case involves a denial of due process at a preliminary, interlocutory phase. Nonetheless, "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." Kremer v. Chemical Const. Corp., 456 U.S. 461, 483 (1982).

Though perhaps contrary to the conventional wisdom of class action practitioners, I do not believe that a hearing at which preliminary approval is sought in a class action is a meaningless or harmless event. Though in some instances the final/fairness hearing may result in rejection of proposed settlements, that fact is not a basis for concluding that exclusion of Mr. Romstadt in this case can be remedied or redressed at that stage.

I note that to allow participation of other class action plaintiffs at the outset would likely have some benefits beyond providing due process. Well-taken challenges to proposed settlements would become known, as would the judge's acceptance of such challenges, before the expense and delay of class notice had been undertaken. The shambles left by failed class action settlements would be created in fewer cases. The primacy of the judge's role over all phases and aspects of a class action proceeding would be assured. The risk of collusion would be reduced, as would the risk, which has been actualized in this case,¹² that potential allies would become adversaries, thereby benefiting the defendant whose conduct each is challenging. Settlement orders, even if preceded by challenge at the final/fairness hearing, would probably enjoy a greater measure of protection against reversal on appeal if due process were afforded at each step--and not just the last step--along the way.

¹² Long-distance sniping between counsel purporting to represent the same plaintiff class is unseemly at best, and profitable only to Apple, which should be the common target. Those counsel may not be or become friends, and they may have different views on the outcome of this case, but certainly they should not be, as they are becoming, enemies pitted solely against each other.

To the extent that, as Apple also contends, I am disregarding the conventional view, that the "main event" is the final/ fairness hearing, I am persuaded that whatever can happen at that hearing cannot remedy the due process wrongs that occurred in this case. For the reasons I have already expressed, I believe that Mr. Romstadt and the class he seeks to represent have been and will be disadvantaged and prejudiced unless I proceed with this order and further proceedings.

If, as already stated, the Texas amended order is vacated and a hearing is scheduled, with due notice and an opportunity to be heard being extended to Mr. Romstadt and his counsel, I will stay all further proceedings in this case.

If I am disregarding conventional wisdom about the proceedings by which preliminary approval is obtained in class actions, so be it. Contrary to such "wisdom," that is no time for proceeding ex parte and leaving judges uninformed. It is at that point that the judge has, and is most likely to exercise, maximum discretion and authority. Later he or she will be confronted, after the expenditure of considerable money and effort, with a binary "up or down" choice. Even the fairest judge will feel some hesitancy in the face of that situation. In practical effect, the settlement, even though contested, may have a aspect of presumptive acceptability that will be more difficult to overcome than at the outset of the proceedings.

How I proceed at this point is up to the Apple, Texas plaintiff's counsel, and the Texas court: but I issue no commands to any of them, and they are free to act as they see fit. I note, however, that if notice is issued to the class certified in Texas, I anticipate, if I certify a class or classes, to require Apple to undergo the expense of issuing notice to the class members in this case.

I will close with the observation that, if the proposed settlement is as fair as Apple and Texas counsel have represented to the Texas court, they should have no fear or reluctance to subject it

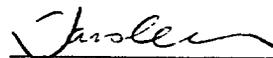
forthwith to the attentive scrutiny that only a due process hearing can afford. There may well be no merit to the objections that Mr. Romstadt and his counsel seek to make--that is for the Texas court to decide. The parties in Texas should be willing now to expose their agreement to the sunlight of challenge; if they do not want to do so, one must wonder what it is they seek to hide.

For the foregoing reasons, it is hereby

ORDERED THAT:

1. Plaintiff's motion for a preliminary injunction is denied;
2. Plaintiff's motion for class certification is initially and conditionally granted, subject to revision; the class being all persons who prior to August 21, 1996, purchased or leased for personal, and not commercial, use, a new Apple Performa 475 or 476 computer in the United States of America, for their own use and not for resale or lease to others, pursuant to Fed. R. Civ. P. 23; and
3. Defendant's motion for stay is denied, without prejudice to renew.

So ordered.



James G. Carr
United States District Judge

#2078

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January 14, 1997

Via Facsimile and U.S. Mail

Peter G. McCabe, Secretary
of the Committee on Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. McCabe:

I regret that I will be unable to testify at the January 17, 1997, public hearing on the proposed amendments to Federal Rule of Civil Procedure 23. I am enclosing a memorandum that I prepared for publication by the Manhattan Institute and would appreciate its inclusion in the Rule 23 rulemaking record.

The memorandum describes my experience as an objector's counsel in a number of class action settlements where I appeared on behalf of individual class members to challenge the excessive attorneys' fees being claimed in those cases. Too often, attorneys in class actions are obtaining huge fee awards at the expense of advancing the rights of the members of the class. This abuse has so far alluded the scrutiny of the courts. That is not likely to change unless significant modifications are made to Rule 23 procedures.

To that end, I encourage the rulemaking committee to consider adopting an additional reform measure not currently included in the proposed amendments -- which would change the default mechanism for 23(b)(3) classes from opt-out to opt-in. A number of commentators on the proposed Rule 23 amendments have suggested adoption of an opt-in mechanism and I believe the idea deserves serious consideration. Current abuses of class actions would be significantly curtailed and the goals of class action litigation would be adequately protected if opt-in class actions were reinstated.

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

Peter McCabe, Secretary
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litigation and would, more than likely, be appalled if they realized the amount of attorneys' fees being obtained in their name.

I greatly appreciate the opportunity to share my views with members of the Committee and I commend them for their thoughtful, important work. I look forward to learning about the outcome of the Committee's deliberations after the public hearings have ended.

Very truly yours,

Lawrence W. Schonbrun
Lawrence W. Schonbrun

LWS:sn

Enc. - "Class Actions: The New Ethical Frontier"

CIVIL JUSTICE MEMO

MANHATTAN INSTITUTE

JUDICIAL STUDIES PROGRAM

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CLASS ACTIONS: THE NEW ETHICAL FRONTIER

Lawrence W. Schonbrun has been recognized as the most prominent attorney in the United States fighting excessive attorney's fee requests in class action litigation. He has been the subject of articles in The Wall Street Journal, Barron's, The National Law Journal, and California Lawyer, and was featured in John Stossel's ABC special "The Trouble With Lawyers." A graduate of the University of Vermont and Boston College Law School, Schonbrun has worked for the San Francisco Neighborhood Legal Assistance Foundation as a VISTA volunteer.

* * * * *

Controversy keeps mounting over class actions, yet the discussion often seems to take place in a historical vacuum. In particular, it isn't always realized to what extent shrewd lawyering in recent years has transformed this type of litigation in ways the drafters of Rule 23 never foresaw or intended. Over the past decade or so, the class action bar has taken advantage of gaps in judicial and public oversight to develop entirely new techniques for prosecuting and settling class action suits, techniques that offer unprecedented opportunities for abuse. If the class action device is under attack as never before, one reason may be that it's being abused as never before.

The "textbook" class action runs as follows. Using a token representative plaintiff to get into court, entrepreneurial lawyers sue a defendant, gain the court's permission to represent a large class, and negotiate a settlement. Because class counsel is bargaining away class members' legal rights, in circumstances where the clients are in no position to review their attorneys' handling of the case, proposed settlements must receive judicial approval as to their fairness, adequacy and reasonableness. The court must also approve the lawyers' request for attorneys' fees and costs, which traditionally have been deducted from the "common fund" from which class members get their relief.

The problems with this mechanism are by now familiar. Lawyers may walk off with millions in fees while class members individually receive pennies on the dollar for alleged harms. One client of mine, in the *Greenwich Pharmaceuticals Securities Litigation*, received a settlement check for 14 cents—along with four pages of Internal Revenue Service instructions on how to report the payment!

Judges often display little initiative in verifying lawyers' claims regarding how much time they devoted to the case, who worked on it, and how and to what extent litigation costs were incurred. Defendants, as a condition of settlement, are required to agree not to contest plaintiff counsel's representations on these matters. An overworked judiciary, hoping to clear its docket, too often finds it easier to follow the maxim, "better a bad settlement than a good trial."

Two developments in recent years have drastically transformed the textbook model of a class action

settlement. The first has been the rise of coupon settlements. Defendants found they could offer settlements consisting not of cash, but of coupons or other discounts, to class members. Instead of resisting such non-cash settlements, class counsel began to retain valuation experts willing to attach extravagantly high values to the purported benefits of these nonpecuniary settlements.

The result has been a long string of settlements whose terms look favorable to plaintiffs on the surface—but only on the surface. In the *Domestic Air Transportation Antitrust Litigation* settlement, class members received \$25 coupons for discounts on certain flights; in the *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation* settlement, class members were offered a \$1,000 discount coupon toward the purchase of a new GM vehicle. In the *Toyota Motor Sales USA, Inc.* case, class members were offered a \$100 discount on the purchase of a new car and a \$50 discount off the cost of repairs. In the *Stouffer Frozen Foods Corp., Inc.* case, class members were offered 35-cent and 50-cent coupon discounts off the future purchase of Lean Cuisine products. In the recent *America Online, Inc.* settlement, class members were offered an additional hour's use of America Online services—though it was estimated that between 60 and 70 percent of class members already didn't use even the full five hours allotted to them.

But as economists know, the true economic value of a coupon to its recipient, or true economic cost to its issuer, are by no means equivalent to its face value. If it were, the Sunday-paper supplements containing \$100 worth of coupons would be as valuable as a \$100 bill. Many customers never cash in coupons, and others who do are actually bringing a net profit to the issuer who would not otherwise have gotten their business.

Some coupons come with baffling fine-print conditions attached. In other cases, defendants appear to offer cash, but payments are made only to claimants found eligible according to complex or even undisclosed formulas, and only after class members furnish what one party or the other considers adequate documentation. Any money not paid to class members is kept by the defendant company. In the *State Farm Mutual Automobile Insurance Company* class action, a client of mine was denied eligibility for several reasons, including her failure to include her home address and social security number, but was accorded no opportunity to correct the omissions. In other situations, coupons may be given out indiscriminately to anyone who claims to be a class member. For example, in the *In re Sears Automobile Center Consumer Litigation*, anyone who claimed they were a class member, without any verification of class membership, was given a \$50 coupon redeemable for the purchase of merchandise sold by Sears.

In these coupon settlements, the 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 again being to legitimate the size of the fee they have negotiated with the defendant. In the *State Farm* case, the projected value of the settlement ranged from a high of \$106 million to a low of \$6 million—a remarkably wide range, one might think. And in many cases, very little money is actually paid out. In defending their failure to create a common fund in the *In re Pentium Processor* case, class action lawyers argued that since defendant Intel had placed the entire assets of the corporation at risk in agreeing to settle class members' claims, rather than placing a fixed sum of money in a common fund, their failure to create a common fund was a benefit to the class. As of March 1996, a total of 68 claims had been filed against Intel for money damages, and the company had paid out \$18,000 to these claimants. Not long ago, in the

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, a settlement that established a \$10 million settlement fund for business class members' claims actually paid out a mere \$60,000 to class members, reportedly because it was inadequately advertised.

You might expect the attorneys for the class to cry foul at such developments, fighting for broader distribution of money, for more effective advertising and clearer explanations of claim procedures, and for more generous application of eligibility rules. However, once a settlement has been approved and fees paid, neither side has an incentive to direct the court's attention to the question of whether real payouts are keeping up with the script. The overwhelming majority of class action settlements do not provide the court or general public with any means of obtaining later data on the number or size of claims made, the proportion of these that are rejected, or the resulting total payout to class members. In coupon settlements in which class members are offered discounts, it can be even more difficult to determine how many beneficiaries have taken advantage of the offers.

Even more remarkable than the coupon settlement ploy is a technique developed by class action lawyers some time around the early 1990s and typified in such well-known recent cases as *Pentium*, *America Online*, and *In re Packard Bell Consumer Class Action Litigation*. Traditionally, class counsel had obtained their fees as a deduction from the common fund held in trust for the class, after the opponent had written the settlement check. But what was there to prevent the lawyer from asking for a fee to be paid by the opponent directly? Hence, a brilliant innovation—the class action fee *separately negotiated with, and paid by, the opponent*.

It was an idea created out of whole cloth and unknown to previous fee jurisprudence, and it offered several immediate advantages. To begin with, the separately paid attorneys' fee did not have to be linked to some set hourly formula or to some fixed percentage of the recovery. Instead, the amount could depend far more on the discretion of both sides. In fact the fee negotiations could take place in private, with neither the public nor class members being invited to watch or take part. And the greatest advantage of all—or so class counsel regularly argue with a straight face—is that this method of attorney compensation, unlike the common fund method, doesn't reduce the class's recovery.

This argument simply cannot be taken seriously. Suppose lawyers for accident victims were discovered to be striking side deals by which they recovered handsome fees from the insurance company after agreement on their clients' recovery. Would they really get away with assuring ethical inquisitors that, after all, the nice fees were no skin off their clients' backs; the clients' settlement would have been the same regardless of the amount of the attorneys' fee which they had negotiated for themselves? Wouldn't clients and bystanders be justified in questioning the implicit trade-off going on in such negotiations: lower settlement sums for higher attorneys' fees? It is quite clear that in normal litigation the law would view such arrangements as constituting an impermissible conflict of interest.

To hear the lawyers tell it, there's no conflict of interest at all in this type of negotiation. The official line is that as soon as the sides sit down to talk settlement, class counsel informs defendants' counsel that no discussion of attorneys' fees will take place until after the class's relief has been agreed on. However, they also advise defendants' counsel that any agreement to settle the class's claims is contingent upon a satisfactory resolution of the attorneys' fee issue. 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 agreed on.

The common term of art is that no "discussions" took place, which of course leaves open the possibility of other forms of signaling. These are all matters to take on faith, because neither we, the public, nor members of the class are ever allowed into the negotiating room.

In their presentation to the court seeking approval of the settlement, a prime objective of class counsel is naturally to get the judge to rubber-stamp the separately negotiated attorneys' fee provision of the settlement. As one who has participated as an objector's counsel to urge greater judicial scrutiny of attorneys' fees in numerous class action settlements, this writer has heard an endlessly inventive array of entreaties and arguments aimed at trial judges in state and federal courts throughout America:

1. Your Honor, approve this fee. It was bargained for by sophisticated and experienced attorneys on both sides. The defendants would not have agreed to pay this amount were it not reasonable.
2. Your Honor, approve this fee. We were careful to avoid any conflict of interest that might have arisen had we negotiated our fee and the class's recovery at the same time.
3. Your Honor, approve this fee. The settlement is a package. You needn't find each of its provisions reasonable in order to find it reasonable overall.
4. Your Honor, approve this fee. So long as you believe the class's recovery to be fair, adequate and reasonable, then you have sufficiently protected its interests, even if the fee itself may be higher than you would have awarded.
5. Your Honor, approve this fee. Remember, no standard has yet been established by which judges review the "separately negotiated" fee, and you need not apply a standard of reasonableness. We urge you instead to adopt a "shock the conscience of the court" standard. This means you can approve a fee to which we and the defendants have agreed even though it's higher than the fee you would have found reasonable.
6. Your Honor, approve this fee. The judiciary's time, and in particular your time, is too valuable to be spent examining the details of an attorneys' fee request. After all, there is no dispute about the fee between the two main parties and you have more important matters to which your attention should be devoted.
7. Your Honor, approve this fee. After all, the purpose of litigation is to punish and deter wrongful conduct. If you reduce the amount of our fee, the defendant will get some of his money back and the deterrent effect of this litigation will be weakened.
8. Your Honor, approve this fee. Here is a declaration by a retired judge (whom we've hired) who says the fee we're requesting is reasonable. Certainly you can rely on the opinion of this distinguished former jurist.
9. Your Honor, approve this fee. Should you desire to undertake the exhaustive effort needed to calculate a reasonable attorneys' fee, you must bear in mind that there simply is no money available to pay a special master or outside expert to assist you. It is the position of the defendants that any money not paid to class counsel must go back to them and cannot be used for any other purpose.

In all too many cases, trial court judges across America dutifully accept one or more of these rationales in awarding class counsel their fees. As the trial judge in the *Sears* case noted in approving a separately negotiated fee whose amount he described as "not unreasonable": "the fee is separately paid by the defendants; whether the defendants pay \$3.50 or \$50 million in fees is pretty much irrelevant to the [class member] plaintiffs."

The final indignity comes when a disgruntled member of the victimized class tries to appeal the fee ruling to a higher court: class counsel proceed to argue that the lower court judge's approval of the fee *cannot be appealed*. They unashamedly challenge objectors' standing to get into court, on the grounds that even if the appellate court were to reduce the fee as excessive, any refunded money would simply revert to the defendants. Since class members would get no proximate financial benefit from a reduced fee, they are not aggrieved by the Court's ruling (under this view) and lack standing to appeal. At least one appellate court, the Third Circuit in the *General Motors Pickup* case, refused to accept this rationale. However, there are many judges across America upon whom the class action bar is eager to test their theory.

Scientists long ago gave up on the idea of the perpetual motion machine, but lawyers have done handsomely by reviving the concept. Their system hums along smoothly on an endless stream of fees, serving the interests of the attorneys, the defendants they sue, and the judges who hear the cases, with results that seem appealable to no one but the Lord Almighty. And we, the general public, are the losers.

* * * * *

For additional information, contact The Manhattan Institute, 52 Vanderbilt Avenue, New York, NY 10017
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ATTORNEYS AT LAW

96-CV-115

Supp

February 14, 1997

VIA FACSIMILE

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Amendments to Rule 23

To the Committee:

On behalf of the law firm of McClintock, Weston, Benshoof, Rochefort, Rubalcava and MacCuish, I am writing to thank you for the opportunity to comment on the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. Specifically, I wish to express this firm's support for the proposed amendments as an important step towards refining the class action procedure and providing judges with necessary tools to certify those cases truly appropriate for class treatment, while eliminating those inappropriate and reducing the potential for abuse of the procedure.

Too often, we have seen the class action procedure inappropriately used as a tool to enrich lawyers while pursuing often meritless claims, providing little or no benefit to their clients, clogging the courts and draining resources from the economy. Perhaps the most troubling aspect of this misuse of the process is the often distinct divergence of the interests of the lawyers and the interests of the clients. In our firm's experience, we have observed that class lawyers often inappropriately aggregate mass tort claims and vigorously pursue those claims and issues which hold the promise of maximizing damages, while often ignoring the concerns and goals of their clients. After spending huge sums in defending against those claims, it is often revealed through depositions of plaintiffs that the claims advanced by the lawyers for the class are unsupported in fact and of little concern to the plaintiff class, while the plaintiffs' actual concerns and claims, although somewhat less lucrative, are left unaddressed and ignored by their lawyers.

While this situation can certainly present itself in an individual litigation context, the potential and frequency is much

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greater in the class context. With this in mind, we believe that the proposed amendments are a good step towards reducing the potential for abuse for the following reasons:

1. New subsection (b) (3) (A) of the rule, requiring the court to examine the "practical ability" of the class members to pursue individual claims, 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 and providing undue leverage to otherwise insubstantial claims.

2. Perhaps the most important amendment is the addition of subsection (b) (3) (F). This subsection, which requires the court to consider whether probable relief to individual class members justifies the costs and burdens of class litigation, 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. We believe that the class action procedure was not intended to be a tool for lawyers to pursue their own agendas in the guise of pursuing an action on behalf of a class. This amendment enables federal judges to prevent that sort of abuse.

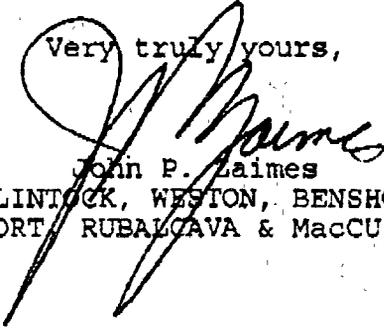
3. Another important amendment to the Rule which on which we would like to comment is the proposed addition of subsection (b) (4), allowing certification for settlement even when the class certification requirements could not be met for the purposes of trial. In theory, this amendment could on the one hand provide an important tool in the appropriate case, for final resolution of particularly complex and far reaching claims that cannot otherwise be resolved by litigation. On the other hand, it may provide a powerful tool for abuse by class lawyers and may unfairly compromise those claims of individuals who have no voice in the class action. 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.

Again, we thank you for the opportunity to comment, and we appreciate the efforts of the committee to polish and refine the class action procedure. We urge the adoption of the proposed amendments, with the possible exception of Rule 23(b) (4), which we believe requires some additional safeguarding language to address

Secretary
February 14, 1997
Page 3

the concerns reflected above. We will continue to follow with interest the activities of the committee.

Very truly yours,



John P. Laines
McCLINTOCK, WESTON, BENSHOOF,
ROCHFORD, RUBALCAVA & MacCUISH LLP

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March 6, 1997

Mr. Peter McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the United States Courts
Washington, DC 20544

96-CV-181

Dear Mr. McCabe:

INTRODUCTION

The purpose of this letter is to submit comments on proposals to amend F.R.C.P. Rule 23, which was intended to govern the adjudication of Federal class action lawsuits.

These comments are based on discouraging experiences in which the due process criteria of Rule 23 were virtually ignored.

SETTLEMENTS SHOULD BE BINDING ONLY ON THOSE WHO POSITIVELY OPT IN

At some point in negotiations linked to a Federal class action lawsuit, the character of the proceeding begins to change.

Our traditional adversary system, with the court sitting as arbiter, begins to melt away. Plaintiffs, defendants and the court all seem to merge into an amorphous entity of juggernaut proportions with all elements of it pushing for the settlement. The business of ensnaring additional putative plaintiff class members smacks more of entrapment with judicial blessing than it does of administration of justice. The acme is attained when the

court issues a nationwide injunction binding on putative plaintiff class members who have never opted in; who have been forbidden to name a class representative or class co-counsel; who have been completely shut out of negotiations; who are ineligible for benefits; and who do not fit the class definition. These observations are based on actual experiences in the United States Courts.

The exercise of mailing out hundreds of thousands of arcanelly drafted notices is necessarily a hit-or-miss proposition, and has proved to be such. Thousands of putative class members in at least one case did not receive any notice prior to the fairness hearing, despite the fact that every putative class member's name and address were in the defendant's data base. The settlement notice was confusing and created additional hurdles for putative class members to participate in the proceeds of the class. In fact, the terms of the settlement made it impossible for thousands of putative class members to participate in the class proceeds.

It is respectfully urged that Federal class action lawsuit settlements should be binding only on those who positively opt in. Such a rule would eliminate the unjust results from Federal class action lawsuit settlements, which countless putative plaintiff class members have suffered. Such a rule would also have the beneficial effect of avoidance of swelling the lists of plaintiff class members with names of thousands of persons who are indifferent or even frivolous or who have not been advised of their

alternative rights by their own counsel.

The numerosity of the cases on settlements cited in Manual for Complex Litigation Third, note 773 at page 243 and notes 1106 through 1125, pages 330 through 334, strongly supports the conclusion that the Federal class action system is not working in satisfactory fashion. The opt in requirement would at least serve as a bridge until a long-term solution has been achieved, such as a new special court for adjudication of nationwide Federal class action lawsuits.

JUDICIAL SCRUTINY OF SETTLEMENTS IN FEDERAL
CLASS ACTION LAWSUITS SHOULD BE MORE
EXACTING, RATHER THAN LESS EXACTING

Judicial scrutiny of settlements in Federal class action lawsuits should be more exacting rather than less exacting. Class action settlements are susceptible of abuse. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169 (5th Cir.) cert denied, 439 U.S. 1115, 99 Sup Ct 1020, 59 L.Ed.2d 74 (1978).

The interest of lawyer and class may diverge as may the interest of different members of the class, and certain interests may be wrongfully compromised, betrayed, or 'sold out' without drawing the attention of the court. Id.

In Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982) at page 657, it is stated:

Section 1.46 of the Manual for Complex Litigation suggests that ordinarily, before any settlement negotiations occur, there should be a class action determination and

that if settlement has been negotiated before class action determination and the appointment of a class action representative, the court must be doubly careful in evaluating the fairness of the settlement.

In the case of Georgine v. Amchem Products, Inc., 83 F.3d 610 (1996), the Third Circuit Court of Appeals made a meticulous, painstaking legal analysis of the requirements of Federal Rule of Civil Procedure 23 in adjudication of Federal class action lawsuits, and concluded that Rule 23's requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated. 83 F.3d at 626.

INTERPRETATION AND APPLICATION OF
RULE 23 IS A MAJOR ISSUE
OF DUE PROCESS OF LAW

The issue as to the correct interpretation and application of Rule 23 is a major Constitutional issue. This is true because Rule 23 is an effort to write the abstract principles of due process of law into the rules governing adjudication of Federal class action lawsuits. If these rules are casually scuttled by the phrase "for settlement purposes only," as has been done in many such settlements, the result can be a deprivation of property without due process of law. When this is coupled to a nationwide injunction purporting to prohibit efforts to seek justice in courts throughout the nation, the effect is to give a carte blanche to defendants, absolving them of all wrongs they may have perpetrated against anybody, anywhere, at any time. Obviously, this is not appropriate administration of justice.

The unfortunate results of failure to follow the precepts of the Third Circuit Court of Appeals are:

1. Absentee plaintiff class members may be relegated to a plaintiff class to which they do not belong, neither by definition nor by eligibility for benefits.

2. Absentee plaintiff class members may not be permitted to name a class representative or a class co-counsel and thus be completely shut out of negotiations.

3. Absentee plaintiff class members may have their rights under their own sovereign state laws bargained away by the class representatives and class counsel without receiving any commensurate benefits.

4. Absentee plaintiff class members may be prohibited by a nationwide injunction from pursuing their rights under their own state laws in the state courts of their own sovereign state.

Such results can only be viewed as a maladministration of justice.

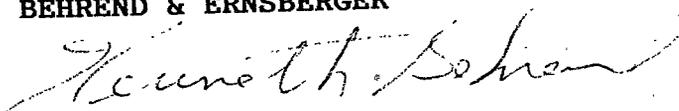
CONCLUSION

In conclusion, we respectfully urge the Standing Committee to take action that would endorse the holding of the United States

Court of Appeals for the Third Circuit in the case of Georgine v. Amchem Products, Inc., supra.

Sincerely,

BEHREND & ERNSBERGER



Kenneth W. Behrend

KWB:hr

P.S. Please send me the names and addresses of those who have written to you advocating Rule 23 modifications.



3/20/97

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96-CV-166

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March 18, 1997

VIA AIRBORNE EXPRESS

Mark Shapiro, Esq.
Committee of Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mark:

As we discussed last week, I am pleased to submit the testimony of the states of New York, Arkansas, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Vermont and Wisconsin on the Committee's proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. As the Committee agreed, this testimony is to substitute for the testimony previously submitted by Attorney General Dennis C. Vacco dated February 13, 1997.

The enclosed testimony was revised, not in any substantive respect, but only to reflect the participation of the above-mentioned eighteen states. Moreover, in keeping with the February 15 deadline for closing the record, the testimony reflects the state of affairs in the class action arena as of February 13, 1997, when Attorney General Vacco submitted his testimony.

Please call me if you have any questions.

Very truly yours,

Joy Feigenbaum
Assistant Attorney General

cc: Shirley F. Sarna, Esq.

TESTIMONY OF THE STATES OF
NEW YORK, ARKANSAS, FLORIDA, HAWAII, IDAHO,
ILLINOIS, IOWA, KANSAS, KENTUCKY, MINNESOTA, NEVADA,
NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA,
OKLAHOMA, VERMONT AND WISCONSIN ON PROPOSED AMENDMENTS
TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

February 13, 1997

The states of New York, Arkansas, Florida, Hawaii¹, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Vermont and Wisconsin submit the following testimony on the amendments to Rule 23 of the Federal Rules of Civil Procedure proposed by the Committee on Rules of Practice and Procedure of the United States Judicial Conference. We begin by thanking the Committee for its extensive efforts toward improvement of the class action device as a mode of redressing grievances. The participating states are concerned, however, that two of the revisions proposed by the Committee -- (1) the addition of proposed factor (F) to the matters pertinent to a finding that a class action is maintainable under Rule 23(b)(3), and (2) the addition of a provision for

¹ Of the states participating, all except Hawaii are represented by the Attorneys General of the respective states. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state.

certification of a settlement class under a new Rule 23(b) (4) -- if implemented, would undermine the efficacy of the class action device as a means of redressing legitimate grievances of our citizens and exacerbate already existing class action abuses as reported in the popular press.

Specifically, as discussed below, proposed factor (F) -- which requires consideration by the class action court of whether the probable relief to individual class members justifies the costs and burdens of class litigation -- could effectively eliminate the class action device as the only realistic avenue for the redress of many of the wrongs inflicted upon consumers which, although small when viewed individually, are substantial when considered in the aggregate.

Additionally, the proposed provision for certification of a special settlement class that, for purposes of trial, might fail to satisfy the requirements of Rule 23(b) (3), would, in fact, increase the opportunities for the abuses now so frequently reported in the press. If such abuses are not addressed, and certainly if opportunities are increased, public confidence in the class action device specifically, and in lawyers and the judicial system generally will be undermined.

The most troubling of these settlement class abuses is the collusion between defendants and class counsel which

has often resulted in settlements on terms favorable to defendants but of limited benefit to class members. Although the due process rights of class members may be compromised in such settlements, substantial fees are nevertheless awarded to class counsel. In order to raise their unique perspective and concerns for their citizens with such class action abuses, the Attorneys General of twenty-two States filed an Amicus Brief with the United States Supreme Court in *Adams v. Robertson*.² Without taking a position on the underlying dispute between the parties, the States directed the Court's attention to issues raised by the case concerning the minimum constitutional protections which must be afforded to absent class members lacking minimum contacts with the forum state. Those protections include: (1) the ability to opt out of the class action lawsuit, at least where substantial monetary interests are at stake; (2) meaningful notice to class members of the class action lawsuit and settlement, which should be written in language readily comprehensible to the lay reader of ordinary intelligence, with all necessary disclosures set out clearly and conspicuously for the class member to make an informed decision whether to retain counsel, opt out or

² The Amicus Brief in *Adams* was submitted on behalf of the States of New York, Vermont, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania and Tennessee and the District of Columbia.

object; and (3) adequate representation by class counsel as well as the named plaintiff, which should be examined by the courts with reference to objective standards.³

Because of the likelihood that misuse of the class action device would only intensify under proposed Rule 23(b)(4), we believe that the proposed amendment should be rejected in its current standardless form. Rather, to ensure that absent class members are afforded their constitutionally required due process rights, any amendment authorizing settlement class actions should expressly require heightened judicial scrutiny of settlement class actions, with specified standards against which courts would be required to measure the adequacy of notice, representation and opt-out rights.

I. Small Claims Litigation: Proposed Addition of Factor (F) to Matters Pertinent to Finding that Class Action is Maintainable Under Rule 23(b)(3)

The proposed revision to Rule 23(b)(3) includes, inter alia, the following factor as pertinent to the findings that common questions of law or fact predominate and that a class action is superior to other methods of adjudication:

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

The Committee Note states that subparagraph (F) has been added

³ Additionally, the States raised the constitutional deficiency of an order issued by the class action court enjoining absent class members from challenging the jurisdiction of the class action court in another forum.

"to effect a retrenchment in the use of class actions to aggregate trivial individual claims." Yet the proposed revision ignores the fact that while the monetary value of certain consumer claims may seem insignificant when viewed individually, the economic injury that is occasioned upon large numbers of consumers under those circumstances can be quite substantial.

Additionally, proposed Rule 23(b)(3)(F) overlooks the importance of deterring wrongful conduct that may injure each consumer slightly, but nevertheless injures many consumers in the aggregate. Because Rule 23(b)(3) has a significant deterrent effect in the market, it serves an essential public function of protecting consumers from transgressions of law that result in relatively small wrongs inflicted upon large numbers of people. In a time of tight governmental budget constraints, the possibility of private consumer class actions serves as an important means of policing nationally based manufacturers and merchandisers from engaging in practices that result in economic harm to consumers on a grand scale. Thus, to adopt proposed Rule 23(b)(3)(F) would effect an unwarranted and inappropriate retrenchment in the enforcement of consumer protection laws, and would effectively condone violations of those laws by manufacturers and merchandisers where the individual economic harm from those violations is small.

Finally, proposed Rule 23(b)(3)(F) is also troubling because it contains no standards limiting its reach. Assuming that the elimination of "small" or "trivial" individual consumer claims were a worthy goal (which is highly questionable), the proposed amendment nevertheless fails to provide any guidance to a court in considering whether the value of probable individual relief outweighs the costs and burdens of class action proceedings.

II. Settlement Classes: Proposed Addition of Rule 23(b)(4)

Proposed Rule 23(b)(4) adds a fourth type of action that may be maintained as a class action, provided that the requirements of subdivision (a) are met:

(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.

This proposal would codify the controversial practice by some federal district courts, recently rejected by the Third Circuit in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir. 1996), of certifying a class for settlement purposes even though the same class could not be certified for trial purposes. The proposal reflects the Committee's recognition that settlement often proves superior to litigation as a comprehensive solution to issues engendered by class actions. However, we are concerned that such settlements under new subdivision (b)(4) might come at a very high price to the fair

administration of justice and the public's confidence in the judicial system.

Critics and the popular press have already charged that the existence or at least the appearance of collusion between defendants and class counsel, as in the case of *Hoffman et al. v. BancBoston Mortgage Corp. et al.*, Civ. No. CV-91-1880 (Cir. Ct., Mobile Cty., Ala. 1994), has been carried to unfortunate extremes. In *Hoffman*, the plaintiff class of mortgage holders serviced by BancBoston alleged that BancBoston had overcharged them so that a surplus existed in each mortgage holder's escrow account. An Alabama court approved a settlement agreement in that case that actually left the majority of class members suffering a net out-of-pocket loss, while the lawyers received a substantial fee funded out of the class members' escrow accounts. In *Kamilewicz v. BancBoston et al.*, 92 F.3d 506 (7th Cir. 1996), the Seventh Circuit upheld the district court's decision dismissing the plaintiffs' claims against class counsel and the bank for defrauding the class members in *Hoffman*. Again, in order to direct the judiciary's attention to their unique perspective on and concerns with settlement class abuses, nine State Attorneys General filed an Amicus Brief with the Seventh Circuit in support of plaintiffs' appeal to that court.⁴

⁴ The Amicus Brief to the Seventh Circuit was submitted on behalf of the States of Vermont, New Hampshire, Arkansas,

Plaintiffs have recently petitioned the United States Supreme Court for a Writ of Certiorari and a substantial number of States will be filing an Amicus Brief in support of the Petition. Unless the United States Supreme Court grants the Petition and overturns the Seventh Circuit's decision, the **Kamilewicz** plaintiffs are left without any realistic avenue of redress for the fraud that was perpetrated upon them.

There has also been a storm of criticism over the proposed settlement of a class action suit against Prudential Insurance Company of America that involves 10.7 million life insurance policyholders nationwide. The settlement has been criticized as unfairly favoring Prudential by making it difficult for policyholders, many of whom are elderly, to qualify for compensation, and failing in large measure to provide true restitution to the class, while giving \$90 million in fees to class counsel. See Paltrow, *Judge Acts To Settle Prudential Class Action Courts: Controversial Ruling Which Would Affect 750,000 Policyholders In California, Was Made In A Secret Hearing*, LOS ANGELES TIMES, October 31, 1996 at D1; Quinn, *Insurance Scam Suits Don't Benefit All Victims*, ITHACA JOURNAL, November 19, 1996 at 6A .

We are concerned that new subdivision (b) (4) will only exacerbate already existing abuses by changing the whole

Florida, Illinois, Maine, Nevada, New Mexico and Oklahoma.

calculus of leverage in the negotiations between defendants and class counsel. Rather than plaintiffs' lawyers being able to negotiate a favorable settlement for the class because the defendant fears opposing those lawyers at trial, class counsel in the new (b) (4) class actions might well be the lawyers most willing to join with the defendant to convince a court to approve a settlement of little benefit to the class but which provides attractive attorney's fees.

Such opportunities for collusion make it difficult for even the most well-intentioned courts to assess the fairness to class members of proposed settlements because the courts must necessarily rely upon the information provided by defendants and class counsel. Under the proposed revision, courts would be constrained only by the weak requirements of Rule 23(a) -- numerosity, common questions of law and fact, typicality of the representative's claims and adequate representation -- in certifying settlement classes. Under the present Rule, for an action to be maintained as a class action, **in addition to** the prerequisites of Rule 23(a), the action must satisfy the requirements of Rule 23(b) (1), (b) (2) or (b) (3). Allowing certification of settlement classes that satisfy the Rule 23(a) prerequisites alone, without subdivision (b) (3)'s limits or other limits in their stead, cannot ensure careful scrutiny of either attorney incentives or the fairness of the use of the class action device.

Moreover, we do not believe that the requirement of a mandatory hearing before a court may approve a class settlement as provided in proposed Rule 23(e) would provide the necessary due process protections to absent class members. Indeed, in the *Georgine* asbestos litigation which is currently before the United States Supreme Court on the issue of the certifiability under Rule 23 of a settlement class which could not be certified for purpose of trial, extensive hearings in the district court did not protect the due process rights of absent class members. Indeed, as discussed in the Amicus Brief filed with the Supreme Court by the Attorneys General of eighteen States ⁵ ("*Georgine* Amicus Brief"), the settlement's terms clearly favor the interests of presently ill claimants over future class members, i.e., persons exposed to the asbestos products of the defendants but who are not yet ill, who comprise the majority of the class. Moreover, the future class members did not have any meaningful right of opt-out, since many were unaware that they were exposed to asbestos, and even those who were aware of their exposure were in no position to assess the impact of the settlement's terms on their particular situation. Indeed, in mass tort cases involving latent disease, only a "back-end" opt-out right,

⁵ The Amicus Brief in *Georgine* was submitted on behalf of the States of New York, California, Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oklahoma and Virginia, the District of Columbia and the Territory of Guam.

i.e., a right to opt out of the class at such point in time that future claimants become ill, can afford any real due process protection for absent future class members.

We propose that any amendment to Rule 23 which authorizes settlement class actions, should require heightened judicial scrutiny of settlement class actions to ensure that absent class members receive the constitutionally required procedural due process safeguards. Those safeguards include adequate notice, adequate representation and an opportunity to opt out of the class, at least where substantial monetary interests are at stake.

Additionally, clarification of the requirements of adequate notice in any proposed amendment authorizing settlement class actions is vitally important to ensure that heightened judicial scrutiny will result in curbing abuses of the class action device. Because of the common use of highly technical language in class notices, consumers often do not understand the full import of the settlement terms or what specific action is required of them to avoid becoming part of the court proceeding. Out of frustration, many class members simply toss such notices into the trash. See *Georgine* Amicus Brief 14. Thus, any amendment to Rule 23 should include a requirement that clear and comprehensible notice of the class action and settlement be provided to all class members. Such notice should include not only the essential terms of the

proposed settlement in language understandable to the lay reader, but also information as to how the settlement is to be distributed, what opt-out rights exist, the procedures for filing a claim or objecting, the amount of attorney's fees to be awarded, the source of class counsel fees, and any other disclosures that a class member would need in order to make an informed decision whether to retain counsel, opt out or object.

In addition, any amendment authorizing settlement class actions should expressly require that absent class members be afforded an opportunity to opt out of the class action in all cases where substantial monetary interests are at stake. (Indeed, the proposed rule does not expressly provide for opt-out rights to the (b)(4) class members.) Any amendment should also require that in mass tort class actions where defendants' products or practices are alleged to cause latent disease and where the class settlement determines the rights of future claimants, such future claimants must be afforded an opportunity to opt out of the class action or settlement at a meaningful point in time, i.e., when and if such class members become ill.

Finally, an amendment authorizing settlement class actions should also provide that the federal district courts must consider the following factors as indicia that the due process requirement of adequate representation is not met in a

particular case: (1) parallel representation by class counsel of the class and similarly situated non-class clients; (2) settlement agreements negotiated by class counsel for their non-class clients in conjunction with the negotiation of a class settlement; (3) more favorable settlements negotiated for non-class claimants than those negotiated for the class; and (4) definition of the class to include only those claimants who have not filed lawsuits against the defendant(s) by a given date. The absence of any of the standards suggested above in the current version of proposed Rule 23(b)(4) requires the rejection of the proposed revision.

We wish to thank the Committee for the opportunity to comment on the proposed amendments, and we hope our remarks will prove helpful.

