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ADVISORY COMMITTEE ON CIVIL RULES

Deer Valley, Utah
October 6-7, 1997

AGENDA
Advisory Committee on Civil Rules
October 6-7, 1997

I. Opening Remarks of the Chair

A. Minutes of June 19-20, 1997 Standing Committee Meeting and Report to the Judicial Conference
B. Docket Sheet of Completed and Pending Items for Committee Consideration

II. Approval of Minutes of May 1-2, 1997, and September 4-5, 1997 Meetings

III. Overview of Issues and Agenda Materials

IV. Standing Committee's Consideration of Proposed Amendment of Rule 23(c)(1)

V. Rule 23: Issues Carried Forward

(A) Maturity: Factor (C) Revisited
(B) *Amchem*: First Thoughts
(C) August 1996 Rule 23 Proposals Revisited
(D) FLSA/ADEA Opt-In Classes
(E) Resnik/Coffee Proposed Rule 23(b)(4)

VI. Update on Proposed Amendment to Rule 68

VII. Proposed Amendments to Admiralty Rules B, C, and E and conforming amendments to Civil Rule 14

VIII. Report of the Discovery Subcommittee (Materials to be sent separately)

IX. Technical Amendment of Rule 6(b)

X. Judicial Conference Recommendations on the Civil Justice Reform Act

XI. Status Report on Electronic Filing

XII. Report on Standing Committee Project on Rules Governing Attorney Conduct (Oral report)

XIII. Next Meeting

ADVISORY COMMITTEE ON CIVIL RULES

Chair:

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street, Suite 910
Baltimore, Maryland 21201

Area Code 410
962-4210

FAX-410-962-2277

Members:

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Area Code 215
597-2399

FAX-215-597-7373

Honorable David S. Doty
United States District Judge
United States Courthouse
300 South 4th Street, Suite 14W
Minneapolis, Minnesota 55415

Area Code 612
664-5060

FAX-612-664-5067

Honorable C. Roger Vinson
Chief Judge, United States District Court
United States Courthouse
100 North Palafox Street
Pensacola, Florida 32501

Area Code 904
435-8444

FAX-904-435-8489

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

Area Code 916
498-5725

FAX-916-498-5464

Honorable Lee H. Rosenthal
United States District Judge
8631 United States Courthouse
515 Rusk Avenue
Houston, Texas 77002

Area Code 713
250-5980

FAX-713-250-5213

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ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Honorable John L. Carroll United States Magistrate Judge United States District Court Post Office Box 430 Montgomery, Alabama 36101	Area Code 334 223-7540 FAX-334-223-7114
Honorable Christine M. Durham Justice of the Utah Supreme Court 332 State Capitol Salt Lake City, Utah 84114	Area Code 801 538-1044 FAX-801-538-1020
Professor Thomas D. Rowe, Jr. Duke University School of Law Box 90360 Durham, North Carolina 27708	Area Code 919 613-7099 FAX-919-613-7231
Carol J. Hansen Posegate, Esquire Giffin, Winning, Cohen & Bodewes, P.C. One West Old State Capitol Plaza Suite 600 P.O. Box 2117 Springfield, Illinois 62705	Area Code 217 525-1571 FAX-217-525-1710
Mark O. Kasanin, Esquire McCutchen, Doyle, Brown & Enersen Three Embarcadero Center San Francisco, California 94111	Area Code 415 393-2144 FAX-415-393-2286
Francis H. Fox, Esquire Bingham, Dana & Gould 150 Federal Street Boston, Massachusetts 02110	Area Code 617 951-8000 FAX-617-951-8736
Phillip A. Wittmann, Esquire Stone, Pigman, Walther, Wittmann & Hutchinson 546 Carondelet Street New Orleans, Louisiana 70130-3588	Area Code 504 581-3200 FAX-504-581-3361

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Assistant Attorney General for the Civil Division (ex officio) Honorable Frank W. Hunger U.S. Department of Justice, Room 3143 Washington, D.C. 20530	Area Code 202 514-3301 FAX-202-514-8071

Liaison Members:

Honorable Adrian G. Duplantier United States District Court United States Courthouse 500 Camp Street New Orleans, Louisiana 70130	Area Code 504 589-7535 FAX-504-589-4479
Sol Schreiber, Esquire Milberg, Weiss, Bershad, Hynes & Lerach One Pennsylvania Plaza, 49th Floor New York, New York 10119-0165	Area Code 212 594-5300 FAX-212-868-1229

Reporter:

Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, Michigan 48109-1215	Area Code 313 764-4347 FAX-313-763-9375

Secretary:

Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, D.C. 20544	Area Code 202 273-1820 FAX-202-273-1826

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701
Area Code 714-836-2055
FAX 714-836-2062

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061
Area Code 913-782-9293
FAX 913-782-9855

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130
Area Code 504-589-7535
FAX 504-589-4479

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201
Area Code 410-962-4210
FAX 410-962-2277

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612
Area Code 510-637-3550
FAX 510-637-3555

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650,4393
FAX-617-576-1933

Professor Carol Ann Mooney
Vice President and
Associate Provost
University of Notre Dame
202 Main Building
Notre Dame, Indiana 46556
Area Code 219-631-4590
FAX-219-631-6897

Professor Alan N. Resnick
Hofstra University
School of Law
121 Hofstra University
Hempstead, NY 11549-1210
Area Code 516-463-5872
FAX-516-481-8509

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 313-764-4347
FAX 313-763-9375

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602
Area Code 210-431-2212
FAX 210-436-3717

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CHAIRS AND REPORTERS (CONTD.)

Chairs

Honorable Fern M. Smith
United States District Judge
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102
Area Code 415-522-4120
FAX 415-522-4126

Reporters

Professor Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, New York 10023
Area Code 212-636-6855
FAX 212-636-6899

Agenda Item IA

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1997
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 19-20, 1997. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P. Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present. Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts: Mark D. Shapiro, senior attorney in that office: and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and James B. Eaglin, acting director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference had submitted its final report to the Congress on the Civil Justice Reform Act. She stated that the committee at its January 1997 meeting had been presented with a proposed draft of the Conference's report, prepared by a subcommittee of the Court Administration and Case Management Committee (CACM). The members had expressed a number of serious concerns with the document, which were later conveyed informally to the Administrative Office and CACM. As a result, the final Judicial Conference report was adjusted in several respects. Judge Stotler pointed out that the report included a number of specific recommendations concerning the Federal Rules of Civil Procedure.

Judge Stotler reported that the Judicial Conference at its March 1997 session had approved the committee's recommended changes in the civil and criminal rules to conform them to recent statutory amendments to the Federal Magistrates Act. The changes had been sent to the Supreme Court for action on an expedited basis.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 9-10, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), which consisted of: (1) a description of recent legislative activity; and (2) an update on various administrative steps that had been taken to enhance support services to the rules committees. (Agenda Item 3)

He reported that many bills had been introduced in the Congress that would amend the federal rules directly or have a substantial impact on them. He described several of the bills,

covering such diverse matters as grand jury size, scientific evidence, composition of the rules committees, offers of judgment, protective orders, cameras in the courtroom, forfeiture proceedings, and interlocutory appeals of class certification decisions.

Judge Stotler pointed out that Mr. Rabiej and the rules office had prepared written responses to the Congress setting forth the Judiciary's positions on these various legislative initiatives. She emphasized that the AO had prepared the responses in close coordination with the chairs and reporters of the Standing Committee and advisory committees. All the letters had been carefully written and approved, and the judiciary's positions had been formulated under very tight deadlines.

One of the members suggested that it might be productive for individual members of the rules committees to contact their congressional representatives on some of the legislative proposals. Judge Stotler responded that she would be pleased to take advantage of the services of the members.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eaglin presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, he reported that the Center was in the process of updating the manual on scientific evidence and hoped to have a new edition ready by the middle of 1998. He also pointed out that the Center was in the process of conducting a detailed survey of 2,000 attorneys to elicit their experiences with discovery practices in the federal courts. The results would be presented to the Advisory Committee on Civil Rules at the committee's September 1997 meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of May 27, 1997, and his memorandum of June 10, 1997 (Agenda Item 8).

He reported that the advisory committee had completed its style revision project to clarify and improve the language of the entire body of Federal Rules of Appellate Procedure. It now sought Judicial Conference approval of a package of proposed style and format revisions embracing all 48 appellate rules and Form 4. The comprehensive package had been developed by the committee in accordance with the *Guidelines for Drafting and Editing Court Rules* and with the assistance of the Standing Committee's Style Subcommittee and its style consultant, Bryan A. Garner.

Judge Logan stated that the public comments received in response to the package had not been very numerous, but they were very favorable to the revisions. He noted that judges and legal writing teachers had expressed great praise for the results of the project, and many judges had also commented orally that the revised rules were outstanding. Only one negative comment had been received during the publication period.

Rules With Substantive Changes

FED. R. APP. P. 5 and 5.1

Judge Logan reported that the Standing Committee had tentatively approved proposed consolidation of Rule 5 and Rule 5.1 and revisions to Form 4 at its June 1996 meeting, after the package of rules revisions had been published. Accordingly, these additional changes were published separately in August 1996.

Judge Logan pointed out that Rule 5 governs interlocutory appeals under 28 U.S.C. § 1292(b), while Rule 5.1 governs discretionary appeals from decisions of magistrate judges under authority of 28 U.S.C. § 636(c). The advisory committee had not contemplated making substantive changes in either of these two rules. But when the Advisory Committee on Civil Rules proposed publication of a new Civil Rule 23(f), authorizing discretionary appeals of class certification decisions, the appellate committee concluded that a conforming change needed to be made in the appellate rules. It decided that the best way to amend the rules was to consolidate rules 5 and 5.1 into a single, generic Rule 5 that would govern all present, and all future, categories of discretionary appeals. In late 1996, the Congress enacted the Federal Courts Improvements Act of 1996, which eliminated appeals from magistrate judges to district judges in § 636(c) cases and made Rule 5.1 obsolete.

Judge Logan said that following publication the advisory committee added language to paragraph (a)(3) to specify that the district court may amend its order to permit an appeal "either on its own or in response to a party's motion." It also added the term "oral argument" to the caption of subdivision (b), made other language changes, and included a reference in the committee note to the Federal Court Improvements Act of 1996.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP .P. 22

Judge Logan reported that the Anti-Terrorism and Effective Death Penalty Act of 1996 had amended Rule 22 directly. It also created two statutory inconsistencies. First, it extended the statutory habeas corpus requirements, including the requirement of a certificate of appealability, to proceedings under 28 U.S.C. § 2255. Accordingly, the caption to Rule 22, as

enacted by the statute, was amended to refer to 28 U.S.C. § 2255 proceedings. But the text of the rule made no reference to 28 U.S.C. § 2255. Second, the statute created an inconsistency between 28 U.S.C. § 2253, which provides that a certificate of appealability may be issued by "a circuit justice or judge," and Rule 22(b), which provides that the certificate may be issued by "a district or circuit judge." It was therefore unclear whether the statute authorizes a district judge to issue a certificate of appealability.

Judge Logan said that he had made telephone calls and had sent letters to the Congress when the legislation was pending, pointing to these drafting problems and offering assistance in correcting them. The Congress, however, had not shown interest in correcting the inconsistencies. Following enactment of the statute, additional attempts had been made to ascertain how the Congress would like to have the ambiguities resolved. Again, no direction was received, other than a suggestion that the problem should be resolved by the courts. Through case law development, three circuits have construed the reference in 28 U.S.C. § 2253 to a "circuit justice or judge" to include a district judge. The advisory committee followed that case law in revising the rule.

Judge Logan stated that the advisory committee had worked from the text of Rule 22, as enacted by the Congress, and had made several style improvements in it. It also recommended three substantive changes in subdivision (b) to eliminate the statutory inconsistencies.

1. The rule would be made explicitly applicable to 28 U.S.C. § 2255 proceedings.

2. The rule would allow a certificate of appealability to be issued by "a circuit justice or a circuit or district judge."

3. Since the rule would now govern 28 U.S.C. § 2255 proceedings, the waiver of the need for a certificate of appealability would apply not only when a state or its representative appeals, but also when the United States or its representative appeals.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 26.1

Judge Logan said that Rule 26.1, governing corporate disclosure statements, had been amended only slightly after publication. The advisory committee, for example, substituted the Arabic number "3" for the word "three." The proposal had been coordinated with the Committee on Codes of Conduct.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 27

Judge Logan stated that after publication the advisory committee had made a substantive change in Rule 27, dealing with motion practice. In paragraph (a)(3)(A), the committee provided that "[a] motion authorized by rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner." The committee was of the view that if a court acts on these motions, it should so notify the parties.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 28

Judge Logan stated that the advisory committee had made no changes in the rule, dealing with briefs, after publication.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 29

Judge Logan reported that the only significant change made in Rule 29 (brief of an amicus curiae) following publication was to add the requirement that an amicus brief must include the source of authority for filing the brief.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 32

Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The committee decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 35

Judge Logan reported that the advisory committee had made post-publication changes in subdivision (f), dealing with a court's vote to hear a case en banc. He explained that the advisory committee had considered adopting a uniform national rule on voting, but the chief judges of the courts of appeals expressed opposition. There are different local rules in the courts of appeals on such issues as quorum requirements and whether senior judges may vote. The advisory committee decided, accordingly, to let the individual courts of appeals handle their own voting procedures.

Judge Stotler expressed concern about the special committee note to the rule. It would "urge" the Supreme Court to delete the last sentence of the Court's Rule 13.3 (which provides that a suggestion made to a court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of that rule unless so treated by the court of appeals). She said that the note was designed to help practitioners avoid a trap in the rules, but suggested that it might be phrased simply to point out that the last sentence of the Supreme Court's rule might not be needed. Judge Logan responded that it would be better simply to delete the special note.

Judge Stotler also expressed concern that there might be debate or controversy in the Judicial Conference or the Supreme Court over the change in terminology from "in banc" to "en banc." Judge Logan replied that the advisory committee proposed including a special paragraph in the cover letters or memoranda to the Conference and the Court explaining the reasons for the change. He noted, for example, that the committee's research had shown that the Supreme Court

itself had used the term "en banc" 12 times as often in its opinions as it had used "in banc." Similarly, a review of the decisions of the courts of appeals also showed an overwhelming preference for "en banc." He added that the committee believed strongly that the rules revision package should not be held up over this usage and would urge that the package of revisions be approved, regardless of whether the Conference and the Court preferred "en banc" or "in banc."

Judge Logan added that a similar explanation was needed in the cover letters to explain the committee's use of "must," rather than "shall." The advisory committee would elaborate in the letters why it was preferable to follow that style convention, but it would also advise the Conference and the Court not to hold up the package of revisions over this particular usage.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 41

The amended rule provides that the filing of either a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court will delay the issuance of the mandate until the court disposes of the petition or motion. Judge Logan reported that the only change made by the advisory committee after publication was to provide that a stay may not exceed 90 days unless the party who obtained the stay files a petition for a writ of certiorari and notifies the clerk of the court of appeals in writing of the filing of the petition.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FORM 4

Judge Logan reported that the proposed revision of Form 4 (in forma pauperis affidavit) had been initiated at the request of the clerk of the Supreme Court, who had commented that the current form did not contain sufficient financial information to meet the needs of the Court. Shortly thereafter, the Congress enacted the Prison Litigation Reform Act of 1996, requiring prisoners filing civil appeals to provide more detailed information for the court to assess their eligibility to proceed in forma pauperis.

Judge Logan stated that the revised form was based in large part on the form used in the in forma pauperis pilot program in the bankruptcy courts. After publication, the advisory committee made two changes: (1) requiring the petitioner to provide employment history only for the last two years; and (2) making the form applicable to appeals of judgments in civil cases.

The committee voted without objection to approve the revised form and send it to the Judicial Conference.

Rules With Style Changes Only

Judge Logan reported that the advisory committee had made no post-publication changes in FED. R. APP. P. 1, 7, 12, 13, 14, 15.1, 16, 17, 19, 20, 33, 37, 38, 42, and 44.

He said that tiny grammatical changes had been made post-publication in FED. R. APP. P. 2, 6, 8, 10, 11, 15, 18, 23, 24, 36, 40, 43, 45, and 48. He also directed the committee's attention to minor changes made in FED. R. APP. P. 3, 4, 9, 21, 25, 26, 30, 31, 34, 39, 46, and 47, and to rule 3.1, which would be abrogated because of recent legislation..

Professor Mooney presented a number of minor style changes suggested by Mr. Spaniol to FED. R. APP. P. 3, 4, 10, 25, and the caption to title IV of the appellate rules.

Mr. Spaniol added that Form 4 was the only form being revised. He suggested that the committee might wish to state expressly in its report that no changes were being made in the other appellate forms (1, 2, 3, and 5). Alternatively, the committee might include the text of these unchanged forms in the package of revisions in the interest of having a complete package of all 48 rules and all five forms. Judge Logan agreed to the latter suggestion. He also agreed with Mr. Spaniol's suggestion that a table of contents be included in the package.

The committee voted without objection to approve the proposed amendments above and send them to the Judicial Conference.

Cover Memorandum

Judge Logan volunteered to prepare a draft communication for the Standing Committee to submit to the Judicial Conference explaining the style revision project and the style conventions followed by the advisory committee. He said that he would include in the communication a discussion of the committee's decisions to use:

1. "en banc" rather than "in banc";

2. "must" rather than "shall";

3. indentations and other format techniques to improve readability; and

4. a side-by-side format to compare the existing rules with the revised rules.

Judge Stotler inquired whether it would be advisable to send an advance copy of the style revision package to the Executive Committee of the Judicial Conference. One of the members responded that the Executive Committee might be asked to place the package on the consent calendar of the Conference.

Judge Stotler also stated that it was important to present the package of revisions to the Supreme Court and the Congress in the side-by-side format. She pointed out that the physical layout of the rules, including indentations, was an integral part of the package. She asked whether the Government Printing Office would print the material in that format. Mr. Rabiej replied that GPO would print the rules in whatever format the Supreme Court approved.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 12, 1997. (Agenda Item 10)

Revised Official Forms for Judicial Conference Approval

Judge Duplantier reported that the advisory committee's project to revise the official bankruptcy forms had been initiated in large part in response to comments from bankruptcy clerks of court that some of the existing forms were difficult for the public to understand and had generated numerous inquiries and requests for assistance. The advisory committee's subcommittee on forms worked on the revisions for about two years, and the package of revised forms attracted more than 200 comments during the publication period. The subcommittee and the full advisory committee made a number of additional changes in the forms as a result of the comments.

Judge Duplantier explained that the main purposes of the advisory committee were to make the forms clearer for the general public and to provide more complete and accurate descriptions of parties' rights and responsibilities. To that end, he said, the committee had to enlarge the typeface and expand the text of certain forms. As a result, some of the forms—such as the various versions of Form 9—will now have to be printed on both back and front sides, adding some cost for processing. The advisory committee, however, was satisfied that the marginal cost resulting from expansion of the forms would be more than offset by reductions in the number of inquiries made to clerks' offices and reductions in the number of documents that contain errors.

Judge Duplantier said that it would be advisable to specify a date for the revised forms to take effect. He pointed out that the revisions in bankruptcy forms normally take effect upon approval by the Judicial Conference. Several persons, however, had suggested to the committee that additional time was needed to phase in the new forms, to print them, to stock them, and to make needed changes in computer programs. Therefore, the advisory committee recommended that the revised forms take effect immediately on approval by the Judicial Conference in September 1997, but that use of them be mandated only on or after March 1, 1998.

FORM 1

Professor Resnick reported that Form 1 (voluntary petition) had been reformatted based on suggestions received during the public comment period. No substantive changes had been made by the advisory committee following publication.

FORM 3

Professor Resnick pointed out that the advisory committee had to make a policy decision with regard to Form 3 (application and order to pay a filing fee in installments). The current form, and rule 1006(b), on which it is based, provide that a debtor who has paid a fee to a lawyer is not eligible to pay the filing fee in installments. Neither the form nor the rule, however, prohibits the debtor from applying for installment payments if fees have been paid to a non-attorney bankruptcy petition preparer.

The advisory committee had received comments during the publication period that the disqualification from paying the filing fee in installments should apply if a debtor has made payments either to an attorney or to a bankruptcy petition preparer. Professor Resnick pointed out, though, that most debtors who apply for installment payments proceed pro se and may be unaware of the disqualification rule. The fiduciary responsibility that an attorney has to advise a debtor about the right to pay the filing fee in installments is not present when a non-attorney preparer assists the debtor.

Therefore, the advisory committee concluded that payment of a fee to a non-attorney bankruptcy petition preparer before commencement of the case should not disqualify a debtor from paying the filing fee in installments. Nevertheless, the bankruptcy petition preparer may not accept any fee *after* the petition is filed until the filing fee is paid in full.

FORM 6

Professor Resnick stated that the advisory committee had made only a technical change in Form 6, Schedule F (creditors holding unsecured nonpriority claims).

FORM 8

Professor Resnick said that no substantive changes had been made after publication in Form 8, the chapter 7 individual debtor's statement of intention regarding the disposition of secured property. He noted that the form had been revised to track the language of the Bankruptcy Code more closely and to clarify that debtors may not be limited to the options listed on the form.

FORM 9

Professor Resnick explained that Form 9 (notice of commencement of case under the Bankruptcy Code, meeting of creditors, and fixing of dates) was used in great numbers in the bankruptcy courts. He pointed out that the advisory committee made a number of changes following publication to refine and clarify the instructions for creditors and to conform them more closely to the provisions of the Bankruptcy Code. He added that the form had been redesigned by a graphics expert and expanded to two pages to make it easier to read.

FORM 10

Professor Resnick said that Form 10 (proof of claim) had been reformatted by a graphics expert. The advisory committee had made additional changes after publication to make the form clearer and more accurate. The revisions make it easier for a claimant to specify the total amount of a claim, the amount of the claim secured by collateral, and the amount entitled to statutory priority.

FORM 14

Professor Resnick said that no substantive changes had been made following publication in Form 14 (ballot for accepting or rejecting [a chapter 11] plan).

FORM 17

Professor Resnick pointed out that revised Form 17 (notice of appeal under § 158(a) or (b) from a judgment, order, or decree of a bankruptcy judge) took account of a 1994 statutory change providing that appeals from rulings by bankruptcy judges are heard by a bankruptcy appellate panel, if one has been established, unless a party elects to have the appeal heard by the district court. He noted that revised Form 17, as published, had included a statement informing the appellant how to exercise the right to have the case heard by a district judge, rather than a bankruptcy appellate panel. Following publication, the advisory committee expanded the statement to inform other parties that they also had the right to have the appeal heard by the district court.

FORM 18

Professor Resnick said that Form 18 (discharge of debtor) had been revised after publication to provide greater clarity. He noted that the instructions, which consist of a plain English explanation of the discharge and its effect, had been moved to the reverse side of the form.

FORMS 20A and 20B

Professor Resnick said that Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were new. He explained that many parties in bankruptcy cases do not have lawyers. They do not readily understand the nature of the legal documents they receive, such as motion papers and objections to claims. Thus, they do not know what they have to do to protect their rights. The new forms provide plain-English, user-friendly explanations to parties regarding the procedures they must follow to respond to certain motions and objections.

One of the members inquired as to the significance of the dates printed at the top of the forms. Judge Duplantier recommended that the date shown on each form should be the date on which it is approved by the Judicial Conference.

The committee voted without objection to approve all the proposed revisions in the forms and send them to the Judicial Conference, with a recommendation that they become effective immediately, but that use of the amended forms become mandatory only on March 1, 1988.

Rules Amendments for Publication

Judge Duplantier reported that the advisory committee had deferred going forward with minor changes in the rules in order to present the Standing Committee with a single package of proposed amendments. He pointed out that the package included amendments to 16 rules, seven of which dealt with a single situation (FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006).

FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006

FED. R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62, which provides that no execution may issue on a judgment until 10 days after its entry. Rule 7062 applies on its face to adversary proceedings, but it is also made applicable to contested matters through Rule 9014.

Professor Resnick explained that Rule 7062 had been amended over the years to make exceptions to the 10-day stay rule for certain categories of contested matters, i.e., those involving time-sensitive situations when prevailing parties have a need for prompt execution of judgments. The advisory committee had pending before it requests for additional exceptions.

The committee decided that it was not appropriate to have a long, and expanding, laundry list of exceptions for contested matters in a rule designed to address adversary proceedings. It decided, instead, to conduct a comprehensive review of all types of contested matters and determine which should be subject to the 10-day stay, taking into account such factors as the need for speed and whether appeals would be effectively mooted unless the order is stayed. As a

result of the review, the advisory committee concluded as a matter of policy that the 10-day stay should *not* apply to contested matters generally, unless a court rules otherwise in a specific case.

Accordingly, the advisory committee decided: (1) to delete the language in Rule 9014 that makes Rule 7062 applicable to contested matters; and (2) to delete the list of specific categories of contested matters in Rule 7062. Thus, as amended, Rule 7062 would apply in adversary proceedings, but not in contested matters.

Professor Resnick added that the advisory committee had decided that there should be four specific exceptions to the general rule against stay of judgments in contested matters. The exceptions should be set forth, not in Rules 7062 or 9014, but in the substantive rules that govern each pertinent category of contested matter. Accordingly, the advisory committee recommended that the following categories of orders be stayed for a 10-day period, unless a court orders otherwise:

1. FED. R. BANKR. P. 3020(e) and 3021 - an order confirming a plan;

2. FED. R. BANKR. P. 4001 - an order granting a motion for relief from the automatic stay under Rule 4001(a)(1);

3. FED. R. BANKR. P. 6004 - an order authorizing the use, sale, or lease of property other than cash collateral; and

4. FED. R. BANKR. P. 6006 - an order authorizing a trustee to assign an executory contract or unexpired lease under 11 U.S.C. § 365(f).

The committee voted without objection to approve the proposed amendments for publication.

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017, governing dismissal or conversion of a case, currently provides that all parties are entitled to notice of a motion by a United States trustee to dismiss a chapter 7 case for failure to file schedules. The advisory committee would revise the rule to provide that only the debtor, the trustee, and other parties specified by the court are entitled to notice. He pointed out that the revision would avoid the expense of sending notices to all creditors.

FED .R. BANKR. P. 1019

Professor Resnick reported that several changes were being proposed in Rule 1019, governing conversion of a case to chapter 7. He said that the revised rule would clarify that a

motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires. The amendments would also clarify ambiguities in the rule regarding the method of obtaining payment of claims for administrative expenses. The rule would specify that a holder of such claims must file a timely request for payment under § 503(a) of the Code, rather than a proof of claim, and would set a deadline for doing so. The committee would conform the rule to recent statutory amendments and provide the government a period of 180 days to file a claim.

FED. R. BANKR. P. 2002

Professor Resnick stated that the proposed revisions to Rule 2002(a)(4) would save noticing costs. Under the current rule, notice of a hearing on dismissal of a case for failure of the debtor to file schedules must be sent to every creditor. The rule would be amended to conform with the revised Rule 1017 requiring that notice be sent only to certain parties. The same revision would be made with regard to providing notice of dismissal of a case because of the debtor's failure to pay the prescribed filing fee.

FED. R. BANKR. P. 2003

Professor Resnick noted that Rule 2003(d)(3) governs the election of a chapter 7 trustee. It requires the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested it. The revised rule would give a party 10 days from the date the United States trustee files the report—rather than 10 days from the date of the meeting of creditors—to file a motion to resolve the dispute.

Professor Resnick pointed out that the Congress had amended the Bankruptcy Code in 1994 to authorize creditors to elect a trustee in a chapter 11 case. The advisory committee then amended Rule 2007.1 to provide procedures for electing and appointing a trustee. The revised rule—scheduled to take effect on December 1, 1997—provides that the election of a chapter 11 trustee is to be conducted in the manner provided in Rule 2003(b)(3) for electing a chapter 7 trustee. The proposed revisions to Rule 2003(d), governing the report of a trustee's election and the resolution of a disputed election, are patterned after newly-revised Rule 2007.1(b)(3).

FED. R. BANKR. P. 4004 and 4007

Professor Resnick said that the advisory committee made companion changes in Rule 4004, governing objections to discharge of the debtor, and Rule 4007, governing complaints to determine the dischargeability of a particular debt. The advisory committee proposed amending these rules to clarify that the deadline for filing a complaint objecting to discharge or dischargeability is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The committee would also revise both rules to provide that a motion for an extension of time to file a complaint must be filed before the time has expired.

FED. R. BANKR. P. 7001

Professor Resnick explained that Rule 7001, which defines adversary proceedings, would be amended to provide that an adversary proceeding is not necessary to obtain injunctive or other equitable relief if that relief is provided for in a reorganization plan.

FED. R. BANKR. P. 7004

Professor Resnick noted that Rule 7004(e), governing service, provides that service of a summons (which may be by mail) must be made within 10 days of issuance. The proposed revision would carve out an exception by providing that the 10-day limit does not apply if the summons is served in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick noted that Rule 9006(c)((2), as amended, would prohibit any reduction of the time fixed for filing a request for payment of an administrative expense incurred after commencement of a case and before conversion of the case to chapter 7.

The committee voted without objection to approve all the proposed amendments above for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 5).

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

Judge Niemeyer reported that the advisory committee had studied class actions and mass tort litigation in depth for nearly six years. During the course of that study, it had actively solicited the views of lawyers, judges, and others on every aspect of class litigation. The advisory committee, he said, had concluded that most of the perceived problems affecting class litigation and mass torts simply could not be resolved through the federal rulemaking process. After intense investigation and discussion, the advisory committee published the following five relatively modest proposals to amend Rule 23:

1. Expanding the list of factors that a judge must consider undr Rule 23(b)(3) in determining whether common questions of law or fact predominate over questions

affecting only individual class members and whether a class action is superior to other available methods for adjudicating the controversy;

2. Providing explicit authorization for a judge to certify a settlement class;

3. Requiring a judge to conduct a hearing before approving a settlement;

4. Requiring a judge to make a determination as to class certification "when practicable," rather than "as soon as practicable"; and

5. Authorizing a discretionary, interlocutory appeal of a class certification decision.

Judge Niemeyer stated that the advisory committee had received an enormous volume of responses on the proposed changes to Rule 23 and had conducted three public hearings . He stated that the comments had been very thoughtful and informative, and the debate had been conducted on the highest intellectual and practical level. Following the publication period and the hearings, the committee asked the Administrative Office to collect and publish the statements of lawyers, academics, and others for consideration by the Standing Committee and the advisory committees.

Judge Niemeyer reported that excellent points had been made by commentators on each side of each proposal. In the end, however, it was clear to the advisory committee that there are deep philosophical divisions of opinion on many of the issues. Moreover, the advisory committee had decided that it would have to defer further consideration of settlement class issues until the Supreme Court rendered a decision in *Amchem Products, Inc. v. Windsor.*

He stated that the advisory committee at this time was seeking Judicial Conference approval of only two proposed changes in Rule 23:

1. a new subdivision (f) that would authorize interlocutory appeals, and

2. an amendment to paragraph (c)(1) that would require a court to make a class certification decision "when practicable."

He added that the other proposed changes in the rule had either been withdrawn by the advisory committee or were being deferred for further study.

Rule 23(f) - Interlocutory Appeal

Judge Niemeyer stated that there was a strong consensus within the advisory committee and among the commentators in favor of permitting a court of appeals—in its sole discretion—to take an appeal from a district court order granting or denying class action certification. The

proposal would enable the courts of appeals to develop the law. This change alone, he said, might well prove to be the most effective solution to many of the problems with class actions. He emphasized that the advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b). He added that the appellate review provision was not philosophically connected to any of the other proposed changes in Rule 23. Therefore, it should be separated from the other proposed changes and approved by the Judicial Conference immediately.

Several members pointed out that it was generally not appropriate to proceed with piecemeal changes in a rule, especially when additional changes in a rule are anticipated in the next year or two. But the consensus of the committee was that the proposed interlocutory appeal provision of Rule 23(f) was sufficiently distinct from the other changes in the rule under consideration and of sufficient benefit that it justified an exception to the normal rule.

One of the members said that the change might result in thousands of additional cases in the courts of appeals and add substantial costs to litigants, especially in civil rights cases. But many of the members of the committee, including its appellate judges, stated that the courts of appeals make prompt decisions—usually within a matter of days—on whether to accept an interlocutory appeal. And once they accept an interlocutory appeal, they normally decide it on the merits with dispatch. Several members emphasized that the courts of appeals simply will not take cases that do not appear to have merit. Some judges added that class action decisions were an important area of jurisprudence that could be helped by having more appellate decisions, especially at early stages of litigation before the parties incur great costs and delays.

The committee voted without objection to approve the proposed new Rule 23(f) and send it to the Judicial Conference.

Rule 23(c)(1) - "When practicable"

Some members observed that changing the time frame for the court to make a class action determination from "as soon as practicable" to "when practicable" merely conforms the rule to current practice in the federal courts. They argued that the amendment provides a district judge with needed flexibility to deal with the various categories and conditions of class actions in the district courts. Judge Niemeyer pointed out that district judges already exercise that flexibility without negative consequence, and no adverse comments had been received on the proposal during the public comment period.

Others argued, though, that the proposed amendment would make a significant change in the rule because it could result in district judges delaying their certification decisions. They pointed out that in 1966 the drafters of Rule 23 had made a conscious decision to require the court to make a prompt class certification decision, leaving substantive decisions to be made later

in the case when they would be binding on all parties. It was suggested, too, that the impact of the class certification decision on absentees was a very serious question that needed to be addressed further.

Some members suggested that the proposed amendment be deferred for further consideration by the advisory committee and included eventually with the package of other proposed amendments to Rule 23.

The motion to approve the amendment to Rule 23(c)(1) and send it to the Judicial Conference failed by a voice vote.

Other proposed amendments to Rule 23

Judge Niemeyer reported that the advisory committee had decided not to proceed with proposed new subparagraph (b)(3)(A). It would have added as an additional matter pertinent to the court's findings of commonality and superiority "the practical ability of individual class members to pursue their claims without class certification." He explained that the advisory committee had decided that the benefits to be derived from the change were outweighed by the risk of introducing changes in the rule. The committee also abandoned further action on the proposed amendment to subparagraph (b)(3)(B), which slightly clarified the existing subparagraph (A).

Judge Niemeyer said that the advisory committee had decided to conduct further study on the proposed amendment to subparagraph (b)(3)(C). It would authorize the court to consider the maturity of related litigation involving class members in making its commonality and superiority findings. He pointed out that as a result of public comments, the committee had improved the language of the amendment to read as follows: "the extent and nature of any related litigation and the maturity of the issues involved in the controversy."

Judge Niemeyer advised that the proposed subparagraph (b)(3)(F) would add to the list of matters pertinent to the court's findings "whether the probable relief to individual class members justifies the costs and burdens of class litigation." He said that it had attracted an enormous amount of public comment, and articulate views had been expressed both in favor of and against the proposed amendment. He pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions.

He reported that the advisory committee had not made a final decision as to whether to proceed with the amended Rule 23(b)(3)(F). It would continue to study the matter further and consider five possible options at its next meeting.

He added that the advisory committee had also deferred action on the proposed new paragraph (b)(4), regarding settlement classes, until after Supreme Court action in *Amchem Products, Inc. v. Windsor.*

Judge Niemeyer reported that the advisory committee would consider all remaining class action proposals as part of a package at its October 1997 meeting. He reemphasized that the class action debate had evoked substantial public interest and had disclosed deep philosophical divisions. On the one hand, there had been a great deal of support for amending the rule to eliminate cited abuses in current practices, particularly class actions resulting in insignificant awards for individual, largely uninterested, class members and large fees for attorneys. On the other hand, many commentators argued that class actions, regardless of the monetary value of individual awards, serve vital social purposes.

He added that sentiment had also been expressed in favor of making no additional changes in the rule because: (1) resolution of the perceived problems may well lie beyond the jurisdiction of the rules committees to correct; and (2) the courts of appeals may resolve many of the problems through the development of case law.

Informational Items

Judge Niemeyer reported that the advisory committee was making good progress in its comprehensive study of discovery. It was evaluating the role of discovery in civil litigation, its cost, and its relation to the dispute-resolution process. As part of the review, the committee would consider whether any changes could be made to lessen the cost of discovery while retaining the value of the information obtained.

In addition, he pointed out that both the Civil Justice Reform Act of 1990 and the 1993 amendments to the Federal Rules of Civil Procedure had authorized substantial local court variations in pretrial procedures. He stated that the advisory committee would like to return to greater national uniformity in civil practice as a matter of policy, but it realized the difficulty of gaining acceptance of uniform national rules after several years of local variations.

Judge Niemeyer stated that the advisory committee had planned a major symposium on discovery, to be held in September 1997 at Boston College Law School. Knowledgeable members of the bar and the academic community had been invited to identify and explore issues and make recommendations to the committee. He invited the members of the Standing Committee to attend and participate in the conference.

He reported that the advisory committee had appointed an ad hoc subcommittee to review proposed changes in the admiralty rules. The subcommittee was working closely with the admiralty bar and the Department of Justice. He pointed out that the provisions in the admiralty rules dealing with forfeiture of assets were particularly important since the admiralty rules

govern, by reference, many categories of non-admiralty forfeiture proceedings As part of its drafting process, the subcommittee had concluded that the time limits set forth in the rules for regular admiralty cases should be different from those for other categories of forfeiture cases.

Judge Niemeyer expressed concern that several bills had been introduced in the Congress to legislate forfeiture proceedings. The drafters had not had the benefit of the broad input that the advisory committee and its subcommittee had received from the bar and others. As a result, the bills, among other things, overlooked important distinctions between admiralty proceedings and other types of forfeiture proceedings.

Judge Niemeyer reported that the Civil Rules Committee was studying the inconsistent and misleading provisions governing the timing of the answer to a writ of habeas corpus under Civil Rule 81(a)(2) and Rule 4 of the § 2254 Rules, which was adopted after Rule 81(a)(2) was last amended. Correcting Rule 81 would be directly affected by and dependent on any change in the rules governing § 2254 proceedings involving the timing of the habeas corpus answer. Accordingly, Judge Niemeyer recommended that this topic should be initially addressed by the Criminal Rules Committee. Judge Jensen and Professor Schlueter, chair and reporter, respectively of the Criminal Rules committee agreed to have their committee study the issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 6).

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 5.1 AND 26.2

Judge Jensen pointed out that the amendments to Rules 5.1 and 26.2 were companion amendments. Rule 26.2 governs the production of prior statements of a witness once the witness has testified on direct examination. It has been amended several times in recent years to expand its scope to other categories of criminal proceedings besides trials, such as sentencing hearings, detention hearings, and probation revocation hearings. The proposed amendments would extend the rule's application to preliminary examinations conducted under Rule 5.1.

One member raised the possibility that the rule might be read as encompassing a witness at a preliminary examination who has testified previously at a grand jury proceeding. Some members responded that the situation was at most a theoretical possibility, since preliminary examinations are not conducted once a grand jury returns an indictment.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. CRIM. P. 31

Judge Jensen explained that the proposed amendments to Rule 31 would require that polling of a jury be conducted individually. He added, though, that the rule did not require individual polling as to each count.

The chair noticed that the text of the amended rule used "must," rather than "shall." She suggested that the use of "shall" might be more prudent in light of the Supreme Court's concern over making style changes in the rules on a piecemeal basis. Judge Jensen and Professor Schlueter concurred and said that the advisory committee would continue to use "shall" until it was ready to send forward a complete style revision of the entire body of criminal rules.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 33

Judge Jensen stated that under the current rule, a motion for a new trial based on newly-discovered evidence must be made within two years after the "final judgment." The proposed amendment, as published, would have established a time period of two years from "the verdict or finding of guilty." During the public comment period, the committee received comments that the proposal would seriously reduce the amount of time available to file a motion for a new trial under some circumstances. Accordingly, the advisory committee decided that an additional year was appropriate, and it set the deadline at three years from the verdict of finding of guilty.

One of the members questioned the use of the word "must" on lines 9 and 12. Following discussion, the consensus of the committee was that the use of "may" in the text of the existing rule should be retained.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 35

Judge Jensen pointed out that the proposed amendments to Rule 35(b) would allow a court to aggregate a defendant's pre-sentencing and post-sentencing assistance in determining whether to reduce a sentence to reflect the defendant's "substantial assistance" to the government.

Judge Jensen agreed to a suggestion to delete the comma in line of the text. He did not agree to change the words "subsequent assistance" to "later assistance," because the words "subsequent assistance" are contained in the pertinent statute and have been used in the case law.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 43

Judge Jensen explained that the proposed amendment to the rule was intended to provide consistency in the situations when the defendant's presence is required at a resentencing proceeding.

Judge Jensen noted that Rule 35(a) deals with a situation when the sentence has been reversed on appeal and the case remanded for resentencing. This involves a "correction" of the sentence, and the defendant should be present for the resentencing. But a court should be permitted to reduce or correct a sentence under Rule 35(b) or (c) without the defendant being present. Rule 35(b) deals with reduction of a sentence for substantial assistance. Rule 35(c) gives the trial court seven days to correct a sentence for arithmetical, technical, or other clear error. There was also no need to require the presence of the defendant at resentencing hearings conducted under 18 U.S.C. § 3582(c). That statute governs resentencing conducted as a result of retroactive changes in the sentencing guidelines or a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." Judge Jensen emphasized, however, that the court retains discretion to require or permit a defendant to attend any of these resentencing proceedings.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Jensen reported that the proposed amendments to the rule addressed two issues. First, under the present rule, necessary interpreters are authorized to be present during grand jury sessions, but not during grand jury deliberations. The proposed amendment would allow an interpreter for a deaf juror to be present while the grand jury is deliberating or voting.

Second, under the present rule, the entire grand jury must be present in the courtroom when an indictment is returned. The proposed amendment would authorize the foreperson or deputy foreperson to return the indictment in open court on behalf of the jury. The amendment would save time, expense, and inconvenience by not requiring the whole grand jury to be transported to the courtroom.

In addition, Judge Jensen reported that legislation had just been introduced in the Congress by Representative Goodlatte, H.R. 1536, that would reduce the size of a grand jury to nine persons, with a minimum of seven needed to return an indictment. He pointed out that the advisory committee had not had the legislation on the agenda of its last meeting. Accordingly, it had not taken a position on its merits. Historically, however, the advisory committee from 1974 to 1977 favored a reduction in the size of the grand jury.

Judge Jensen said that the current legislation had been referred for response to the Judicial Conference's Court Administration and Case Management Committee and Criminal Law Committee. Both committees had considered the measure at their recent meetings and decided to recommend referring the matter to the Advisory Committee on Criminal Rules.

The members agreed that the proposal to reduce the size of grand juries should proceed through the normal Rules Enabling Act process, even though the process takes considerable time and the Congress might resolve the matter sooner by legislation. One member suggested, however, that the issue was potentially controversial and might not be enacted by the Congress. Judge Jensen stated that the advisory committee would consider the matter at its October 1997 meeting, and any proposed amendments to Rule 6 would proceed through the normal public comment process.

Judge Jensen argued that the two changes in Rule 6 recommended by the advisory committee should proceed to immediate publication without awaiting action regarding the size of grand juries. Several members concurred and urged publication of the current amendments.

Some members, however, questioned why the proposed amendment should be limited to interpreters for deaf jurors. And one member questioned the use of the word "deaf," favoring "hearing impaired" as the more appropriate characterization.

Judge Easterbrook moved to strike the word "deaf" from the amendment. The committee approved the motion on a voice vote, with four members opposed.

Judge Jensen and Professor Schlueter responded that the advisory committee was very reluctant to open up the exception by allowing all potential types of interpreters into the grand jury deliberations. Accordingly, it had specifically limited the amendment to interpreters for deaf jurors. One participant suggested that the advisory committee explicitly solicit public comments on whether the proposal should be broadened to cover other groups.

Judge Sear moved for reconsideration of Judge Easterbrook's amendment to strike the word "deaf" from the amendment. The committee approved the motion by voice vote.

On reconsideration, the committee approved Judge Easterbrook's motion by a 6-5 vote. Then it approved without objection the amendments to Rule 5 for publication.

One of the members suggested that the committee note to the rule was inconsistent with the text. He recommended that the advisory committee rewrite the note to Rule 6(d) to notify the public that it was seeking input on the issue of how broad the exception for interpreters should be.

FED. R. CRIM. P. 11

Judge Jensen reported that the first proposed amendment in Rule 11 would merely update the rule by changing the term "defendant corporation" to "defendant organization, as defined in 18 U.S.C. § 18."

The committee voted without objection to approve the proposed amendment for publication.

The second amendment, referred to the advisory committee by the Criminal Law Committee, would add to the Rule 11(c) colloquy a requirement that the court inform the defendant of the terms of any provision in a plea agreement waiving the defendant's right to appeal or collaterally attack the sentence. He said that it was increasingly common for plea agreements to include an agreement by the defendant not to appeal. But the current rule does not require the court to inquire into the waiver of appeal. He suggested that the amendment would provide greater certainty as to the plea the defendant enters.

The committee voted without objection to approve the proposed amendment for publication.

Judge Jensen said that the final proposed changes to the rule govern plea agreements and plea agreement procedures under Rule 11(e). They had been coordinated with the United States Sentencing Commission and the Criminal Law Committee.

He explained that the rule had never been modified to take into account the impact of the sentencing guidelines, which have enlarged the very concept of a sentence and the procedures for reaching a sentence. A court, for example, now must determine whether a particular provision of the guidelines, a policy statement of the commission, or a sentencing factor is applicable in a case. Accordingly, the amendments to Rule 11(e) would recognize that a plea agreement may address not only a particular sentence but also the applicability of a specific sentencing guideline, sentencing factor, or Commission policy statement.

A member suggested that the proposed style change in lines 18-19—from "engage in discussions with a view toward reaching an agreement" to "discuss an agreement"—was inappropriate. He recommended that the language be amended to read "agree that."

Several members expressed concern that the proposed amendment to Rule 11(e)(1)(C) would authorize the defendant and the United States attorney to agree to "facts" that are not established facts. They argued that it would further remove the judge as a check on the integrity of the sentencing process and as a guardian in assuring equal treatment for all defendants. Judge Jensen acknowledged the concern and said that the Sentencing Commission also was aware of potential problems with inappropriate agreements. Nevertheless, the advisory committee and the Commission urged publication and public comment on the matter. Mr. Pauley added that Department of Justice's internal guidelines prohibit prosecutors from agreeing to unestablished facts. It was also pointed out by several members that the ultimate bulwark against abuse is the district judge's authority to reject the plea agreement.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 24

Judge Jensen explained that under the present rule, alternate jurors must be discharged when the jury retires to deliberate. The proposed amendments would eliminate this requirement, thereby giving the trial court discretion either to retain or discharge the alternate jurors.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 30

Judge Jensen stated that the proposed amendments would permit the trial court, in its discretion, to require or permit the parties to file any proposed instructions before trial.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 32.2

Judge Jensen reported that the proposed new Rule 32.2 would consolidate several procedural rules governing the forfeiture of assets in a criminal case. The changes had been motivated in large measure by the Supreme Court's decision in *Libretti v. United States*, 116 S. Ct. 356 (1995), which made it clear that forfeiture is a part of the sentence. The proposed new rule, accordingly, would incorporate forfeiture into the sentencing process. He pointed out that

the rule addressed the problem of third parties whose property rights needed to be protected. It also recognized that forfeiture proceedings are akin to a civil case and, therefore, provided for appropriate discovery.

Judge Jensen said that competing bills had been introduced in the Congress dealing with forfeiture of assets. Judge Stotler added that the bills were replete with references to the federal rules. She said that she had been struck by the fact that the Congress apparently wanted to move quickly on forfeiture legislation, but the subject matter was very complex and not well understood by lawyers and judges. There were already more than 100 forfeiture statutes on the books, and the outcome of the various forfeiture bills in the Congress was uncertain. Judge Stotler pointed out that the rules committees had attempted to deal only with a small part of the forfeiture problem, and she suggested that it would be preferable if the Congress enacted a uniform forfeiture code or simply referred all procedural issues to the rules process.

Judge Jensen responded that the advisory committee's proposal dealt only with criminal forfeiture as a part of sentencing. Mr. Waxman added that it would be desirable to have a concordance between the various statutes and rules and between civil and criminal forfeiture. Nevertheless, he urged that the proposed new Rule 32.2 be published for comment. He stated that forfeiture was a controversial subject, and the Department of Justice preferred to have criminal forfeiture procedures enacted carefully through the Rules Enabling Act process, rather than by legislative happenstance in the Congress.

Some of the members expressed concern over the complexity of the proposed rule and its blending of civil and criminal concepts. They suggested that consideration might be given to drafting a simple rule declaring that the pertinent property was forfeited to the government. Interested third parties, accordingly, would have to file a civil suit to assert their property rights.

The committee voted without objection to approve the proposed new rule for publication.

FED. R. CRIM. P. 54

Judge Jensen explained that the proposed amendment to the rule was technical. It would merely eliminate the reference to the United States District Court for the District of the Canal Zone, which no longer exists.

The committee voted without objection to approve the proposed amendment for publication.

Informational Items

Judge Jensen reported that the advisory committee had received a recommendation from the Federal Magistrate Judges Association that Rule 5(c) be amended to delete its restriction on a magistrate judge continuing a preliminary examination. He said that the advisory committee had concurred with the association on the merits of the proposal, but it concluded that the restriction emanated from the underlying statute, 18 U.S.C. § 3060, on which the rule is based. Therefore, the committee recommended that the Standing Committee ask the Judicial Conference to seek legislation to amend the statute.

Mr. McCabe added that the recommendation of the advisory committee had just been endorsed by the Magistrate Judges Committee of the Judicial Conference

Judge Easterbrook moved to reject the recommendation seeking amendment of 18 U.S.C. § 3060(c) on the grounds that the proposed change should be enacted through the Rules Enabling Act process, relying eventually on operation of the supersession clause. He pointed out that the Supreme Court recently had voided the service provisions in the Suits in Admiralty Act on supersession clause grounds. *Henderson v. United States*, 116 S. Ct. 1638 (1996)

The committee voted without objection to approve the motion.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra presented the report of the advisory committee, as set forth in Judge Fern M. Smith's memorandum of May 1, 1997 (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. EVID. 615

Professor Capra stated that the proposed amendment to the rule took account of recent statutory changes giving crime victims the right not to be excluded from criminal trials.

Judge Easterbrook expressed concern over incorporating references to specific statutes in the rules. He pointed out that statutes are frequently amended or superseded. Therefore, he argued for a generic reference to categories of persons who may not be excluded from proceedings. **He moved that the following language be added to the end of Rule 615: "(4) a person authorized by statute to be present."** Professor Capra responded that the advisory committee had included a specific statutory reference because it believed that a generic reference might not be strong enough in light of the Congress' express interest and recent actions regarding victims' rights.

The motion was approved by voice vote without objection.

Professor Capra requested that the amendment be approved without publishing for public comment, since it was merely a conforming amendment. One of the members concurred and emphasized that it was very important to move quickly on the proposal because of congressional interest and policy in expanding victims' rights.

The committee voted by voice vote without objection that the proposed amendment was conforming and approved the rule without publication for public comment.

Amendments for Publication

FED. R. EVID. 103

Professor Capra explained that proposed new subdivision (e) addressed the issue of when a party must renew at trial an in limine objection decided adversely to the party. He noted that a version of the proposal had been published once before, but later withdrawn by the advisory committee after public comments had revealed the text to be unclear. The advisory committee then redrafted the rule, patterning it in large part on a Kentucky state court rule. He pointed out that the third sentence of the new subdivision was intended to codify *Luce v. United States,* 469 U.S. 38 (1984), which held that a criminal defendant must testify at trial in order to preserve an objection to the trial court's decision admitting the defendant's prior convictions for purposes of impeachment.

In response to a question from one of the members, Professor Capra stated that the advisory committee had deliberately limited the sentence's application to criminal cases, believing that its extension to civil cases might cause problems.

Judge Easterbrook expressed several objections to the new subdivision and moved to send it back to the advisory committee for further drafting. He argued that, as formulated, the third sentence of the proposed text would apply only when the court's ruling is conditioned on "the testimony of a witness," rather than on the introduction of evidence. He pointed out that, although the *Luce* case involved testimony, the principle on which it rested is not limited to testimony. In other words, there is no logical distinction between testimony and documentary evidence. Therefore, the court's ruling should be conditioned on admissibility, rather than on testimony. In addition, the text of the third sentence implied that the court's ruling itself was conditional. In reality, it is merely dependent on a party's decision to introduce evidence.

He also questioned the formulation of the second sentence of the subdivision, which states that a motion for an advance ruling, when definitively resolved on the record, is sufficient to "preserve error" for appellate review. The implication of the text, he said, was that the movant may preserve the claim for review, but not the opponent. He added that use of the words

"preserve error" was inappropriate, since there is no intent to preserve error. Rather, the language should be recast to state that a party need not make an exception to a particular ruling in order to preserve the right to appeal. Moreover, it is the court's definitive ruling against a party that preserves the right to appeal, not "a motion for an advance ruling."

Several members expressed support for the substance of the proposal. One lawyer-member emphasized that it represented a significant improvement over the earlier draft. **The consensus of the committee, however, was that the subdivision should be returned to the advisory committee for redrafting in light of the comments made during the discussion.**

Informational Items

Professor Capra pointed out that the committee notes to several of the Federal Rules of Evidence contained inaccuracies. The notes had been prepared to support and explain the advisory committee's draft of the rules. But the rules ultimately enacted by the Congress differed in several respects from the committee's version.

He reported, for example, that the advisory committee had reviewed the notes recently and had discovered that references in 21 notes to rules that were not in fact approved by the Congress. In some instances the committee notes were directly contrary to the positions eventually taken by the Congress. Accordingly, the committee notes were a potential trap for unwary attorneys.

He stated that the advisory committee was considering preparing a short list of editorial comments pointing out the discrepancies between the notes and the rules and asking law book publishers to include the comments in their publications of the rules. He explained that the proposed comments would consist of short bullets set forth at each troublesome section of the rules. The members were asked for their initial views of this proposed course of action.

A couple of participants suggested that it might be preferable to inform law book publishers that the committee notes are not meaningful and should no longer be included in their publications. Other participants, however, responded that the notes were a part of the legislative history of the rules and should continue to be made available. Some members suggested that any action that would help clarify the matter for users should be encouraged. Professor Coquillette added that the reporters had agreed to discuss the matter at their working luncheon.

STATUS REPORT ON THE ATTORNEY CONDUCT STUDY

Professor Coquillette reported that he had completed work on the several background studies of attorney conduct that the committee had requested of him. He pointed out that the last two studies—analyzing the case law under FED. R. APP. P. 46 and bankruptcy cases involving

attorney conduct rules—were set forth as Agenda Item 7. He thanked the Federal Judicial Center in general, and Marie Leary in particular, for invaluable assistance in conducting the studies, especially the survey of existing district court practices and preferences. He also thanked Judge Logan and Professor Mooney for their help in compiling the appellate court study and Patricia Channon for her help on the bankruptcy study. He concluded that the committee had now studied attorney conduct in the federal courts in every meaningful way.

Potential Courses of Action

Professor Coquillette suggested that the committee might wish to consider four possible courses of action regarding attorney conduct:

1. Do nothing.

2. Draft a model local rule on attorney conduct that could be adopted voluntarily by the district courts, and possibly by the courts of appeals.

3. Draft a small number of national rules to govern attorney conduct in the areas of primary concern to bench and bar.

4. Draft both a model local rule and uniform national rules.

He stated that the committee had conducted two special conferences on attorney conduct with knowledgeable lawyers, professors, and state bar officials. At the conferences, the participants had expressed a wide range of diverging views on how best to address attorney conduct issues. There was no clear consensus among the participants as to whether conduct matters should be governed by uniform national rules or by local court rules. Nevertheless, the one thing that all the participants agreed upon was that the present system was deficient in several respects and that the rules committees should take some kind of action.

He pointed out that the principal advantage of national rules is that they would set forth a uniform, national standard applicable in all federal courts. National rules, moreover, would have the benefit of public comment and national debate under the Rules Enabling Act process. On the other hand, a model local rule could be adopted more expeditiously and would not have to be submitted to the Congress. He noted that the recent Federal Judicial Center survey had shown that 30% of the courts favored national rules on attorney conduct, while 62% favored a local-rule approach. He added that, to guide the committee's deliberations, he had included in the agenda materials samples of: (1) a model local rule for the courts of appeals; (2) an amended version of FED. R. APP. P. 46; and (3) uniform federal rules of attorney conduct.

The members discussed generally the advantages and disadvantages of each approach. Several members emphasized that all attorneys as a matter of policy should be governed by the

conduct rules of the states in which they are licensed to practice. They added, however, that it might be appropriate to carve out a very limited number of exceptions for federal lawyers that would govern areas where there were overriding federal interests.

Concerns of Federal Lawyers

Mr. Waxman pointed out that federal lawyers face uncertainty in their practice and need, as a minimum, a clear federal law to govern conflicts between jurisdictions. He added that federal law was needed in certain limited situations that impacted on the work of federal attorneys. Chief Justice Veasey responded that the Department of Justice's interest in uniformity was understandable. Nevertheless, state bars also want uniformity for all lawyers in the state. There should not be one set of conduct standards in the state courts and a different standard for the federal courts of that state.

Mr. Waxman was asked which conduct issues were of particular concern to the Department of Justice and federal lawyers. He responded that there were no problems with the rules governing attorney conduct within a court setting. Rather, the Department's concern was limited to areas where state ethical rules reach, or purport to reach, conduct by federal prosecutors and other attorneys conducting investigations outside the court. These include such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries.

Concerns in Bankruptcy Cases

Professor Coquillette explained that attorney conduct in the bankruptcy courts raised certain unique problems. The local rules of the bankruptcy courts generally adopt the rules of the district courts. Nevertheless, actual practice in the bankruptcy courts is very different from that in the district courts. Bankruptcy judges usually look for guidance on matters of attorney conduct to the Bankruptcy Code and to the common law of bankruptcy. There are, he said, serious differences among the bankruptcy courts in applying these laws and a lack of clear and specific conduct case law and guidelines. He recommended that further research be conducted on attorney conduct issues and practices in the bankruptcy courts.

Judge Duplantier reported that the Advisory Committee on Bankruptcy Rules had a subcommittee in place that was considering attorney conduct issues in bankruptcy cases. Professor Resnick stated that contemporary bankruptcy practice—with thousands of creditors and claimants in an individual case—raises a number of specialized conduct issues that may not be addressed adequately by existing state rules or by model local court rules. He pointed out, for example, that the Bankruptcy Code itself defines a "disinterested person," and it requires court approval of certain appointments. The statutory definition, he said, was troublesome and had been interpreted in different ways by the various courts of appeals. He also noted that the advisory committee was considering potential amendments to FED. R. BANKR. P. 2014, which

requires an attorney, or other professional person, to disclose certain information to the court as part of the appointment process.

Committee Action

Professor Hazard moved that the committee begin drafting rules, identifying the problems, and eliciting discussion.

Judge Stotler concluded that there was a consensus among the committee members that work should begin on drafting a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice. She asked Professor Coquillette to continue with the work of drafting potential rules and making presentations on attorney conduct issues to the advisory committees.

POSTING LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON THE INTERNET

Mr. Rabiej reported that courts are required by statute and rule to send copies of their local rules to the Administrative Office. The AO maintains the rules in loose-leaf binders in its library. They are not readily available to the public.

He stated that the rules office intends to begin posting the local rules on the Internet as a service to public. He added that the office had also proposed posting the official bankruptcy forms on the Internet.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker, chair of the subcommittee, reported that the subcommittee had met with Professor Coquillette and had drafted a short set of proposed guidelines designed to expedite the process of reviewing proposed amendments for style. He pointed out that the advisory committees and their reporters faced extremely short deadlines for completing drafts of proposed amendments and committee notes.

Judge Parker said that the guidelines recommended that drafts be submitted by the respective reporters to the rules office in the AO at least 30 days in advance of an advisory committee meeting. The rules office immediately would send copies to the advisory committee, the style subcommittee, and Mr. Garner, the style consultant. Mr. Garner would then coordinate and consolidate the comments of the style subcommittee within 10 days and return them to the advisory committee reporter.

The reporter would then have 10 days to consider the comments of the style subcommittee, incorporate those he or she deemed appropriate, and return a revised draft to the rules office for transmission to the advisory committee members. Accordingly, the advisory committee members would have the original draft and the suggested style changes at least one week before the committee meeting. After the advisory committee meeting, the reporter would have one week to send a copy of the text and note, as approved by the committee, to the rules office. This would allow the style subcommittee sufficient time before the Standing Committee meeting to make any necessary last-minute changes.

COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler reported that the Executive Committee of the Judicial Conference had requested the committee's views on certain Conference committee practices and procedures. She said that she had responded to an earlier inquiry by stating that there was no need for the rules committees to have liaison members to each of the circuits. Members of the rules committees should represent the system nationally, rather than circuit interests. She added that she proposed to have the committee stand on its previous position.

On the other hand, she emphasized that the use of liaisons between committees of the Judicial Conference had been very useful. She pointed out, for example, that members of the Court Administration and Case Management Committee and the Federal-State Jurisdiction Committee had been invited to attend rules committee meetings and that Judge Easterbrook had been in contact with the chair of the Court Administration and Case Management Committee on matters involving the Civil Justice Reform Act. She stated that the use of liaisons had opened up communications with other committees, and she asked for the committee's endorsement of the increased use of liaisons with other committees.

Mr. Rabiej added that the Executive Committee had asked for the committee's views on the use of subcommittees and the need for face-to-face subcommittee meetings. He pointed out that there was an attempt to reduce the number of subcommittees generally and to restrict their meetings to telephone conferences. He reported that it was the view of the advisory committees that the use of subcommittees was very beneficial and that there was a need for certain in-person subcommittee meetings. Other participants noted that much of the subcommittees' work is conducted by telephone, correspondence, and telefax. They argued strongly, however, that it was essential for the committees to have the flexibility to conduct face-to-face meetings when needed.

REPORT ON MEETING OF LONG RANGE PLANNING LIAISONS

Judge Niemeyer reported that he and Judge Stotler had participated in the meeting of long-range planning liaisons from 13 Judicial Conference committees on May 15, 1997. He

pointed out, among other things, that the liaisons had been asked to consider whether an ad hoc committee of the Conference should be appointed to consider mass tort litigation. Judge Stotler stated that Judge Niemeyer had made an impressive presentation on the extensive work of the Advisory Committee on Civil Rules over the past six years in studying mass torts in the context of class actions. Judges Stotler and Niemeyer added that the liaisons concluded that no new committee was needed, and that if any committee of the Conference were to consider mass torts, it should be the Advisory Committee on Civil Rules.

REPORT ON UNIFORM NUMBERING OF LOCAL RULES OF COURT

Professor Squiers reported that the Judicial Conference had approved the requirement that courts renumber their local rules of court by April 15, 1997, to conform with the numbering of the national rules. She stated that half the district courts had completed their renumbering, and the remaining courts were in the process of fulfilling the requirement.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the winter meeting of the committee would be held on January 8-9, 1998. She invited the members to select the location for the meeting, and they expressed a preference for Marina del Rey, California, if hotel space were available at a reasonable rate.

Judge Stotler reported further that the mid-year 1998 meeting would be held on either June 11-12, 1998, or June 18-19, 1998.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agenda F-18 (Summary)
Rules
September 1997

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 2-9

2. Approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B ..... pp. 9-12

3. Promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998 ..... pp. 12

4. Approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 16-20

5. Approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 21-23

6. Approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 26-27

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

Agenda F-18
Rules
September 1997

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on June 19-20, 1997. All the members attended the meeting, except Alan C. Sundberg. Acting Deputy Attorney General Seth P. Waxman attended on June 19. The Department of Justice was represented on June 20 by Ian H. Gershengorn and Roger A. Pauley.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Judge Fern M. Smith, chair of the Evidence Rules Committee, was unable to be present.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro,

attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; James B. Eaglin of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules completed its style revision project to clarify and simplify the language of the appellate rules. It submitted revisions of all forty-eight Rules of Appellate Procedure and a revision of Form 4 (no changes were made in Forms 1, 2, 3, and 5), together with Committee Notes explaining their purpose and intent. The comprehensive style revision was published for public comment in April 1996 with an extended comment period expiring December 31, 1996. Public hearings were scheduled but canceled, because no witness requested to testify.

The style revision has taken up most of the advisory committee's work during the past four years. The style changes were designed to be nonsubstantive, except with respect to those rules outlined below, which were under study when the style project commenced. A few additional substantive changes have been made necessary by legislative enactments or other recent developments. Almost all comments received from the bench, bar, and law professors teaching procedure and legal writing were quite favorable to the restyled rules. Only one negative comment was received—that to the effect "why change a system that has worked?"

The advisory committee recommended, and the Standing Rules Committee agreed, that the submission to the Judicial Conference and its recommendation for submission to the Supreme Court, if the changes are approved, should be in a different format from the usual

submission. Instead of striking through language being eliminated and underlining proposed new language, the changes made by the restylization project can best be perceived by a side-by-side comparison of the existing rule (in the left-hand column) with the proposed rule (in the right-hand column). Commentary on changes that could be considered more than stylistic—generally resolving inherent ambiguities—are discussed in the Committee Notes. A major component of the restylization has been to reformat the rules with appropriate indentations. Your Committee concurs with the recommendation of the advisory committee that the physical layout of the rules should be an integral part of any official version—and of any published version that is intended to reflect the official version.

In connection with the restylization project, the advisory committee and the Standing Rules Committee bring to the attention of the Judicial Conference two changes in the restyled rules—the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Although 28 U.S.C. § 46 has used "in banc" since 1948, a later law, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633, used "en banc" when authorizing a court of appeals having more than fifteen active judges to perform its "en banc" functions with some subset of the court's members. Also the Supreme Court uses "en banc" in its own rules. *See* S. Ct. R. 13.3. The "en banc" spelling is overwhelmingly favored by courts, as demonstrated by a computer search conducted in 1996 that found that more than 40,000 circuit cases have used the term "en banc" and just under 5,000 cases (11%) have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same—12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The advisory committee decided to follow the most commonly used "en banc" spelling. This is a matter of choice, of course, but both committees recommend the more prevalent use to the Judicial Conference.

The advisory committee adopted the use of "must" to mean "is required to" instead of using the traditional "shall." This is in accord with Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2 at 29 (1996). The advisory committee is aware that the Supreme Court changed the word "must" to "shall" in some of the amendments of individual rules previously submitted to the Court. In doing so, the Supreme Court indicated a desire not to have inconsistent usages in the rules, and concluded "that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than piecemeal, way." The instant submission is a comprehensive revision of all the appellate rules. Because of the potentially different constructions of "shall," *see* Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995), the advisory committee eliminated all uses of "shall" in favor of "must" when "is required to" is meant. Both the advisory committee and the Standing Rules Committee recognized room for differences of opinion and do not want the restylization work rejected due to the use of this word.

Included in this submission are some rules that have substantive amendments, all of which have been published for public comment at least once except the proposed abrogation of Rule 3.1 and the proposed amendments to Rule 22. Both of the latter changes are responsive to recent legislation. The changes to Rules 26.1, 29, 35, and 41 were approved for circulation to the bench and bar for comment in September 1995. They were resubmitted for public comment in April 1996 as a part of the comprehensive style revision. After considering suggestions received during these two comment periods, they were approved with minor changes along with the restylized version of the rules. Revised Rules 27, 28, and 32 were approved for circulation for public comment in April 1996 along with the restylized rules—with special notations to the bench and bar that these three rules underwent substantive changes. Rules 5, 5.1 (the latter of which is proposed to be abrogated), and Form 4 were sent out for comment separately, after the

restylization package. Rules 5 and 5.1 were revised because of recent legislative changes and a proposed new Fed. R. Civ. P. 23(f); Form 4 was revised because of recent legislative changes and a request by the Supreme Court Clerk for a more comprehensive form. The substantive changes are summarized below, rule-by-rule in numerical order.

Rule 3.1 (Appeal from a Judgment of a Magistrate Judge in a Civil Case) would be abrogated under the proposed revision because it is no longer needed. The primary purpose for the existence of Rule 3.1 was to govern an appeal to the court of appeals following an appeal to the district court from a magistrate judge's decision. The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c) and eliminated the option to appeal to the district court. An appeal from a judgment by a magistrate judge now lies directly to the court of appeals.

The proposed consolidation of Rule 5 (Appeal by Permission Under 28 U.S.C. § 1292(b)) and Rule 5.1 (Appeal by Permission Under 28 U.S.C. § 636(c)(5)) would govern all discretionary appeals from a district or magistrate judge order, judgment, or decree. In 1992, Congress added subsection (e) to 28 U.S.C. § 1292 giving the Supreme Court power to prescribe rules that "provide for an appeal of an interlocutory decision to the Court of Appeals that is not otherwise provided for" in § 1292. The advisory committee believed the amendment of Rule 5 was desirable because of the possibility of new statutes or rules authorizing discretionary interlocutory appeals, and the desirability of having one rule that governs all such appeals. One possible new application appears contemporaneously in the proposed new Fed. R. Civ. P. 23(f) to allow the interlocutory appeal of a class certification order. Present Rule 5.1 applies only to appeals by leave from a district court's judgment entered after an appeal to the district court from

a magistrate judge's decision. The Federal Courts Improvement Act of 1996 abolished all appeals by permission that were covered by this rule, making Rule 5.1 obsolete.

The proposed amendments to Rule 22 (Habeas Corpus and Section 2255 Proceedings) conform to recent legislation. First, the rule is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Second, the amended rule states that a certificate of appealability may be issued by a "circuit justice or a circuit or district judge." Amended § 2253 requires a certificate of appealability issued by a "circuit justice or judge" in order to bring an appeal from denial of an application for the writ. The proposed amendment removes the ambiguity created by the statute and is consistent with the decisions in all circuits that have addressed the issue.

The proposed amendment of Rule 26.1 (Corporate Disclosure Statement) would eliminate the requirement that corporate subsidiaries and affiliates be listed in a corporate disclosure statement. Instead, the rule requires that a corporate party disclose all of its parent corporations and any publicly held company owning ten percent or more of its stock. The changes eliminate the ambiguity inherent in the word "affiliates" and identify all of those entities which might possibly result in a judge's recusal. The revised rule was submitted to the Committee on Codes of Conduct, which found it to be satisfactory in its revised form.

The proposed amendment of Rule 27 (Motions) would treat comprehensively, for the first time, motion practice in the courts of appeals. The rule is entirely rewritten to provide that any legal argument necessary to support a motion must be contained in the motion itself, not in a separate brief. It expands the time for responding to a motion from seven to ten days and permits a reply to a response—without prohibiting the court from shortening the time requirements or

deciding a motion before receiving a reply. It establishes length limitations for motions and responses, and states that a motion will be decided without oral argument unless the court orders otherwise.

The proposed amendment of Rule 28 (Briefs) is necessary to conform it to the proposed amendments to Rule 32. Page limitations for a brief are deleted from Rule 28(g), because they are treated in Rule 32.

Rule 29 (Brief of an Amicus Curiae) would be amended to establish limitations on the length of an amicus curiae brief. It adds the District of Columbia to those governments that may file without consent of the parties or leave of court. The amended rule generally makes the form and timing requirements more specific, and states that the amicus curiae may participate in oral argument only with the court's permission.

Rule 32 (Form of Briefs, Appendices, and Other Papers) would be rewritten comprehensively with a principal aim of curbing cheating on the traditional fifty-page limitation on the length of a principal brief. New computer software programs make it possible to use type styles and sizes, proportional spacing, and sometimes footnotes, to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief and are difficult for judges to read. The rule was amended in several significant ways. A brief may be on "light" paper, not just "white," making it acceptable to file a brief on recycled paper. Provisions for pamphlet-sized briefs and carbon copies have been deleted because of their very infrequent use. The amended rule permits use of either monospaced or proportional typeface. It establishes length limitations of 14,000 words or 1,300 lines of monospaced typeface (which equates roughly to the traditional fifty pages) and requires a certificate of compliance unless the brief utilizes the "safe harbor" limits of thirty pages for a principal brief and fifteen

pages for a reply brief. Requirements are included for double spacing and margins; type faces are to be fourteen-point or larger type if proportionally spaced and limited to 10½ characters per inch if monospaced. Treatment of the appendix is in its own subdivision. A brief that complies with the national rule must be accepted by every court; local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize noncompliance with certain of the national norms. Thus, for example, a particular court may choose to accept pamphlet briefs or briefs with smaller typeface than those set forth in the national rules.

Rule 35 (En Banc Determination) would be amended to treat a request for rehearing en banc like a petition for panel rehearing, so that a request for rehearing en banc will suspend the finality of the district court's judgment and extend the period for filing a petition for a writ of certiorari. Therefore, a "request" for rehearing en banc is changed to a "petition" for rehearing en banc. The amendments also require each petition for en banc consideration to begin with a statement demonstrating that the cause meets the criteria for en banc consideration. An intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance"—one of the traditional criteria for granting an en banc hearing.

Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay) would be amended to provide that filing of a petition for rehearing en banc or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari both delay the issuance of the mandate until disposition of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period of a stay of mandate pending petition for a writ of certiorari is extended to ninety days, to accord with the Supreme Court's time period.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) would be substantially revised. The Clerk of the Supreme Court asked the advisory committee to devise a new, more comprehensive form of affidavit in support of an application to proceed in forma pauperis. A single form is used by both the Supreme Court and the courts of appeals. In addition, the Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners, including requiring submission of an affidavit that includes a statement of all assets the prisoner possesses. Form 4 was amended to require a great deal more information than specified in the current form, including all the information required by the recent enactment.

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, are in Appendix A with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Bankruptcy Forms Submitted for Approval

The Advisory Committee on Bankruptcy Rules submitted proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B. The proposed revisions mainly clarify or simplify existing forms. Several of the most heavily used forms were redesigned by a graphics expert, and instructions contained in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

Official Form 1 (Voluntary Petition) would be amended to simplify the form and make it easier to complete. In particular, the amendments reduce the amount of information requested, add new statistical ranges for reporting assets and liabilities, and delete the request for information regarding the filing of a plan.

Official Form 3 (Application and Order to Pay Filing Fee in Installments) would be amended to include an acknowledgment by the debtor that the case may be dismissed if the debtor fails to pay a filing fee installment. It would also clarify that a debtor is not disqualified under Rule 1006 from paying the fee in installments solely because the debtor paid a bankruptcy petition preparer.

Official Form 6 (Schedule F) would be amended by adding to the schedule (which lists creditors holding an unsecured nonpriority claim) a reference to community liability for claims.

Official Form 8 (Chapter 7 Individual Debtor's Statement of Intention) would be amended to make it more consistent with the language of the Bankruptcy Code. Language would also be deleted from the present form that may imply that a debtor is limited to options contained on the form.

Official Form 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates) includes eleven alternatives. Each form is designed for a particular type of debtor (individual, partnership, or corporation), the particular chapter of the Bankruptcy Code in which the case is pending, and the nature of the estate (asset or no asset). The forms are used in virtually all bankruptcy cases.

Form 9 and its Alternatives would be expanded to two pages to make them easier to read, and the explanatory material is rewritten in plain English. Several clerks of court expressed concern that the existing forms' instructions were difficult to understand, which resulted in many

questions from the public that consumed considerable staff resources. The advisory committee agreed that the existing instructions were inadequate. At the same time, it recognized that there would be added printing expense incurred in expanding the instructions. The advisory committee believed that better instructions were essential, and the savings realized from the expected reduction in calls to the clerks' offices asking for assistance probably would offset some of the added printing expenses. In addition, the advisory committee noted that the $30 administrative fee assessed against a debtor filing a chapter 7 or chapter 13 bankruptcy case was intended to pay for the cost of noticing. The fee would easily cover the added expense in expanding the form to two pages. On balance, the advisory committee concluded that the benefits to the public substantially outweighed the added expense.

Official Form 10 (Proof of Claim) would be amended to provide instructions and definitions for completing the form. The form also is reformatted to eliminate redundancies in the information request. Creditors are advised not to submit original documents in support of the claim.

Official Form 14 (Ballot for Accepting or Rejecting the Plan) would be amended to simplify its format and make it easier to complete.

Official Form 17 (Notice of Appeal from a Judgment, Order, or Decree of a Bankruptcy Court) would be amended to direct the appellant to provide the addresses and telephone numbers of the attorneys for all parties to the judgment, order, or decree appealed from, as required by Bankruptcy Rule 8001(a). It also informs other parties—in addition to the appellant—that they may elect to have the appeal heard by the district court, rather than by a bankruptcy appellate panel.

Official Form 18 (Discharge of Debtor) would be amended to simplify the form and clarify the effects of a discharge. A comprehensive explanation, in plain English, is added to the back of the form to assist both debtors and creditors to understand bankruptcy discharge.

Official Form 20A (Notice of Motion or Objection) and Form 20B (Notice of Objection to Claim) would be added to provide uniform, simplified explanations on how to respond to motions and/or objections that are frequently filed in a bankruptcy case.

The proposed revisions and additions to the Official Bankruptcy Forms, as recommended by your Committee, are in Appendix B together with an excerpt from the advisory committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B.

Most debtors and creditors participating in bankruptcy rely on the private sector for copies of the Official Forms. There is usually a significant lag time between the promulgation of a form revision and the date when the private sector publishes the revised new forms. In addition, some of the amended forms are notices and orders generated by the courts' automated systems and the Bankruptcy Noticing Center. Court staff and the Noticing Center will need adequate time to implement the revisions to the forms. The advisory committee recommended that a reasonable transition of about five months be authorized during which continued use of superseded forms would be permitted.

> **Recommendation:** That the Judicial Conference promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and recommended that they be published for public comment.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would only be sent to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file within a specified time period a request for payment under § 503(a) of the Code, rather than a proof of claim under § 501 of the Code or Rules 3001(a)-(d) and 3002; and (3) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal

of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003 (Meeting of Creditors or Equity Security Holders) would require the United States to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report—rather than from the date of the meeting of creditors—to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for

filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather

than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case under chapter 7.

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 23(c)(1) and Rule 23(f) on class actions, together with Committee Notes explaining their purpose and intent. The proposed amendments were part of a larger package of proposed revisions to Rule 23 circulated to the bench and bar for comment in August 1996. Public hearings on the proposed amendments were held in Philadelphia, Dallas, and San Francisco. The Standing Rules Committee approved new subdivision (f), but recommitted the proposed amendments to (c)(1) to the advisory committee.

The advisory committee's work on these proposed amendments began in 1991, when it was asked by the Judicial Conference to act on the recommendation of the Ad Hoc Committee on Asbestos Litigation to study whether Rule 23 should be amended to facilitate mass tort litigation. To understand the full scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the University of Pennsylvania, New York

University, Southern Methodist University, and the University of Alabama, as well as studied the issues at regularly scheduled meetings elsewhere. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. To shore up the minimal empirical data on current class action practices, the Federal Judicial Center, at the request of the advisory committee, completed a study of the use of class actions terminated within a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, to define the fiduciary responsibility of class representativeness and counsel, and to regulate attorney fees. In the end, with the intent of stepping cautiously, the committee opted for what it believed were five modest changes which were published for comment in August 1996.

During the six-month commentary period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and litigants who had been class members. The work of the advisory committee and the information considered by it, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the advisory committee decided to proceed with only the proposed amendments to Rule 23(c)(1) and (f) at this time. The

change to Rule 23(c)(1) would clarify the timing of the court's certification decision to reflect present practice. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying class certification. The remaining proposed changes either were abandoned or deferred by the advisory committee after further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, No. 96-270 (decided June 25, 1997) — a Third Circuit case holding invalid a settlement of a class action that potentially consisted of tens of thousands of asbestos claimants. The advisory committee carefully considered whether to delay proceeding on the proposed amendments to Rule 23 (c)(1) and (f) and wait until action on the remaining proposed amendments to Rule 23 was completed. But it concluded unanimously that the changes to (c)(1) and (f) were important and distinct from the remaining proposed changes and needed to be acted on expeditiously. In particular, the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice.

New subdivision (f) would create an opportunity for interlocutory appeal from an order granting or denying class action certification. The decision whether to permit appeal is in the sole discretion of the court of appeals. Application for appeal must be made within ten days after entry of the order. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay. Authority to adopt an interlocutory appeal provision was conferred by 28 U.S.C. § 1292(e).

The advisory committee concluded that the class action certification decision warranted special interlocutory appeal treatment. A certification decision is often decisive as a practical matter. Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. Alternatively, certification can exert enormous pressure to settle.

Because of the difficulties and uncertainties that attend some certification decisions—those that do not fall within the boundaries of well-established practice—the need for immediate appellate review may be greater than the need for appellate review of many routine civil judgments. Under present appeal statutes, however, it is difficult to win interlocutory review of orders granting or denying certification that present important and difficult issues. Many such orders fail to win district court certification for interlocutory appeal under 28 U.S.C. § 1292(b), in part because some courts take strict views of the requirements for certification. Resort has been had to mandamus, with some success, but review may strain ordinary mandamus principles.

The lack of ready appellate review has made it difficult to develop a body of uniform national class-action principles. Many commentators and witnesses advised the advisory committee that district courts often give different answers to important class-action questions, and that these differences encourage forum shopping. The commentators and witnesses who testified on proposed Rule 23(f) provided strong, although not universal, support for its adoption.

The main ground for opposing the proposed amendment was that applications for permission to appeal would become a routine strategy of defendants to increase cost and delay. The advisory committee recognized that there might be strong temptations to seek permission to appeal, particularly during the early days of Rule 23(f). It hoped that lawyers would soon recognize that appeal would be granted only in cases that present truly important and difficult issues, and that the potential for many ill-founded appeal petitions would quickly dissipate. In any event, it relied on the advice of many circuit judges that applications for permission to appeal under 28 U.S.C. § 1292(b) are quickly processed, adding little to the costs and delay experienced by the parties and trial courts, and imposing little burden on the courts of appeals. The committee was confident that, as with § 1292(b) appeals, Rule 23(f) petitions would be quickly

resolved on motion. The advisory committee concluded that the benefits of the proposal greatly outweighed the small additional workload burden.

The Standing Rules Committee concurred with the advisory committee's recommendation to add a new Rule 23(f). The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your Committee, are in Appendix C with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

In many class action cases, the decision to certify is the single most important judicial event, which often sets into motion a series of actions inexorably leading to settlement. The advisory committee heard much testimony about the intense pressure placed on the defendant to settle once a class action had been certified, rather than risk any chance of losing. The proposed amendment of Rule 23(c)(1) would amend the requirement that the class action certification determination be made "as soon as practicable." The advisory committee's proposed change to "when practicable" was designed to confirm present practice, which permits a ruling on a motion to dismiss or for summary judgment before addressing certification questions.

The Standing Rules Committee recognized that in most class action cases a judge needs sufficient information, which often requires adequate time for discovery, before making the critical class action certification decision. But concern was expressed that a delay in the certification decision might as a practical matter eliminate any real relief to some injured parties under certain circumstances, particularly when their claims may become moot if not acted on expeditiously. In addition, the advisory committee continues to study proposed revisions to other parts of the rule and could further consider the change to (c)(1) at the same time. Accordingly,

your Committee voted to recommit the proposed amendments to Rule 23(c)(1) to the advisory committee for further consideration.

Scope and Nature of Discovery

With the goal of reducing cost and delay in litigation, the advisory committee has embarked on a major review of the general scope and nature of discovery. As part of this overall discovery project, the advisory committee will address the discovery-related recommendations contained in the Judicial Conference's report to Congress on RAND's Civil Justice Reform Act study, including the need to revisit the "opt-in" "opt-out" mandatory disclosure provisions.

A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. Building on that meeting, the advisory committee, along with the Boston College School of Law, is sponsoring a symposium on discovery in September 1997. Academics will present papers that will later be published by the school's law review. Several panels of experienced practitioners and judges will also address distinct discovery issues at the conference. The advisory committee plans to meet in October to decide which specific discovery issues discussed at the symposium it will pursue.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Federal Rules of Criminal Procedure 5.1, 26.2, 31, 33, 35, and 43 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1996. A public hearing was scheduled for Oakland, California, but no witnesses requested to testify.

The proposed amendments to Rule 5.1 (Preliminary Examination) would require production of a witness statement after the witness has testified at a preliminary examination hearing. The proposal is similar to current provisions in other rules that require production of a witness statement at other pretrial proceedings.

Rule 26.2 (Production of Witness Statements) would be amended to include a cross-reference to the proposed amendment to Rule 5.1, extending the requirement to produce a witness statement to a preliminary examination.

The proposed amendment to Rule 31 (Verdict) would require individual polling of jurors when polling occurs after the verdict, either at a party's request or on the court's own motion. The amendment confirms the existing practice of most courts.

Rule 33 (New Trial) would be amended to require that a motion for a new trial based on newly discovered evidence be filed within three years after the date of the "verdict or finding of guilty." The current rule uses "final judgment" as the triggering event, but courts have reached different conclusions on when a final judgment is entered. As a result of the disparate practices, the time to file the motion has varied among the districts. The published version of the proposed amendment fixed a clear starting point to begin the time period and set two years as the outside limit. The advisory committee was persuaded by the public comment, however, that an additional year was necessary. Defense attorneys often concentrate their available time and resources prosecuting an appeal immediately after the verdict or finding of guilty and only begin considering filing a motion for a new trial when they have completed the appeal.

Rule 35 (Correction or Reduction of Sentence) would be amended to permit a court to aggregate a defendant's assistance in the prosecution or investigation of another offense rendered

before and after sentencing in determining whether a defendant's assistance is "substantial" as required under Rule 35(b). The proposed amendment is intended to recognize a defendant's significant assistance rendered before and after sentencing, either of which viewed alone would be insufficient to meet the "substantial" level.

The proposed amendment to Rule 43 (Presence of the Defendant) would clarify that a defendant need not be present: (1) at a Rule 35(b) reduction of sentence proceeding for substantial assistance rendered by the defendant; (2) at a Rule 35(c) correction of sentence proceeding for a technical, arithmetical, or other clear error; or (3) at a 18 U.S.C. § 3582(c) resentencing modifying an imposed term of imprisonment. In virtually all these proceedings, the modification of a sentence can only inure to the benefit of the defendant, and the defendant's attendance is not necessary. The court does, however, retain the power to require or permit a defendant to attend any of these proceedings in its discretion. A defendant's presence would still be required at a resentencing to correct an invalid sentence following a remand under Rule 35(a).

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, are in Appendix D with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 11, 24, 30, and 54, abrogation of Rules 7(c)(2), 31(e), 32(d)(2), and 38(e), and a new Rule 32.2 with a recommendation that they be published for public comment.

Rule 6 (The Grand Jury) would be amended to permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. The second proposed amendment would allow the presence of an interpreter who is necessary to assist a juror in taking part in the grand jury deliberations. The advisory committee recommended that the exception be limited solely to interpreters assisting the hearing impaired. But the Standing Rules Committee concluded that it would be more helpful to obtain public comment on an expanded exception to the rule that would allow any interpreter found to be necessary to assist a grand juror.

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee first considered the proposed amendment at the request of the Committee on Criminal Law. The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors) would permit the court to retain alternate jurors during the deliberations if any other regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations because otherwise a new trial would be required.

The proposed amendments to Rule 30 (Instructions) would permit a court to require or permit the parties to file any requests for instructions before trial. Under the present rule, a court may direct the parties to file the requests only during trial or at the close of the evidence.

New Rule 32.2 (Forfeiture Procedures) consolidates several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The proposed amendment was originally suggested by the Department of Justice and sets up a bifurcated post-guilt adjudication forfeiture procedure. At the first proceeding, the court determines what property is subject to forfeiture. At the second, the court rules on any petition filed by a third party claiming an interest in the forfeitable property and otherwise conducts ancillary proceedings. Parties are permitted to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent determined necessary by the court.

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

Informational Items

The Standing Committee voted to reject the recommendation of the advisory committee to seek legislation amending 18 U.S.C. § 3060 to permit a magistrate judge to conduct a preliminary examination over the defendant's objection. Criminal Rule 5(c) tracks the statutory provision, and it would also need to be amended to conform to a statutory change. At the request

of the Committee, the Committee on the Administration of the Magistrate Judges System was asked to review the advisory committee's recommendation. It agreed with the substance of the proposal and endorsed the necessary legislative and rule changes. Your Committee concluded that the proposed change should be recommitted to the advisory committee to consider action under the rulemaking process. A parallel statutory change could be pursued at the appropriate time.

A bill was introduced in the House of Representatives (H.R. 1536) that would amend 18 U.S.C. § 3321 and reduce the number of grand jurors from a range of 16-23 to 9-13, with 7 jurors instead of 12 jurors necessary to concur in an indictment. Criminal Rule 6 tracks the language of the current statutory provision. The Advisory Committee on Criminal Rules has placed the matter on the agenda of its next meeting in October 1997, which is consistent with the recommendations of the Committee on Court Administration and Case Management and the Committee on Criminal Law.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Federal Rules of Evidence 615 (Exclusion of Witnesses). The amendment would expand the list of witnesses who may not be excluded from attending a trial to include any victim as defined in the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. The amendment is intended to conform to the two Acts. These laws provide that: (1) a victim-witness is entitled to attend the trial unless the witness' testimony would be materially affected by the testimony at trial; and (2) a victim-witness who may testify at a later sentencing proceeding cannot be excluded from the trial for that reason.

The advisory committee's proposed amendment was limited to witnesses specifically defined by the two victim rights' statutes. The Standing Rules Committee concluded that a more expansive amendment was preferable to account for any other existing or future statutory exception. It revised the proposed amendment to extend to any "person authorized by statute to be present." The Committee also agreed with the request to forward the proposed amendments directly to the Judicial Conference without publishing them for public comment. Under the governing, *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* the "Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Standing Rules Committee determined that the proposed amendment, as revised, was a conforming amendment.

The proposed amendment to the Federal Rules of Evidence, as recommended by your Committee, appears in Appendix E together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

The Standing Rules Committee recommitted to the advisory committee for further study proposed amendments to Evidence Rule 103 (Rulings on Evidence) that would add a new subdivision governing *in limine* practice. The present rules do not address *in limine* practice, and this has resulted in some conflict in the courts and confusion in the practicing bar. Proposed amendments to Evidence Rule 103 were published for comment in 1995, but were eventually withdrawn. Although generally inclined to publish for comment another proposed *in limine* rule,

several members of the Standing Rules Committee expressed concern regarding certain technical issues that they believed needed first to be addressed by the advisory committee. The Committee agreed that further study by the advisory committee would be helpful before publishing another proposed change to Rule 103.

The advisory committee has refrained from considering amending Evidence Rule 702 to account for the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later decisions generated by it, until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. Several years have now passed. *Daubert* case law has rapidly developed and involves many areas not considered nor in issue in the 1993 case. The advisory committee has concluded that the time is now right for a review of Evidence Rules 702 and 703 and has placed the matter on its agenda for its October meeting. In addition, both the Senate and the House of Representatives are considering bills to codify the Court's decision.

RULES GOVERNING ATTORNEY CONDUCT

A study by the Committee's reporter of appellate and bankruptcy cases involving rules of attorney conduct and a Federal Judicial Center empirical study on rules governing attorney conduct have now been completed. The Committee was also advised of the current status of meetings between the Department of Justice and the Conference of Chief Justices on contacting represented parties. The Committee's reporter was asked to prepare some specific proposals for the Committee's consideration at its next meeting in January.

UNIFORM NUMBERING SYSTEM FOR LOCAL RULES OF COURT

Amendments to the Federal Rules of Practice and Procedure took effect on December 1, 1995, which required that all local rules of court "must conform to any uniform numbering

system prescribed by the Judicial Conference." In March 1996, the Conference prescribed a numbering system for local rules of court to implement the 1995 rules amendments. The Conference set April 15, 1997, as the effective date of compliance with the uniform numbering system so that courts would have sufficient time to make necessary changes to their local rules.

Slightly less than half of the courts were able to renumber their local rules by April 15, 1997. Several additional courts completed their renumbering before the Standing Rules Committee met in June. Other courts have advised the Committee that they are nearing completion of their local rules renumbering. The Committee continues to encourage those courts that have not yet adopted a uniform numbering system to renumber their local rules. The Committee finds promising the recent increase in the number of courts adopting a uniform numbering system, and it will continue to offer to help the courts that are in the process of renumbering their local rules.

LONG RANGE PLANNING

The chairs of the Standing Rules Committee and the Advisory Committee on Civil Rules participated in the May 15, 1997, meeting of the Judicial Conference committee liaisons on the judiciary's *Long Range Plan.* During the discussion on mass torts, the advisory committee chair described the extensive work of the Advisory Committee on Civil Rules on the study of mass torts in the context of class actions during the past six years. As previously noted, the advisory committee garnered substantial information and data on class action and mass torts practice, which were compiled into a four-volume compendium of working papers. The rules committee chairs favored the consensus of the liaisons that the individual Conference committees should continue to coordinate their respective work with the other committees involved in the study of mass tort litigation.

LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON INTERNET

The Committee was advised of ongoing efforts in the Administrative Office to place local rules of court and Official Bankruptcy Forms on the Internet. Rather than furnishing paper copies of local rules of court and any amendments to the Administrative Office—as presently required by 28 U.S.C.§ 2071(d)—courts could fulfill this statutory responsibility by placing and updating their local rules directly on the Internet. It is expected that Internet access to the rules would benefit lawyers researching local practices and relieve the clerks' offices of some of their burden in providing copies of local rules and otherwise responding to inquiries regarding them. Access to Official Bankruptcy Forms would benefit practitioners and pro se claimants in bankruptcy. Paper copies of most of these forms are not available from the courts, but must be obtained from private sector sources. The advantages of having public access to the forms on the Internet are clear.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select new amendments and proposed amendments generating controversy is set forth in Appendix F.

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix G, which shows the status of the proposed amendments to the rules.

Respectfully submitted,

Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	Alan W. Perry
Frank H. Easterbrook	Sol Schreiber
Seth P. Waxman	Morey L. Sear
Geoffrey C. Hazard, Jr.	James A. Parker
Phyllis A. Kravitch	E. Norman Veasey
Gene W. Lafitte	William R. Wilson, Jr.

APPENDICES

PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory rules committees and the Standing Rules Committee on certain new rules or controversial rules amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

The proposed style revision of the Appellate Rules is intended to improve the rules' clarity, consistency, and readability. The advisory rules committee identified and eliminated ambiguities and inconsistencies that inevitably had crept into the rules since their enactment in 1976. The style changes are designed to be nonsubstantive, unless otherwise specified and except with respect to several rules that were under study when the style project commenced. Virtually all comments from the bench, bar, and law professors on the stylized rules were favorable.

The style revision has taken up most of the advisory committee's work during the past four years. The revision of the appellate rules completes the first step of a long-term plan to re-examine all the procedural rules. The rules committees do not, however, plan to revise the Evidence Rules for style purposes because of the disruptive effect it would have on trial practice. Judges and lawyers are familiar with, and rely heavily on, the current text and numbers of the Evidence Rules during trial proceedings. The style project was launched originally by Judge Robert E. Keeton, former chairman of the Standing Rules Committee, and Professor Charles Alan Wright, the first chairman of the Style Subcommittee. The consultant enlisted by them created *Guidelines for Drafting and Editing Court Rules*, which provides a uniform set of conventions for all future writing.

Two style changes are brought to the attention of the Court — the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Like several other style changes made in the rules, these two changes represent the consensus of the rules committees on a style issue that required a decision that would be adhered to uniformly throughout the rules for purposes of consistency. The committee recognizes room for differences of opinion and does not want the restylization work to be rejected due to the adoption of either usage.

Two other rules, published and commented on for revision other than style, drew notable comment. Rule 32 is of interest because it incorporates generally the acceptability of computerized word-processing programs that assist the bench and bar in determining the proper length of briefs and size of typeface for text. The proposed amendments addressed concerns expressed by many commentators that were aimed at earlier drafts of the rule. As revised in light of these comments, the amended rule was well received by the bench and bar. Rule 35 was rewritten after careful deliberations with representatives of the Department of Justice as well as careful attention to other

proposed word choices, to the extent of setting aside preferred style conventions, in order to improve the rule.

I. Use of "en banc" instead of "in banc"

A. Brief Description

The proposed amendment to Rule 35 substitutes the word "en banc" for "in banc."

B. Arguments in Favor

- "En banc" is the common usage and is overwhelmingly favored by the courts. More than 40,000 published opinions in circuit cases referred to "en banc" and just under 5,000 opinions used the term "in banc." A similar pattern was evidenced in Supreme Court opinions, with 950 opinions using "en banc" while only 46 opinions used "in banc." The Supreme Court rules refer to "en banc."

- "En banc" was used by Congress in a statute when authorizing a court of appeals having more than fifteen judges to perform its "en banc" functions. Act of Oct. 20, 1978, Pub. L. No. 95-486.

C. Objections

- 28 U.S.C. § 46(c) sets out the requirements for an "en banc" proceeding and uses the term "in banc."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee decided that the most commonly used spelling should be followed in the stylized rules. No objection from any committee member was expressed to the proposed use of "en banc."

II. Use of "must" instead of "shall"

A. Brief Description

The word "must" is used throughout the stylized rules whenever "is required to" is intended, instead of using the more traditional "shall."

B. Arguments in Favor

- The meaning of "must" is clear in all contexts.
- The meaning of the word "shall" is ambiguous and changes depending on the context of the sentence in which it is used. In fact, the word "shall" can shift its meaning even in midsentence. It has as many as eight senses in drafted documents. It is also commonly used as a future tense modal verb, which is inconsistent with present-tense drafting.

C. Objections

- The sound of "must" is jarring in many sentences. Statutes and current rules commonly use "shall."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee initially expressed skepticism about the use of "must" instead of "shall." But on careful consideration, both committees agreed that the use of "shall" has generated much unwarranted satellite litigation over its meaning. Case law is replete with examples of courts and litigants attempting to discern its precise meaning in various contexts. "Must" has the virtue of universal and uniform meaning. Both committees are sensitive to concerns over piecemeal stylistic changes and adopted the convention of using "must" in every instance that "is required to" is intended in the rules.

Federal Rules of Civil Procedure

I. Rule 23(f) (Interlocutory Appeal of Class Action Certification)

A. Brief Description

A new subdivision (f) would permit an interlocutory appeal from an order granting or denying class action certification in the sole discretion of the court of appeals. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay.

B. Arguments in Favor

- The proposed amendment would facilitate the establishment of a body of uniform class-action certification principles.

- Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. A grant of certification can exert a reverse death knell, creating enormous pressure to settle that is often decisive as a practical matter. The need for immediate appellate review may be greater than the need for appellate review of many routine final civil judgments.

- Final judgment appeal, review on preliminary injunction appeal, certification for permissive appeal under § 1292(b), and mandamus together often fail to provide effective review. One response has been to strain ordinary mandamus principles.

- The committee was confident that, as with § 1292(b) appeals, the courts of appeal would act quickly and at a low cost in determining whether to grant permission to appeal. Significant costs would be incurred only in cases presenting such pressing issues as to warrant permission to appeal. In addition, the committee believed that although requests for interlocutory appeal may initially be frequent, that number would fall as the bar acquired experience with the rule and the appellate courts' responses to such requests.

- The committee also noted that a similar proposal had been introduced in Congress.

C. Objections

- Applications for permission to appeal would become a routine strategy to increase costs and delay.

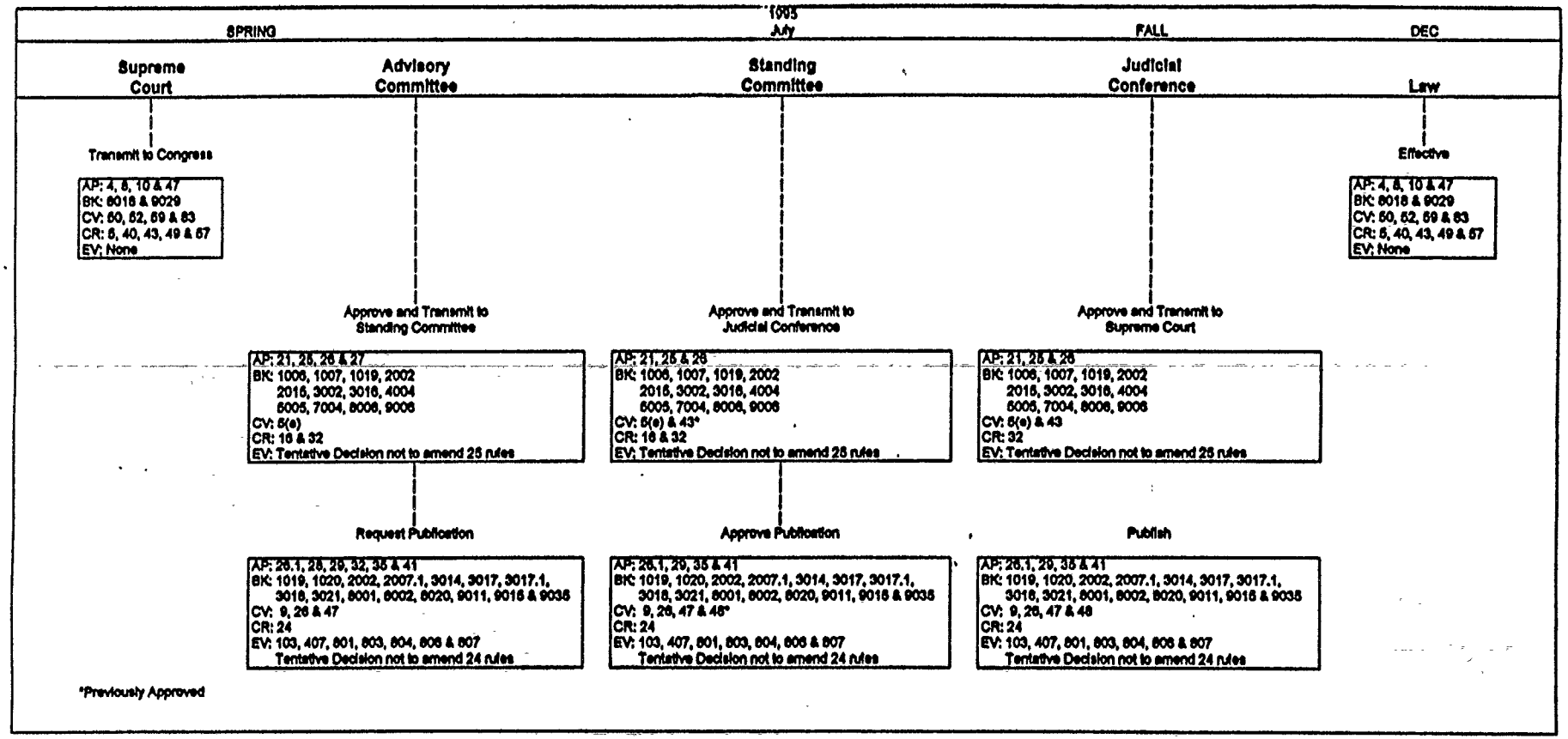
- The proposed amendment would add hundreds, maybe thousands, of motions to the already overburdened workloads of the courts of appeals.

D. Rules Committees Consideration

Both committees agreed that the benefits of the proposed amendment greatly outweigh the predictably lesser disadvantages.

PROMULGATION OF RULES AMENDMENTS
Page 1
1983
1984
Act
2010
2011
2012
Advisory Committee
Supreme Court
Standing Committee
Judicial Conference
Advisory Committee
Law
Published
Approve and Transmit to Standing Comm.
Request Publication
Approve and Transmit to Judicial Conference
Approve Publication
Approve and Transmit to Supreme Court
Transmit to Congress
Published
Effective

PROMULGATION OF RULES AMENDMENTS



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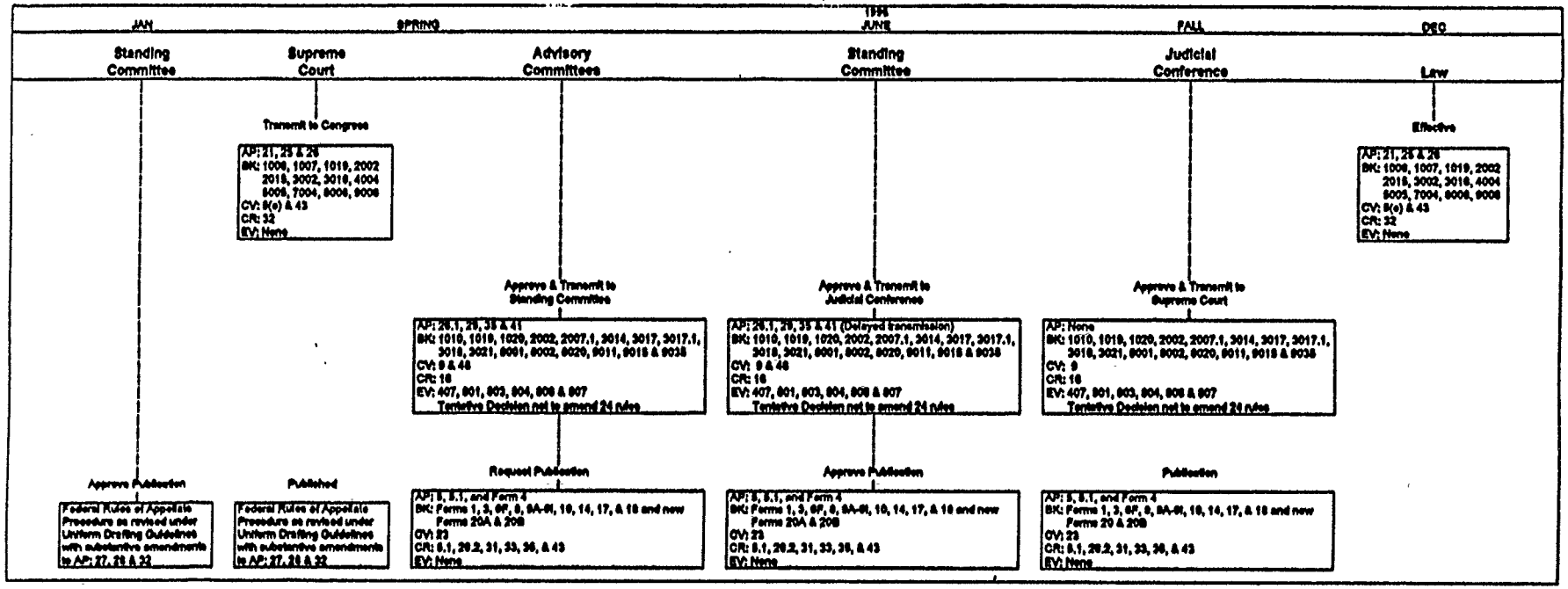

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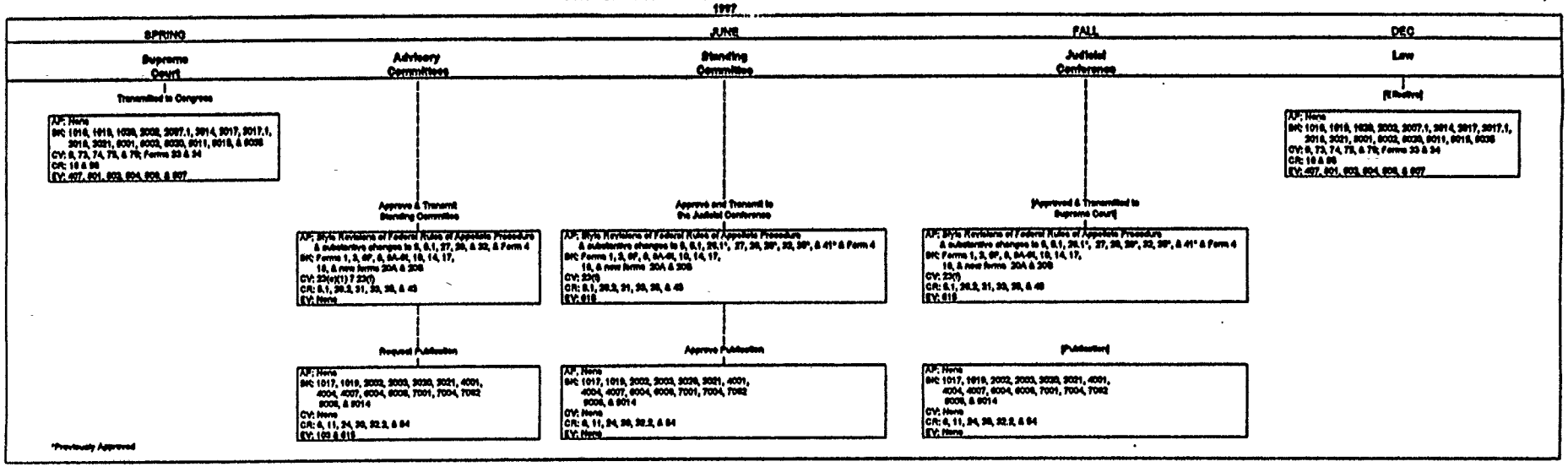
1997



Agenda Item IB

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
Copyright Rules of Practice — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by committee 10/96 — Considered by committee **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to committee 4/96 — Considered by committee 10/96 — Considered by committee, assigned to subcommittee 5/97— Considered by committee **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts; 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Subcom. **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/4 — Referred to Reporter and Chair **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Subc. **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by committee **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by committee 4/94 — Considered by committee 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV5] — electronic filing		10/93 — Considered by committee 9/94 — Published for comment 10/94 — Considered 4/95 — Committee approves amendments with revisions 6/95 — Approved by Stg Com 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee **PENDING FURTHER ACTION**
[CV6(e)] — Time to act after service	Standing Committee 6/94	10/94 — Committee declined to act **COMPLETED**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by committee 10/93 — Considered by committee 10/94 — Considered by committee 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by committee 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Committee for submission to the Jud Conf 6/96 — Stg Comm approved 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court
[CV11] — mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Letter from Blommer, Legislative Affairs Officer on general court workload concerns
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G) #2830	5/97 — Referred to reporter, chair, and agenda subcom
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration **PENDING FURTHER ACTION**

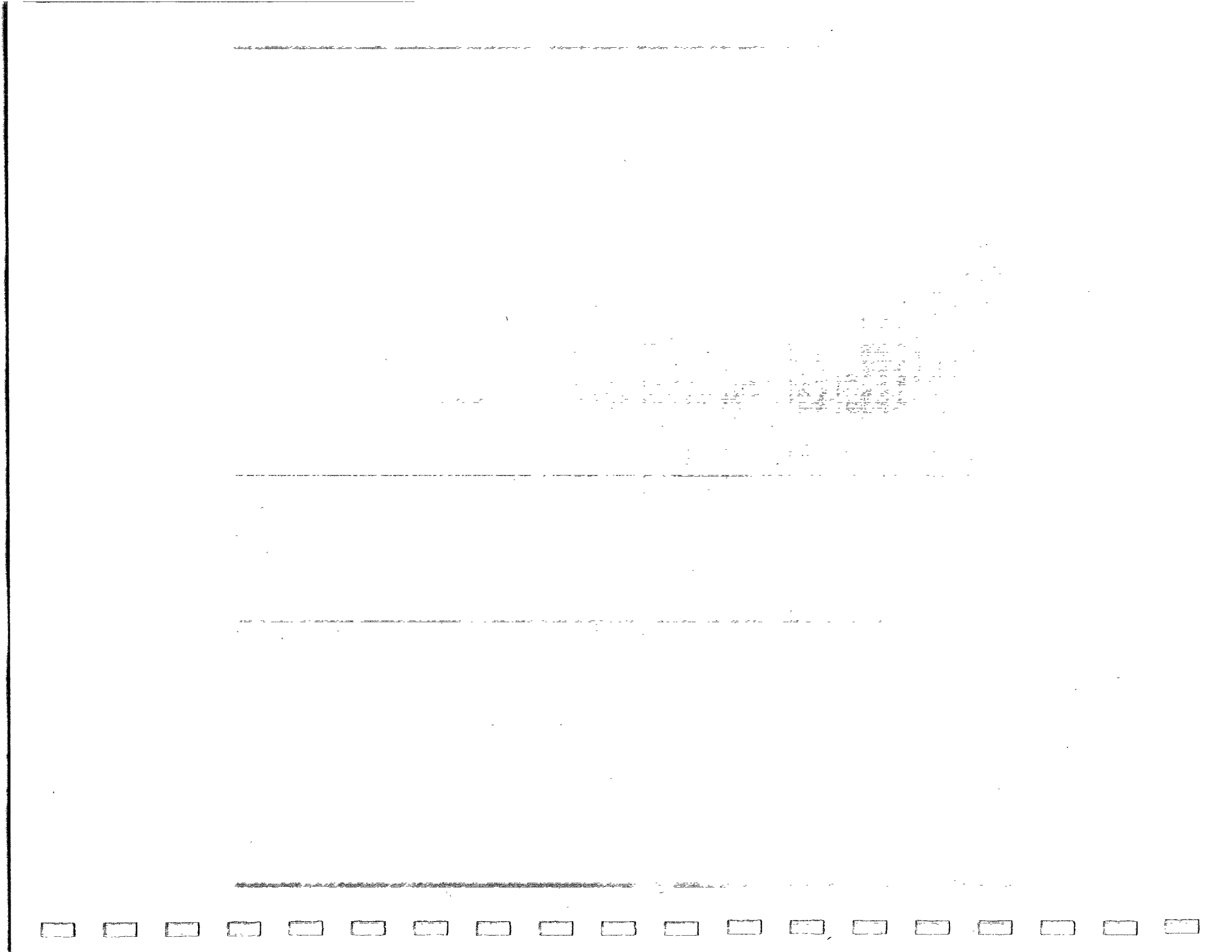
Proposal	Source, Date, and Doc #	Status
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, agenda subcom **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by committee and deferred **DEFERRED INDEFINITELY**
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by committee 6/93 — Submitted for approval for publication, withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95 — Studied at meetings 4/96 — Forwarded to the ST Committee for submission to the Jud Conf 6/96 — Approved for publication by ST Committee 8/96 — Published for comment 10/96 — Discussed by committee 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by Stg Com; changes to 23(c)(1) were recommited to advisory com **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act. **DEFERRED INDEFINITELY**
[CV26] — Revamp current adversarial system of federal legal practice — RAND evaluation of CJRA plans	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College Trial Lawy; Allan Parmlee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by committee 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by committee, subcommittee appointed 1/97 — Subc. Held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to disc. Subcom **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by committee 10/93 — Published for comment 4/94 — Considered by committee 10/94 — Considered by committee 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by the Jud Conf 4/95 — Considered by committee 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch **PENDING FURTHER ACTION**
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to Reporter, Chair, and Agenda Subc. **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96 96-CV-H	12/96 — Sent to Reporter and Chair **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96; #1045	7/31/96 — Submitted for consideration 10/96 — Considered by committee, FJC to conduct study **PENDING FURTHER ACTION**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Committee 1/95 — Stg Comm approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory committee pending review of American with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox	10/94 — Considered by committee 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Committee 9/95 — Published for comment 4/96 — Considered and ~~rejected~~ by advisory committee **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and agenda subcom **PENDING FURTHER ACTION**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by committee 7/95 — Proposed amendment approved for publication by ST Committee 9/95 — Published for comment 4/96 — Forwarded to the ST Committee for submission to the Jud Conf 6/96 — Stg Comm approves 9/96 — Jud Conf rejected 10/96 — Committee's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	Bk Committee	5/93 —Approved for publication 6/93 — Stg Comm approves publication 4/94 — Approved by committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV51] — jury instructions submitted before trial	Judge Stotler (96-CV-E)	11/8/96 — Referred to Chair **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	Bk Committee	5/93 —Approved for publication 6/93 — Stg Comm approves publication 4/94 — Approved by committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by committee 10/93 — Considered by committee 4/94 — Draft amendments to cv16.1 regarding "pretrial masters" 10/94 — Draft amendments considered **DEFERRED INDEFINITELY**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and agenda subcom **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by committee, draft presented 11/95 — Draft presented, reviewed, and set for further discussion **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	Bk Committee	5/93 —Approved for publication 6/93 — Stg Comm approves publication 4/94 — Approved by committee 6/94 — Stg Comm approved 9/94 — Jud Conf approved 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by committee 5/93 — Considered by committee 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C) ;S. 79 Civil Justice Fairness Act of 1997 and section 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by committee 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to Reporter, Chair, and Agenda Subc. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced section 303 would amend the rule 4/97 — Stolter letter to Hatch **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to committee's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 **PENDING FURTHER ACTION**
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (#1558; 96-CV-A)	10/96 — Recommend repeal rules to conform with statute and transmit to Standing Committee 1/97 — Approved by Stg com 3/97 — Approved by Judicial Conference 4/97 — Approved by Supreme Court **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to Reporter and Chair **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to Reporter, Chair, and Agenda Subc. 5/97 — Considered and referred to Criminal Rules Com for coordinated response **PENDING FURTHER ACTION**
[CV81(a)(1)] — applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Committee considered **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approve for publication 10/93 — Published for comment 4/94 — Revised and Approved by committee 6/94 — Approved by Standing Committee 9/94 — Approved by Jud Conf 4/95 — Sup Ct approved 12/95 — Effective **COMPLETED**
[CV84] — Authorize Conference to amend rules		5/93 — Considered by committee 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by committee **DEFERRED INDEFINITELY**



Agenda Item II

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

May 1 and 2, 1997

NOTE: THIS DRAFT HAS NOT BEEN REVIEWED BY THE COMMITTEE

The Civil Rules Advisory Committee met on May 1 and 2, 1997, at the LaPlaya in Naples, Florida. The meeting was attended by all members of the Committee: Judge Paul V. Niemeyer, Chair, Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Carol J. Hansen Posegate, Esq., Judge Lee H. Rosenthal, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Sol Schreiber, Esq., attended as liaison member from the Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette was present as Reporter of that Committee. Judge Adrian G. Duplantier attended as liaison member from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, and Mark D. Shapiro represented the Administrative Office of the United States Courts. Thomas E. Willging represented the Federal Judicial Center. Deborah Hensler attended and reported on the progress of the RAND Institute for Civil Justice class-action project. Observers included John Beisner, Sheila Birnbaum, Kathleen Blaner, Elizabeth Cabraser, Jonathan Cuneo, John P. Frank, Danita James, Beverly Moore, Ira Schochet, Fred S. Souk, and H. Thomas Wells, Jr. (liaison, ABA Litigation Section).

Chairman's Introduction

Judge Niemeyer opened the meeting by noting the progress of the Judicial Conference report to Congress on the results of the Civil Justice Reform Act. This Committee met in conjunction with the ABA conference on the CJRA in March. Members of this Committee had worked with members of the Court Administration and Case Management Committee to help shape the CACM draft report that was submitted to the Judicial Conference. The Judicial Conference Report has not yet been delivered to Congress, and remains "embargoed," but it is expected to report that it is good to establish early discovery cut-offs and to set a firm trial date early in the pretrial process. The Rules Committees may be asked to consider these techniques. The data gathered by the RAND study will in any event prove useful to the Discovery Subcommittee in its work.

The Policy and Agenda Committee met during the March meeting. Its work will be what its name implies. In addition to helping frame the Committee agenda, it will make recommendations on policy matters to be decided by the Committee. Several matters were discussed for consideration at the present Committee meeting.

The Policy and Agenda Committee noted that this Committee's work cannot focus only on consideration of a rule and recommendations for improvement. There are many constituencies to

be addressed. These constituencies include the familiar constituencies that make up the Enabling Act process — the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. They also include an increased level of interest within the bar, in the business community, and in the media. Congress is taking ever greater interest in procedural matters. If this Committee believes in a proposal, it probably will have to work harder to encourage adoption, keeping many different groups informed of the proposal and the justifications for it. The ideal rule change is one that is purely procedural, that "creates peace," and is satisfactory to all sides of a dispute. Achieving such changes is difficult. There is a great risk that changes will be seen to favor one "side" or the other, whether or not that is so. Discovery is a good illustration. Enough discovery to uncover the proverbial "smoking gun" always seems to be a good thing. But that may not be the fair measure of a good judicial dispute-resolution procedure. Any proposals in this area are likely to be scrutinized closely from many different perspectives and positions of interest.

It is important that we keep Congress informed of what may be coming through the Enabling Act process. It also is important to keep in touch with Congress on legislative initiatives to revise procedure. The values of the Enabling Act process must be continually emphasized. At the same time, this Committee should be alert to the possibilities of enlisting the help of Congress with matters that seem to call for resolutions that lie, in part or entirely, beyond the reach of the Enabling Act process. The interplay of substance and procedure seems to be growing ever more persistent, and may increasingly call for joint solutions.

Press releases provide one means of reaching the more numerous constituencies. The chair has begun to issue press releases, believes them to be a good and healthy means of illuminating the Committee's work, and plans to continue to use them.

There are persisting questions as to the reach of public access to Committee work. Meetings of course are public "sunshine" meetings, unless special reasons require an executive session. But what about telephone calls on Committee business? Probably they are public. Every writing exchanged on Committee work is a public paper. When in doubt, questions should be resolved on the side of keeping correspondence and other writings in Committee records. At the same time, the Committee process is a deliberative one. There are some aspects that should not require immediate publication. The subcommittees should be able to have working sessions that are not open to the public. Further questions are raised by conversations over meals, even over who is allowed to attend meals that occur during Committee meetings; by work with consultants; by conversations with those who represent one or another "interest." Committee members and staff must be sensitive to any appearance of forming relationships with those who represent defined interest points of view, and should not accept entertainment or food gifts.

Discussion of these matters led the Committee to conclude that it is proper for a subcommittee to meet or confer without public notice when, as a working committee, the subcommittee believes that course desirable.

Legislation Report

As noted in the introduction, Congress is increasingly interested in procedural matters, and in the work of this Committee. The legislative process can bypass the Enabling Act process. Often Congress does not duplicate the advantages of the extremely deliberate but thorough procedures dictated by the Enabling Act. But Congress may feel it important to get results faster than the Enabling Act permits. Accommodation of these competing interests can be difficult. The Enabling Act process will be better served if most lawyers can be persuaded of the importance and benefits of the process.

The pending legislation that is closest to the present work of the Committee would create a permissive interlocutory appeal procedure for orders granting or denying class certification. The sponsors know that proposed Rule 23(f) is well advanced, and that the Standing Committee could recommend its adoption to the Judicial Conference this summer. Other bills would create new offer-of-judgment procedures; one of them would directly amend Civil Rule 68. The Sunshine in Litigation Act, which would impose new requirements and limits on discovery protective orders, has again been introduced.

Other pending legislation that directly affects the judiciary does not seem to fall directly within the scope of this Committee's work. Among other matters, pending bills would seek to control "judicial activism," create one judge-disqualification right for all parties on each side of an action, and place limits on orders that direct increases in state or local taxes. It was pointed out that several states have statutes that allow a party to disqualify one judge from hearing an action.

The Standing Committee and other Judicial Conference committees regularly write to Congress about bills that affect federal courts and federal procedure. Judge Niemeyer also reported on his meeting with Congressman Charles Canady on Rule 23(f). It was agreed that the Committee should make Congress better aware of the Committee's work and processes. Congressional aides should be invited to Committee meetings. It will help to show Congress that the Committee's process generally enlists the help of the most able legal minds in the country, and that advice from all sides of an issue is seriously considered. But the Committee must recognize the capacity of Congress for speedy action.

Standing Committee Report

Professor Coquillette, Reporter for the Standing Committee, summarized portions of the Standing Committee's work that affect this Committee.

The Standing Committee has some responsibilities that affect all of the advisory committees alike. The style project is one. The Standing Committee wants to have all the sets of rules conform to its style conventions. It hopes that as much of the work as possible can be done by exchanges between each advisory committee reporter and the Standing Committee style consultant, Bryan Garner.

Relations with Congress are the direct responsibility of the Standing Committee. Congressional aides are regularly attending the meetings of the Evidence and Criminal Rules Committees. The Standing Committee believes it important to resist any pressures to accelerate the Enabling Act process.

The Standing Committee has devoted much effort to the questions that arise from local rules regulating the conduct of attorneys. It may decide at its next meeting on the best form of response to these problems. Among the possible responses would be a uniform or model local rule; this and some other possible forms of response are likely to be handled directly by the Standing Committee and its Local Rules project. One possibility, however, is adoption of a uniform national rule. If that form is chosen, the Civil Rules Advisory Committee is likely to become involved.

The Civil Justice Reform Act local rules are approaching the statutory sunset date. Many of them have not been adopted under the regular local rules process. To endure, they will have to be readopted as local rules, subject to the constraints on local rules.

Discussion of local rules focused on the importance of national uniformity. It has been difficult even to achieve a uniform numbering system for local rules. There is likely to be even greater resistance to efforts to achieve national uniformity by superseding local rules. Wide differences in disclosure practice have emerged under Civil Rule 26(a)(1). The local bar culture in districts that have departed from the national rule is likely to generate pressure against an amendment of Rule 26(a)(1) that would remove the permission to depart. Local lawyers feel little sympathy for the needs and interests of the mobile, nationwide federal bar. This topic will be one of the items studied by the Discovery Subcommittee, beginning with the discovery conference in September.

It was further noted that the Judicial Conference is considering the possibility of establishing a "mass torts" committee. If there are to be recommendations for substantive law, they are not likely to come to this Committee. But this Committee has gathered much information about mass tort litigation in the course of its class action work. Some means should be found to bring this Committee's experience into the study. And if any proposals are made with respect to the class action procedure established by Civil Rule 23, this Committee certainly should be heard.

Report of Discovery Subcommittee

Discovery will be the topic of the September meeting, to be held as a conference at Boston College. The meeting will be primarily a "listening" meeting for this Committee. The work of sorting through the information and setting an agenda of specific topics for consideration by the Discovery Subcommittee will come at the October meeting.

The September meeting will begin each day with a brief review of discovery history. Most of each day's program, however, will focus on panel discussions. It is hoped to get as much input as possible from practicing attorneys. Invitations to participate have been extended to many bar groups; we hope for written presentations from each.

It was suggested that there have been marked changes in discovery practice in the last four or five years. The growing use of magistrate judges and the Civil Justice Reform Act have made a big difference.

Minutes

The Minutes of the October, 1996, and March, 1997 meetings were approved.

Rule 23

Proposed Rule 23 amendments were published in August, 1996, for comment. The volume of written comments, statements, and testimony was impressive. All have been collected in a four-volume set of materials. The Committee is deeply grateful to the many lawyers, judges, and bar groups that expended great time and effort to share their experience.

Having gathered this information, the Committee now must report to the Standing Committee. Not only must the published proposals be reviewed; new proposals advanced in the process — often reflecting proposals that this Committee had considered to some extent — should be reviewed as well. At the March meeting, the Committee concluded that all Rule 23 issues should be considered open for further consideration or final action. The central issues are summarized in Judge Niemeyer's March 15 memorandum to the Committee.

Two proposals provoked the greatest volume of comments. Perhaps the greatest attention was drawn by proposed Rule 23(b)(3)(F), which would allow a court to deny class certification because the probable relief to individual class members does not justify the costs and burdens of class litigation. The reactions to this proposal demonstrated that it goes to the very heart of the purpose of Rule 23. The central question is whether — and when — Rule 23 should be used not for the purpose of providing meaningful individual relief but for the purposes of enforcing public values, of forcing wrongdoers to internalize the costs of their wrongs.

Much comment also was directed to proposed Rule 23(b)(4), which would allow certification of a (b)(3) class for settlement even though the same class might not be certified for trial. Settlement classes raised complicated issues. Some of these issues are likely to be resolved, and others illuminated, by the Supreme Court decision in the pending *Amchem* litigation. It was agreed in March that it would be premature to act further on proposed (b)(4) before the Court has rendered its decision.

The agenda materials arranged the proposals in three groups for purposes of discussion. The first group included the least controversial matters, the proposed change in Rules 23(c)(1) and new Rule 23(f) for interlocutory appeals. The second group included rather more controversial matters, proposed factors (A), (B), and (C) for Rule 23(b)(3). The third group included the proposal to amend Rule 23(e) as well as the quite controversial Rules 23(b)(3)(F) and (b)(4).

A letter from Judge Patrick E. Higginbotham, former chair of the Committee, was summarized. Judge Higginbotham suggested that the (b)(4) settlement-class proposal must await the Supreme Court decision in the Amchem case. He further suggested that years of work would be required to establish the proper shape for the concept expressed in the small-claims proposal advanced in (b)(3)(F). The remaining proposals, however, can properly go forward now.

It was asked why the settlement hearing proposal in subdivision (e) had been grouped for discussion with the controversial matters. It was responded that the hearing requirement indeed could be handled independently. Rule 23(e), however, has been closely linked throughout this process with settlement-class proposals. The proposed hearing requirement, indeed, was added as part of the decision to recommend subdivision (b)(4). Much of the testimony bearing on settlement classes suggested greater changes in subdivision (e). Further consideration of settlement classes is likely to shape not only any settlement-class proposal that may yet be made but also subdivision (e).

Timing of Proposals

Discussion turned to the question whether any part of the Rule 23 proposals should be recommended for present adoption while the settlement class questions remain pending. This question might be affected by the choice whether to open up new proposals in addition to those published for comment in 1996.

The first new proposal discussed was the possibility of adopting an opt-in class for some situations. An opt-in class could be used to replace the opt-out nature of (b)(3) classes. Opt-in classes instead could be added as an alternative to (b)(3) opt-out classes, either generally or for specific situations. One recurring suggestion was that an opt-in alternative might be a good

means of addressing classes involving claims so small that individual class members may not care about vindication of their claims.

Opt-in classes could bear on each of the new factors proposed as matters pertinent to the decision whether to certify a (b)(3) class. If a general opt-in class should be proposed, or if (b)(3) should be amended to provide for opt-in rather than opt-out classes, the factors could be affected substantially. At least as important, an opt-in proposal clearly would require publication for a new round of comment. Thought might be given to seeking advice outside the Committee even before publication.

A note of caution was sounded. The Committee has done a lot, and has worked a lot. There is no compulsion to do anything, much less to propound a comprehensive package of Rule 23 amendments. It would be proper to propose nothing for actual adoption. It would be appropriate to propose modest changes now, reserving the question whether more substantial changes should be proposed later. Substantial questions have been raised even as to proposals that were regarded as modest, and that probably should be implemented — if adopted — in a modest way. The opt-in question presents the possibility of drastic changes; if it is to be considered, it will be a long-range project. The Committee must be careful not to make a complex rule even more complex.

At the other end of the complexity spectrum, it was noted that the proposed amendment of subdivision (c)(1) and the new interlocutory appeal provision could reap significant benefits, and are easy to implement. Appellate courts have strained to take a more active role in class-action law in recent years, with good results. Affording a more regular means of involvement, increasing the opportunities for appellate review, may do much to simplify current law and make practice more nearly uniform. In addition, Congress is interested in the interlocutory appeal question; it would be good to demonstrate the responsiveness of the rulemaking process.

And so the question is what sort of package, if any, should be presented now. This question was seen to be one that could not be fully resolved before exploration of the several proposals. If some are ready to be advanced now, while others require further work, the wisdom of acting on some now will depend in part on the length of the anticipated delay. If there is likely to be a relatively extended delay, the risk of rapid successive amendments is much reduced.

The Committee agreed to consider first the (c)(1) and (f) proposals.

Rule 23(c)(1)

Rule 23(c)(1) now requires the court to determine whether to certify a class action "as soon as practicable after the commencement of an action." The published proposal would change

this to "when practicable."

The first note was that current style conventions would support a substantial rewriting of this sentence to achieve the same meaning with fewer words. At the same time, the simple change from "as soon as" to "when" has at least two virtues. It emphasizes the nature of the one intended change of meaning. And it reduces the risk that arguments will be made to find unintended changes of meaning in other language changes. It was agreed that the special complexities and sensitivities of Rule 23 counsel restraint in style.

The proposed changes in (c)(1) were approved unanimously, to be recommended to the Standing Committee for submission to the Judicial Conference.

Several changes were made in the (c)(1) Note. In part, the changes reflected the anticipated decision not to send forward now the published changes in subdivision (b)(3) or the proposed settlement-class provisions of (b)(4). Other changes deleted proposed references to public comments, to deferring the certification settlement pending settlement attempts, and to decisions that have hesitated to decide Rule 12(b)(6) or Rule 56 motions before deciding whether to certify a class. With these changes, the proposed Note was unanimously approved.

Rule 23(f)

The permissive interlocutory appeal provision of proposed Rule 23(f) was approved unanimously as published. It will be recommended to the Standing Committee for submission to the Judicial Conference.

A possible revision of Rule 23(f) was noted. Several witnesses urged that a class certification decision may rest on misunderstandings that may yield to quick correction on motion for reconsideration. Rather than force an attempt to appeal for fear of losing the 10-day time limit, the rule should provide that the 10-day appeal period is suspended by a motion to reconsider made within the 10-day period. The appeal time would begin anew upon disposition of the motion to reconsider. This revision was found to raise complicated issues that could not be easily resolved in the text of the rule. The topic was moved to discussion of the published Note to Rule 23(f).

Several changes were made in the Note, responding to the public comments and testimony. The references to 28 U.S.C. § 1292(b) were revised to make it clear that none of the restrictions that surround § 1292(b) appeals apply to subdivision (f) appeals. Passages predicting that permission to appeal would be granted with restraint, and that the proposed change is modest, were removed. The suggestions that district courts may wish to comment on the desirability of appeal, however, were retained.

The value of district court suggestions on the desirability of

appeal led discussion back to the effect of motions to reconsider. It was noted that there are no clear analogies in present practice. Section 1292(b) depends on certification by the trial judge, which can easily be withheld pending a timely motion to reconsider. The possible complications of motions to reconsider are further reduced for § 1292(b) appeals by the power of the district court to enter a new § 1292(b) certification after expiration of the time to appeal triggered by an initial certification. Since a Rule 23(f) appeal is not a matter of right, the rules that surround the effect that a notice of appeal has on continuing district court proceedings are not directly apposite. The question may arise, moreover, on motion made before a petition to appeal is filed, after a petition to appeal is filed, or after a petition to appeal has been granted. The effects on district court power to grant reconsideration and amend the certification decision may vary among these several situations. The occasions for district court reconsideration, moreover, may turn on incomplete presentation of the initial certification arguments, better knowledge of the issues that emerges as the action progresses, or partial pretrial dispositions or proposed settlements. Many of the possible problems are likely to be worked out in a pragmatic accommodation between the court of appeals and the district court. It was concluded that there are too many issues to be addressed cogently in the Note to Rule 23(f). They must be left for development as the courts of appeals find best.

Preliminary RAND Report

Deborah Hensler gave a preliminary report on the progress being made in a study of class actions undertaken by the RAND Institute for Civil Justice.

The study was initiated a year ago at the urging of Judge Patrick E. Higginbotham, then chair of this Committee.

The study is designed to build on, and supplement, the Federal Judicial Center study that was undertaken at the request of this Committee. Its goals are to describe the current class-action landscape; to describe the practices of attorneys and parties with as much objectivity as can be brought to a study based on their own descriptions of their own practices; and to assess the consequences of class actions for claimants, consumers, businesses, and society. The approach begins with creating a data base. Then practitioners are interviewed. And finally, selected cases will be studied intensively in an attempt to measure the costs and outcomes.

It was not feasible to determine the total number of class actions, either for federal courts or for state courts. Instead, an effort has been made to identify the range of class actions that are being filed. Reliance has been placed on a variety of data bases, all of them subject to electronic search. These sources will show what is going on now, but do not show changes over time.

As of April 30, interviews have been conducted with 34

different attorneys, some of whom asked associates to participate so that more than 50 attorneys have been involved. Many of the interviews have lasted several hours.

An early step was to group class actions into categories. The FJC data were consulted, with the help of the FJC, so that the FJC cases could be reshuffled into the same categories. The most numerous categories of class actions involved securities and civil rights. Employment cases, including employment discrimination, came next. The RAND data bases show a larger proportion of "consumer" class actions than the FJC data. The difference is thought to arise from the fact that state cases are included in the RAND data, and also from the fact that the RAND data cover a more recent period.

Reports of class actions in the general press for one year, from July 1, 1995 through June 30, 1996, show 3,080 class actions. This number includes cases that simply have class allegations; some of the cases may have disappeared without any action whatever, and many may never be certified.

Mass torts are a smaller proportion of class actions than the categories already noted, even including property damage cases in the mass tort category.

"Consumer" cases tend to include antitrust, fraud, and "fee" cases that involve charges by service providers — insurers, credit-card issuers, and the like. Antitrust cases often follow on the heels of public actions, or stimulate public enforcement. "Fraud" cases involve a variety of deceptive practices.

The data bases do not provide complete information whether the class actions were filed in state or federal court. Over the same one-year period, 413 appellate decisions in class actions were found. A majority of these decisions were in state courts.

The interviews show a dramatic increase in class-action activities, suggesting a doubling or tripling in the last two or three years. All agree that the increase is mostly in state courts. Multiple competing suits are increasing, as are races to certification.

There has been a dramatic change in the landscape in another way. The "absent plaintiff" class — often for an injunction, or for damages readily calculated by formula — remains, but there are now more aggregations of individual claims that require individualized determinations of damages. Common-law claims are more prevalent. There are more cases that seek a mix of remedies.

It will be very difficult to identify categories of cases that are particularly likely to present problems. The new kinds of class actions "are all over the map." Class members' damages may span a spectrum from low to high in many subject areas.

The interviews with lawyers show disagreement as to what the

problems are, and as to which problems can be fixed.

There is a lot of agreement that class actions sometimes are useful. Even defendants recognize this. And many, including even plaintiffs, agree that there are problems.

There is general agreement on many propositions. Fees play a primary role in plaintiff filing decisions. Settlements are driven by defendants' risk aversion. Unless judges exercise careful supervision, the system will encourage filing on weak claims, but also will encourage settlements that are too low in strong-claim cases.

There are attorneys who electronically scan news reports, government announcements, and like sources for events that can support class actions. Many of the resulting class actions are meritorious. Many are not. All agree that these activities help drive the surge in filings. The surge is in part fueled by the common judicial tendency to follow a "first filing" rule that gives precedence to the class — and its attorney — that first filed. This practice is a problem, however difficult it may be to correct. There also are problems arising from "copycat" filings that seek at least to become involved in the action. Some lawyers believe that it is possible, and clearly desirable, to adopt better rules as to priorities in the race to represent a class.

In private, defense lawyers will recognize that settlements are offered on the basis of little discovery, small class recovery, and nice fees for plaintiff counsel. Plaintiffs' lawyers will say that they never offer such settlements, but that defendants often approach them with such offers.

There is substantial criticism of fee awards based on noncash compensation ("coupon settlements"), or on hypothetical changes in the defendant's behavior, or on a hypothetical class size. Defendants recognize that these deals are often in their own interest. There is strong evidence that, although criticized, these practices are quite common.

If we think reform is desirable, what is the means? More demanding certification practices may help. Federal certification standards already seem to be tightening — and many lawyers think that is the reason for the movement to state courts.

The resolution process also may be a focus for change. Whether plaintiffs or defendants are the initiators of bad settlements, it is agreed that the problem is that judges often are not discharging their responsibilities to review settlements, nor their responsibilities in scrutinizing fees in relation to work done. The need for judicial supervision exists in all class actions, not only settlement classes. The interests and incentives of the parties demand that judges take their Rule 23(e) responsibilities more seriously. The strong general favor of settlement, and the sense that judges should not intrude, do not work as well here.

The final questions address the consequences of class actions, good and bad. These will require measurements of many things. Transaction costs, compensation to class members, bad products improved or good products withheld, the public repute of courts, and so on are involved. These questions will be very difficult. Broad-scale judgments probably will prove impossible. The RAND study will attempt only to focus on what a select number of individual actions have achieved.

ADR methods have been used in the post-resolution phase of class actions, primarily to determine individual damages. RAND is struggling with the question of how many individual case studies it will be able to do within budget limits. They hope to complete at least half a dozen by this fall. These studies may shed some light on the use of nationwide classes in state courts.

The Committee expressed great thanks and appreciation to Dr. Hensler for her presentation.

Rule 23(b)(4)

It was agreed without further discussion that the settlement-class proposal published as Rule 23(b)(4) should be deferred to the next meeting that discusses Rule 23. The impending Supreme Court decision in the *Amchem* case will provide a much more secure foundation for further consideration of settlement classes.

Rule 23 General Discussion

The remaining published proposals include factors A, B, C, and F in Rule 23(b)(3). In addition, the hearings have renewed more philosophical questions as to the proper role of Rule 23. These questions are summarized in the March 15 Memorandum from Judge Niemeyer to the Committee. The possibility of adopting opt-in classes has been advanced by several witnesses, and provides a useful focus for the deeper questions.

The deliberations that led to adoption of Rule 23(b)(3) in 1966 included consideration of a (b)(3) class without an opportunity to request exclusion, but it was decided not to force people to be in such a class. Opt-out was adopted. No one knew what the effects would be. Professor Kaplan, the Committee Reporter, suggested that it would take a generation to learn the consequences. We have a generation of experience. It may be time to reconsider the assumption that class members are litigants until they opt out.

In a world of perfect communication, there would be no difference between opt-out and opt-in. Each class member would actually receive notice, would fully understand the nature of the litigation and the consequences of being in the class, would form a sophisticated judgment as to the desirability of being in the class, and would opt in or out as the rule might demand. All the testimony, however, confirms the Committee's sense that there is an enormous difference between opt-in and opt-out. The "default"

mechanism is vitally important. Both the capacity of Rule 23 to accomplish important social ends and the untoward pressure that may be placed on defendants depend on how many people the class representative controls.

The present-day effects of opt-out classes have never been debated in the Enabling Act process. They were not foreseen. The question, however, is not what was intended, but what the rule has become. Plaintiffs welcome the aggregation. Defendants fear the pressure exerted by large classes, but also welcome the opportunity to achieve peace. The rule lies on the edge between substance and procedure. The proponents of the practice that has evolved around Rule 23(b)(3) argue that it is an essential public enforcement tool, a tool that Congress has relied upon. The rule in this form is not neutral in its substantive impact. Changes in the rule will have substantive impact. Should the rule have the substantive impact that comes from aggregating the "clout" of class members, or should it be only a device for aggregating the claims of those who deliberately choose to become involved? The time is right to consider this question, whether or not it proves desirable to do anything, or possible to do whatever may seem desirable.

It was suggested that opt-in classes would provide no real protection for defendants. There would be ongoing individual actions, or multiple opt-in classes. Defendants would be most unhappy with a general opt-in class provision. If opt-in classes were limited to "consumer" cases, it might not be undesirable. If more general, it would destroy the effective use of (b)(3).

John P. Frank reminded the Committee that the opt-out provision was proposed as a compromise to preserve adoption of the (b)(3) class rule. The Committee then was thinking of 100-person classes. But what they were thinking then is irrelevant now. He urged that if the action is not important enough to a person to warrant the investment of energy and postage to opt in, that person should not be a class member. Opt-in classes should be adopted, at least for the "consumer" class action. The private attorney-general notion is not a social policy that this Committee should make. Congress can do that. The virtually inadvertent creation of a rule in the 1960's should not make this Committee a tool of social regulation in place of Congress and the administrative agencies.

Support for the opt-in approach was expressed with the recognition that it will require more work. The work is worthwhile, because (b)(3) needs to be corrected.

The Committee was reminded that earlier drafts included a general opt-in provision that was an alternative to the opt-out class, not a substitute. Even if opt-in classes were adopted in place of opt-out classes, many opt-out class opportunities would remain available in the state courts. During the early stages of any study of opt-in classes, attention must be directed to the experience under the Fair Labor Standards Act procedure, adopted

also for Age Discrimination in Employment Act cases. As to the "social policy" aspect of the change, it must be remembered that any substantive effects of the present rule emerged from the rule. If the rule could be propounded in the Enabling Act process, surely the Enabling Act process can amend the rule. Amendment, however, will affect the substantive effects wrought by the initial rule.

Thomas E. Willging reminded the Committee of an empirical study conducted in the 1970's of three cases in which, without apparent authorization in Rule 23, district courts certified opt-in classes. The opt-in procedure seemed to have a dramatic effect in reducing class size.

It was urged that proposed factor 23(b)(3)(F) represented this Committee's conclusion that meaningful individual relief is the proper goal of Rule 23, not private attorney-general enforcement.

The effect of an opt-in procedure on class size was attributed to several factors. Some class members may understand and make a deliberate choice to stay out. Many, however, would not understand the class notice. And even if the notice is understood, the average person fears litigation. Class members may fear exposure to costs, discovery, or even counterclaims if they come in.

Other questions about opt-in classes involve notice, and perhaps amount-in-controversy requirements.

The importance of an opt-in class was recognized, whether as an alternative to (b)(3) opt-out classes or as a limited or general substitute. It was suggested that it would be a mistake to go forward with the small-claims proposal embodied in published Rule 23(b)(3)(F), and then to follow it promptly with an opt-in proposal, whether or not the opt-in proposal was limited to small-claims classes. It well might be that the Committee will not want to adopt a general opt-in provision. There are real risks that opt-in classes will increase, not reduce, the burdens faced by the judicial system. The motive underlying proposed factor (F) was that Rule 23 sweeps in people who really do not want to be in a class, particularly in "consumer" class actions with very small individual stakes. Opt-in classes may make particular sense as an alternative for the "(F)" cases.

This discussion of opt-in classes led back to the package that might be presented to the Standing Committee with a recommendation for action now. Settlement classes have been deferred. It is likely that any eventual proposal will require publication for another round of public comment. An opt-in proposal surely will require publication and comment. Perhaps it makes sense to hold back as well on factors (A), (B), and (C), so that a second package can be presented as a whole. On the other hand, the (A), (B), and (C) factors were shaped in large part by the desire to respond to mass tort class actions. They might go forward now, if the Committee concludes that they should be adopted, either as published or with minor changes that do not require a second

publication.

Discussion of the general approach to timing the (A), (B), and (C) proposals noted that the public comment provided much information. There was some controversy over these factors. If they were to go ahead with the change in subdivision (c)(1) and the interlocutory appeal provision of subdivision (f), the whole package might be affected by concerns directed primarily to (A), (B), and (C). A motion was made to separate (A), (B), and (C) for further study, but to defer sending them forward until the Committee has completed work on other Rule 23 issues. The motion carried by 8 votes for, 4 votes against.

Rule 23(b)(3)(A)

Proposed Rule 23(b)(3)(A) would direct the court to consider the practical ability of individual class members to pursue their claims without class certification. It was proposed primarily because of concerns that some courts may have been too eager to certify mass torts classes despite the prospect that individual class members would in fact do better by pursuing individual actions. Public comments and testimony, however, suggested several reasons for caution.

One concern, advanced in common for several of the proposals, is that changes that are intended to be modest may have unintended consequences. The most surely predictable consequence is that lawyers will seek advantage in any change, contending for unintended meanings. Years of litigation will be required to force the change into the desired shape, and even then unintended consequences may emerge.

It also was urged that proper administration of present factor (A) should accomplish everything intended by the proposed new (A). Present (A) directs attention to the interest of class members in individually controlling separate actions. A bare "interest" in separate actions means nothing if separate actions are not practically available. Practical ability, in short, already is in the rule.

Conceptual difficulties arise, moreover, in addressing the many classes whose members' claims span a wide spectrum of amounts. A single antitrust or securities class, for example, may involve members whose claims range from tens or hundreds of dollars to tens of millions. Refusing to certify a class because some members can practicably pursue separate actions does a grave disservice to the many members who cannot.

The range of claims encountered in many classes has other consequences. The 1995 securities litigation reform legislation stresses the importance of involving in class litigation the class members who have the largest claims. Unthinking application of proposed (A) could be inconsistent both with the letter and spirit of this legislation. The insights of the securities legislation, moreover, are important in all types of classes. It is important

to involve the large-stakes claimants. They may become representatives, and in any event will monitor the representatives. Inclusion of the large-stakes claimants makes it easier to achieve settlement, in part because the defendant achieves a greater measure of repose.

Large-stakes claimants also are most likely to understand the nature of a class action, and to make intelligent determinations whether to opt out of the class. There are strong reasons to remain in a class even when individual litigation is practicable. There is greater efficiency in class litigation, and the class stakes may support more thorough litigation than could be supported by even the largest individual claims. Participation in class litigation also may reduce the risks of reprisal.

Individual litigation, moreover, may lack the capacity to achieve remedies that are available in a class action. Settlements of class actions can provide remedies beyond the reach of traditional judgments, and beyond the scope available in piecemeal settlement of individual actions.

Beyond these problems lie the administrative uncertainties opened up by the proposal. There is no definition of "practical ability." Does it refer to the size of individual claims? The cost of litigation, as it may be affected by the merits? The resources available to an individual to meet the costs of litigation? The sophistication and "savvy" of each individual class member? The actual level of desire to pursue separate actions? How far will discovery be available to test these factors as to each person included in a proposed class definition?

All of these uncertainties leave it probable that different judges will respond differently. Different perceptions about the desirability of class actions in general, or about the wisdom of a particular body of substantive law, or about the apparent strength of a specific claim, will mean that class certification will depend on the identity of the judge assigned to the case.

These difficulties led to the suggestion that the possible benefits of proposed factor (A) are not worth the costs. Present (A) is very close to it. At most, the proposal would accomplish very little. The burden of justifying change lies on the proponent. The language of the proposal is unclear, and the purpose has changed over time. Initially, this proposal was linked to the later-abandoned theory that (b)(3) should be altered to require that a class action be "necessary" for the fair and efficient adjudication of the controversy. Now it has come to be linked to mass torts and an exhortation designed to encourage small claims classes. The administrative problems are manifest. Implementation could mean not only that some class members are excluded from the class definition, but also that some classes are not certified at all. A single-event mass tort such as an airplane crash, for example, might involve claims that all support individual actions.

A motion to abandon proposed factor (A) carried unanimously.

Rule 23(b)(3)(B)

Proposed factor (b)(3)(B) revised present factor (A). The focus continues to be on class members' interests in separate actions. The present reference to "individually controlling the prosecution or defense" of separate actions would be deleted, however, in favor of a more open-ended reference to separate actions. The change is intended to remind courts to consider alternatives beyond simple two-party litigation. A proposed class should be considered in relation to alternative class definitions, aggregation of individual actions by voluntary joinder, intervention, consolidation for joint pretrial proceedings by the Judicial Panel on Multidistrict Litigation, and the like.

The proposed change of emphasis was thought to be too minor to justify an amendment. There was no suggestion that the purpose was unwise. Consideration of all alternative modes of adjudication seems an inevitable part of any superiority determination. But a subtle amendment of the present rule is likely to carry greater potential for mischief than for benefit. A motion to abandon the proposed revision of present factor (A) carried unanimously.

Rule 23(b)(3)(C)

Proposed factor (b)(3)(C) would amend present factor (B) by adding a reference to the "maturity" of related litigation. The impetus came primarily from mass tort cases that have presented great uncertainty as to the causal connection between exposure to a claimed harmful thing and later injuries. The fear has been that premature adjudication can enforce or defeat claims on grounds that are disproved by later scientific knowledge. Premature settlements present parallel dangers. The hope is that deferring class litigation while individual actions develop the information needed for well-informed adjudication or settlement will improve the process. The focus has been on situations in which the court can be confident that there will be substantial numbers of individual actions, has strong reason to fear the inadequacy of the evidence that can be adduced, and has good reason to hope that significantly better evidence will be developed in the reasonably near future.

Much of the opposition to the proposal arose from the possible consequences for regulatory enforcement actions. Securities law actions were often held up as examples. Even when the facts are intricate and the law unclear, a single class action often is the best means of adjudication. The resources needed to explore the issues in depth can be mustered for a class action, but not for any individual action. There is little reason to expect that delay will improve the basis for decision. There are few individual issues to becloud the picture; damages commonly can be calculated by a common formula.

Concerns also were expressed that there is no definition of maturity, and that the lack of definition could augment the problem

of delay while individual actions are processed. Neither is there any definition of "related" litigation, of the closeness of the nexus that justifies deferring class certification.

As with the earlier proposed factors, it was observed that courts already are focusing on problems of maturity. And they may focus on maturity for different purposes than the simple advance of knowledge. In In re Norplant Products Liability Litigation, E.D.Tex.1996, for example, the court deferred certification so that trial of groups of individual claims would show whether individual issues predominate to an extent that defeats class certification.

Elizabeth Cabraser addressed the Committee, suggesting that more time is required to develop the proper role for a maturity factor. Recent appellate decisions have provided substantial guidance, whether or not the guidance is attractive to all observers. Lawyers and courts can extrapolate from the facts of recent cases. It may prove in the end that opt-in classes are desirable for mass torts, and that in this setting there is no need for a maturity factor comparable to the need that arises if mass torts are opt-out or mandatory classes. The plaintiffs will have individual lawyers, they can make well-informed decisions whether to opt in, and there will be substantial numbers of individual actions. So long as individuals are making a choice, there is no need to make them wait. And if we are asking courts to experiment, as they now are, it is better to let the jurisprudence develop. Further consideration of the maturity factor can be deferred, both in its own terms and until there is more consideration of opt-in classes.

Sheila Birnbaum also addressed the Committee. She agreed that there is a growing maturity jurisprudence, but suggested that to reject the published proposal will be seen as disapproval of the development. The Committee should not send this signal. In mass torts, opt-out works. But postponing the maturity factor for further consideration would not present this problem.

Possible ambiguities of the reference to the maturity of related litigation were noted. It was suggested that perhaps the reference should be to the maturity of the factual or legal theories advanced in the class action. This approach would avoid any implications that there must be related litigation, or that any related litigation have reached some point of maturity.

For working purposes, it was moved that this proposal be amended and carry forward on the Rule 23 docket as an amendment of present (b)(3) factor (B), approximately in these words: "the extent and nature of any related litigation, and the maturity of the issues in the controversy." The motion carried without dissent.

Rule 23(b)(3)(F)

Proposed factor 23(b)(3)(F) would make pertinent to the determination of predominance and superiority "whether the probable

relief to individual class members justifies the costs and burdens of class litigation." This proposal was the subject of many comments and much testimony. Vigorous support and vigorous opposition were offered.

Discussion focused both on the proposal as published and on the possibility of tying the concern with small claims classes to an opt-in alternative. Rather than speculate about arguments whether relief on small-stakes claims is meaningful to individual class members, an opt-in class would provide direct evidence that individual class members believe the hope for relief is sufficiently important to justify involvement in the litigation.

The Committee was reminded that pre-publication discussion in the Standing Committee focused on the ambiguity of the focus on individual relief. If it is intended to focus only on individual relief, so that a $10 recovery must be balanced against the costs and burdens of class litigation, the factor would kill consumer class actions. If it is intended to allow consideration also of the aggregate class relief, so that 1,000,000 individual $10 awards — an aggregate of $10,000,000 — would justify costs and burdens estimated at $1,000,000, the rule should say so more clearly.

Factor (F) renews the question whether this Committee should make the value choices that surround consumer classes. Small-claims classes do play a regulatory function now. Congress is aware of this function, and has regulated it, with examples including recent Truth-in-Lending Act amendments dealing with mortgage lending. There are no clear empirical data to show that small-claims classes are somehow "out of control." All we have are anecdotes. There is no clear showing that would help separate actions that serve only enforcement purposes from those that also provide meaningful individual relief.

The Committee's focus has not been on ending the regulatory use of small-claims classes. Rather, it has been attempting to find a way to regulate abusive uses of small-claims classes. The public comments and testimony show that (b)(3) classes have come to serve many purposes; many choices have been made by the courts in the process of developing (b)(3). It may be possible to curb abuses without making the cosmic choices about public law regulation through Rule 23. And it may not be possible to curb abuses even if the big choices are made.

The impact of small-claims class actions on public perceptions of the judicial process has been a recurring theme. Many observers have stated that the public is repelled by a process that turns courts into agencies for administering small recoveries. The sense of revulsion is aggravated by the frequent award of large attorney fees in these cases. These actions breed more cynicism about courts than anything short of the most publicized and exploited criminal prosecutions. John P. Frank suggested to the Committee that the big abuse is the "lawyers relief act" aspect of small-claims classes. Proposed factor (F) is the most important of all

the published proposals. Administration of present (b)(3) has unleashed a scandal.

These observations were met with the response that courts should police fees more directly and effectively. Large aggregate recoveries justify substantial fees. "Coupon" recoveries or other meaningless class relief do not. Judicial regulation of fees, however, is difficult. Even if a court pleads for participation and opposition in the fee-review process, there is little interest. Judges cannot regulate fees without help from objectors.

Support for further consideration of proposed factor (F) was expressed. The Committee gave birth to a rule that has profound impact. The Committee, however, is not the body responsible for determining how far the rule's unforeseen consequences are in the public interest. There should be some constraint on certifications. It is difficult to express them with precision. The published proposal is as good as can be managed.

The focus of (F) on "probable" relief was questioned. This word seems to invite consideration of the likely outcome on the merits, a consideration that the Committee once determined to add to (b)(3) and then deliberately abandoned. At the same time, the Committee refused to determine whether (F) permits consideration of the probable outcome on the merits. The time has come to decide, and the decision should be against confusing the certification process with an anticipatory trial on the merits. The rule should refer to "requested" relief rather than "probable" relief.

The Committee was reminded that "requested" relief had earlier been considered and rejected. The difficulty is that few if any complaints demand "coupon" or similarly small relief.

One compromise would be to delete "probable," so that the rule would refer only to "the relief to individual class members." This would reduce any implied reference to success on the merits, without binding the court to any extravagant demands set out in the pleadings.

It was observed that the language of proposed (F) is vague. Actual administration will give it many meanings. Each judge will be right, and each will be wrong. It may be better to address these problems by adopting an opt-in class as a means of making sure that the class-member plaintiffs really "are there."

Further doubts were expressed about the prospect that a rule can be drafted that will accomplish whatever purpose the Committee may finally reach. The hope is to separate out "bad" class actions that impose great burdens on courts and defendants to no real purpose. The amount of individual recoveries is at best a crude proxy for this purpose. The proxy, moreover, can work only in cases that involve uniformly small stakes; when some class members have larger claims, administration could become very difficult. Opt-in classes may help in this setting, if those with significant claims actually do opt in. On the other hand, if those with

significant claims fail to opt in, the result may be defeat of important individual interests as well as significant public enforcement interests.

Turning to the means of separating opt-in classes from opt-out classes, it was suggested that the test should be whether individual claims are so significant that it is fair to infer consent to class litigation by class members who fail to opt out. Failure to opt out by those who hold significant claims often justifies the inference of knowing consent to be represented by the class action. Failure to opt out by those who hold small claims does not justify the same inference.

It was urged on the other hand that the small-claims class members are those who most need the protection of a class action. They have no realistic alternative means to assert their claims, but many are likely to fail to opt in for reasons that do not reflect disinterest.

Discussion of the disposition to be made of proposed factor (F) led back to the drafting questions. The focus on "individual" relief was challenged again, with the suggestion that this word be deleted, or that "aggregate" be added — "whether the aggregate relief to [individual] class members" justifies class litigation. As an alternative, it was suggested that "individual" simply be removed: "whether the [probable] relief to class members" justifies class litigation. Deletion of "individual" relief would not make (F) meaningless; "coupon" cases and small total recovery cases would be denied certification. This alteration would completely change the intended character of (F). The focus was on individual benefits on the ground that class actions are justified only by individual benefits, not by public enforcement purposes. The Committee did decide that the private attorney-general function is not the stuff of Rule 23 procedure.

The reference to "probable" relief was defended on the ground that the class certification decision is made early in the litigation. An absolute prediction of relief cannot be made; only probable relief can be considered. The focus should be on the relief that will be given if the class wins on the merits. One suggestion was "the likely relief should the class succeed."

These problems led to the suggestion that (F) should be dropped entirely. Administration of any version that might be drafted will not be worth the effort. And any proposal will be challenged on the ground that it is advanced for substantive purposes. We know what the present factors identified in 23(b)(3) mean, even if the meaning is indefinite. The rule should not be complicated further.

The question was raised whether certification can be denied under present Rule 23(b)(3) on the ground that a class action is not superior to other means of adjudication when only de minimis individual benefits will follow. The Committee has regularly been

advised that certifications are now denied on this ground. At the same time, if this ground of denial is proper, it should be expressed in the rule. Denial can then be stated openly, and reviewed in its own terms.

Discovery as to probable relief seems inevitable if factor (F) should be adopted. This will add administrative burdens and delay.

Factor (F) continued to stir discussion of the character of Rule 23. Is it simply a device for aggregating claims? Or does it also serve public enforcement purposes? How far can we adopt a "common sense" provision that authorizes rejection of proffered classes that "just ain't worth it"? If the problem is that some present class certifications should not be made, can a good cure be found that justifies the controversy that inevitably will surround any attempted cure? Adoption of a proposal aimed at restoring "common sense" to some portion of present practice inevitably will lead to a vast body of law seeking to define common sense. It is difficult to add precision to concepts that have been developed into well-defined contours of vagueness. Attempting to attain precision will be costly.

The question whether some version of factor (F) should continue on the agenda for further discussion at the October, 1997 meeting, despite misgivings about the published proposal and the variations that have been suggested, was resolved by consensus. The proposal should carry forward as part of the Rule 23 agenda, with five alternative forms: (1) add a reference to aggregate class relief, while dropping the reference to recovery by individual class members; (2) create an opt-in class that is available only as an alternative to opt-out classes in small-claims cases; (3) refer not to "probable" relief but to "likely relief if the class wins"; (4) the proposal as published; and (5) do nothing. It was agreed that information should be provided about experience with opt-in classes under the Fair Labor Standards Act procedures, including experience with Age Discrimination in Employment Act cases.

Other Rule 23 Proposals

Repetitive class attempts. One of the problems that has been noted is the succession of efforts to win class certification, or to foster parallel and overlapping classes. In addressing certification of a (b)(3) class, the court should be directed to consider "whether a class has previously been certified or denied for the same claims by any court." Even if this practice is adopted by most courts now, it should be in the body of the rule. It does not preclude a court from certifying a class that has been denied by another court, nor from certifying a class that has been certified by another court. It simply urges caution in considering the predominance and superiority questions. Although there may be similar problems with (b)(1) and (b)(2) classes, they have not been urged on the Committee and it is better not to tinker with those classes. The likely place for the amendment would be as an addition to present factor (B). A motion to consider this proposal

as part of the Rule 23 agenda was adopted, 8 votes for and 1 vote against.

Common evidence. Several of those who commented and testified on the published proposals urged consideration of a "common evidence" provision to bolster the "predominance" requirement in Rule 23(b)(3). Classes have been certified in which individual elements predominate. One version would require that the trial evidence be substantially the same as to all elements of the claims asserted by class members. A less ambitious version would add a new factor asking "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." This version would focus on common evidence of the fact of injury, not the amount of injury. The point of separation is between liability — which includes the fact of injury — and proof of the individual quantum of damages.

This proposal would defeat the opportunity to include in a class members who have not yet experienced injury. Mere exposure would not establish the "fact of injury," unless state law allows compensation for the fear or risk of future injury.

This proposal is meant to restrict the use of issues classes. Whether common issues predominate depends on the purposes for which the class is defined. The focus on common proof as to the fact of injury would defeat certification of an issues class that is confined to a subset of the liability issues. All liability issues should be tried in the class, or there should be no class. "Issues" classes are a snare and a delusion. Causation questions, for example, are not as readily divided into "general" and "specific" issues as some would wish.

The proposal is not meant to defeat the use of subclasses when the predominance of common issues can be achieved in that way. Variations in state law, for example, may be met by grouping different states into a limited number of subclasses that account for the variations without forcing state-by-state subclasses.

Concern was expressed that this approach may require undue inquiry into the merits of the claims at the certification stage.

A motion to consider alternative forms of a "common evidence" requirement carried by 9 votes for, 2 votes against.

Notice: It was urged that the Committee take up for consideration the draft that would allow sample notice in actions that join in a (b)(3) class very large numbers of members who typically have small claims. A thoughtful letter from Professor David Shapiro has urged this proposal.

Due process concerns were expressed that sample notice may defeat any justification for an opt-out class.

It was noted that the earlier draft on notice addressed

several questions. It sought to encourage notice language that is intelligible to class members. It provided for notice in (b)(1) and (b)(2) classes. It also provided for notice in opt-in classes.

A motion was made to add a full notice draft to the Rule 23 agenda. The motion was resisted on the ground that the Committee has been trying to narrow the scope of its further Rule 23 work. The motion failed. It was agreed, however, that should the Supreme Court find occasion to address notice questions, the Committee should study whatever the Court might say.

Burden of persuasion and legal indeterminacy: An observation was made that none of the many class-action proposals have suggested a satisfactory response to the central dilemma created by the public-enforcement function of (b)(3) classes. Private enforcement of the public interest is usually desirable when clearly established facts establish a clear violation of clear law. But the decision to file is not made by public officials charged with discretionary responsibility to determine whether unremitting enforcement of the law in a particular situation serves the public interest. Private decisions to file may be motivated by misguided views of the public interest, or by less worthy motives. Defendants may be at an unfair disadvantage because a class action multiplies the risks of mistaken factfinding or law application. Defendants are at risk in another way as well. Even with the best of intentions and the most sophisticated legal advice, it is easy to violate the rules in many areas of modern regulatory law that abound in shades of gray uncertainty. The great stakes at risk, the high costs of litigating, and the inescapable residual fallibilities of adjudication create irresistible pressures to settle even ill-founded claims. These dangers could be addressed directly. Plaintiffs in a (b)(3) class could be required to prove the facts by clear and convincing evidence, and to show that the clearly proved facts establish violation of clear legal rules. These elevated showings would be required only in (b)(3) class actions, as the price for use of a procedural device that combines the potential for great benefit with the risk of great injustice. Ordinary standards of persuasion and enforcement against good-faith violations would continue to apply in other settings. This observation was not made as a suggestion for present action or even further consideration. It was offered instead as an illustration of the forms of direct response that might be made to the persisting dilemmas posed by Rule 23(b)(3).

Rule 81(a)(2)

Rule 81(a)(2) states the time to return a writ of habeas corpus. The statement is directly inconsistent with the later and superseding provisions of Rule 4 of the rules that govern habeas corpus proceedings governed by 28 U.S.C. § 2254. It also is probably inconsistent with the rules that govern other habeas corpus proceedings, at least to the extent that § 2254 Rule 1(b) authorizes resort to Rule 4 in proceedings not governed by § 2254.

Something must be done to bring Rule 81(a)(2) into conformity with the later § 2254 rules.

It is not clear what is the best course. It may be that habeas corpus proceedings governed by the general provisions of 28 U.S.C. § 2241 should be controlled by the § 2254 rules for all purposes. It may be that distinctions should be drawn, as they now are. And it may be that a distinction in the time to answer is appropriate. The possible need for distinctions is most likely in petitions brought by persons in federal custody but outside the provisions of 28 U.S.C. § 2255.

All of these matters must be worked out with the Criminal Rules Advisory Committee, which has had primary responsibility for the § 2254 Rules. The Committee directed its Reporter to work with the Reporters for the Standing Committee and the Criminal Rules Committee in developing a solution to these questions.

Admiralty Rules B, C, and E

Mark Kasanin reported as chair of the Admiralty Subcommittee. Substantial progress has been made in working on proposed amendments to Admiralty Rules B, C, and E. Delay has been required to allow consideration of a revised forfeiture Rule C(6)(a) proposed by the Department of Justice. It is hoped that a final draft of the proposed revisions will be ready by early summer, to be reviewed by the full subcommittee and refined in time to be presented to this Committee in the fall.

Future Meetings

The September meeting will be devoted to the discovery conference. The October meeting will review the September discovery conference and select proposals to be developed by the Discovery Subcommittee for further consideration at the following spring meeting. In addition, the October meeting will resume consideration of Rule 23 proposals and such other matters as prove ready to be considered.

Respectfully submitted,

Edward H. Cooper
Reporter

DRAFT MINUTES

Federal Rules of Civil Procedure Advisory Committee

September 4 to 6, 1997

The Advisory Committee met on September 4 and 5, 1997, at the Boston College Law School to participate in a symposium on the discovery system established by the Federal Rules of Civil Procedure. The Policy and Agenda subcommittee and the Discovery subcommittee met at the Boston Park Plaza Hotel on Saturday, September 6.

All Advisory Committee members attended the symposium, including Judge Paul V. Neimeyer, chair; and Judge John L. Carroll; Judge David S. Doty; Justice Christine M. Durham; Francis H. Fox, Esq; Assistant Attorney General Frank W. Hunger; Judge David F. Levi; Mark O. Kasanin, Esq.; Carol J. Hansen Posegate, Esq.; Judge Lee H. Rosenthal; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Chief Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper attended as Reporter, and Professor Richard Marcus attended as Special Reporter for the Discovery Subcommittee. Professor Geoffrey C. Hazard, Jr.; Alan W. Parry, Esq.; Judge Morey L. Sear; and Sol Schreiber, Esq., attended as members of the Standing Committee on Rules of Practice and Procedure. Professor Daniel R. Coquillette, Reporter for the Standing Committee, acted as host for the Law School. Peter G. McCabe, John K. Rabiej, and Mark Shapiro attended for the Administrative Office of the United States Courts. The many presenters, panel members, and participants in the symposium are listed with the record of the symposium.

These Minutes will not attempt to summarize the two days of papers presented, panel discussions, and general participation discussion. The papers are to be published in the Boston College Law Review, and a full record of the discussions is to be prepared.

Judge Niemeyer provided a brief summary of the symposium events at the conclusion. On behalf of the Committee, he thanked all panels, presenters, and participants. The information and advice offered to the Committee were invaluable. Inevitably, many divergent experiences and views were expressed.

He noted that there seemed to be substantial consensus that uniformity in the disclosure and discovery rules is important. Some form of disclosure seemed to be acceptable to most participants. But the discussion suggested changes that might improve disclosure. The concern that present disclosure rules distort and invade the relationship between attorney and client might be addressed by changing disclosure to a sequence in which the plaintiff first discloses the support presently available for the plaintiff's position, followed after an interval by the defendant's disclosure of the support presently available for its position. The concern that immediate disclosure of damages calculations might require an impossible chore in some

circumstances suggests reexamination of Rule 26(a)(1)(C). Expert witness disclosure under Rule 26(a)(2) also may deserve reconsideration.

There was nearly unanimous agreement that discovery presents serious problems in only a minor fraction of all federal-court cases. It is important that any changes made to address the problem cases not upset the good working of discovery in most cases. One approach might be to establish a relatively limited system of discovery to be managed by the attorneys, with court intervention only as a last resort, coupled with the right of any party to opt into a court-supervised system in which greater discovery is permitted. Access to a judge would be an integral part of the court-supervised system.

There was great support for an early discovery cut-off, coupled with the early setting of a firm trial date. It was commonly agreed that this combination works best if the firm trial date is close to the discovery cut-off date.

The Advisory Committee is not committed to making any changes. Discovery is a centrally important aspect of our adversary procedure. Adjusting it in any way is a sensitive and delicate responsibility. The Committee also recognizes that Congress remains interested in discovery topics, and hopes to continue the long record of mutually respectful relationships.

Special thanks and congratulations were expressed to Judge Levi and Professor Marcus for organizing an outstanding event, as well as to Peter McCabe, John Rabiej, and Mark Shapiro. And a final note of thanks was made to Professor Coquillette and the Boston College Law School.

DRAFT MINUTES

Policy & Agenda and Discovery Subcommittee Meetings

September 6, 1997

The Policy and Agenda and Discovery Subcommittees met on Saturday, September 6, 1997. Advisory Committee Chair Judge Paul V. Niemeyer and Reporter Edward H. Cooper were present for both meetings. Professor Daniel R. Coquillette attended as Reporter for the Standing Committee on Rules of Practice and Procedure.

The Discovery Subcommittee meeting was attended by Judge David F. Levi, Chair; Judge David S. Doty; Francis H. Fox, Esq.; Carol J. Hansen Posegate, Esq.; and Judge Lee H. Rosenthal. Professor Richard L. Marcus attended as Special Reporter.

The Policy and Agenda Subcommittee meeting was attended by Judge Anthony J. Scirica, Chair; Judge David F. Levi; and Phillip A. Wittmann, Esq. Mark O. Kasanin attended to report on proposals of the Admiralty Rules subcommittee.

John K. Rabiej and Peter G. McCabe represented the Administrative Office at both meetings.

Policy and Agenda Subcommittee

The Policy and Agenda Subcommittee meeting began with the observation that the proposal to amend Civil Rule 23(f) has been placed on the consent calendar for the September Judicial Conference meeting.

The main topics for the October 6 and 7 meeting will be discovery, Rule 23, and proposals to amend the Supplemental Admiralty Rules.

The Rule 23 work will include all of the proposals held on the agenda for further study after the May Advisory Committee meeting, as well as the two new proposals that were added. The discussion of settlement classes of course will spring from the Supreme Court decision in the Amchem case.

The Rule 23 work will be tied to continuing work with mass torts. The Rule 23 study and hearings have provided a great deal of information about mass tort litigation. The Long-Range Planning Committee is very interested in exploring mass tort problems through the Judicial Conference Committee structure, and the Civil Rules Committee has special advantages because of this longstanding study. A study group should be formed, perhaps including a few people who are not Advisory Committee members.

Mark Kasanin described the work being done by the Admiralty Rules Subcommittee. The Admiralty Rules have applied to forfeiture proceedings without any variation from the procedures used for in rem admiralty proceedings. There have been confusions in terminology arising from this combination, particularly with respect to divergent uses of the "claim" concept. It seems desirable to provide more time to respond in forfeiture procedures

than can be accommodated in admiralty proceedings. And there are various changes that should be made to catch up to the reformulation of Civil Rule 4 and new forfeiture statutes. The Maritime Law Association will provide further views on the only two matters that remain uncertain in the proposals. And the Administrative Office will keep in touch with the progress of pending legislation that would directly amend Admiralty Rule C. Mr. Kasanin reported that representatives of the Maritime Law Association and the Department of Justice planned to attend the October meeting, and it was agreed that the Admiralty Rules topic should be placed on the agenda for discussion during the morning of Tuesday, October 7.

Professor Coquillette observed that he would want half an hour on the agenda of the October meeting to present information on the progress of proposals to shape rules affecting attorney conduct. The Federal Judicial Center has completed its study of local rules in this field. The Standing Committee is interested in studying a draft of national rules on attorney conduct that would govern specific matters. One possible format will be an amendment of Civil Rule 83 that incorporates by reference an appendix of 8 to 10 rules on the problems that most affect the district courts. The Standing Committee is taking on initial responsibility for this chore because the topic cuts across the responsibilities of most of the several advisory committees. The Bankruptcy Rules Advisory Committee, indeed, has already appointed a subcommittee to study this topic. A further reason for proceeding with this topic now is that the Department of Justice and the Conference of Chief Justices seem to be approaching agreement on a draft Rule 4.2. If everyone — including the American Bar Association — agrees on a resolution, a national uniform rule seems within reach. It was observed that the district courts that have undertaken to enforce disciplinary rules themselves, rather than refer infractions to state disciplinary bodies, have been unhappy with the experience. Local case law grows up, creating possible confusions. Professor Coquillette responded that the core rules generally will govern matters that a judge must do anyway. The new rules will take over state disciplinary standards.

Judge Niemeyer stated that a subcommittee of the Advisory Committee will be appointed to work with the disciplinary rule proposals.

It was suggested that proposals by the Department of Justice to amend Civil Rules 4 and 12 for "Bivens" cases may be ready in time for consideration on the October agenda. It was concluded, however, that the agenda will be so crowded with Rule 23, discovery, and the Admiralty Rules proposals that this topic most likely should be put on the agenda for the spring meeting.

The lack of organized response by copyright groups to the proposal to abolish the Copyright Rules was noted. It was concluded that rather than rush them into hasty response, the topic would be put on the spring agenda.

It was noted that the October agenda could include a technical change to Civil Rule 6(b) that would abolish the cross-reference to Civil Rule 74(a), to conform to the repeal of Civil Rule 74.

Finally, the Committee must be sure to attend to the topics commended to it by the Judicial Conference Report to Congress on experience under the Civil Justice Reform Act. Many of these topics are caught up with the ongoing discovery project. At least one, however, is in part independent, calling for study of Rule 16 to determine whether it should be amended to provide further support for alternate dispute resolution methods. These items should be placed on the October agenda, recognizing that most will carry forward as part of the discovery project.

As a separate matter, Congress continues to be interested in offer-of-judgment proposals that would shift attorney fees. The Committee has studied such proposals in the past, and has concluded that they are very complicated. In addition, feeshifting has manifest substantive characteristics. The central question may be whether there is some way in which the Committee can be of help to Congress as Congress wrestles with these intricately difficult problems. This subject should be noted in the October agenda.

Discovery Subcommittee

Judge Niemeyer began by noting areas in which there was not much disagreement during the discovery symposium.

There was strong support for restoring uniformity, deleting the local option to discard the national disclosure rules. If uniformity is to be restored, there must be some change in Rule 26(a). This will provide the occasion for reconsidering the present disclosure rules. There also will be problems as local CJRA plans expire. Without statutory authority, many local practices will become invalid because they have not been adopted by Local Rules.

The present disclosure rule could be retained, simply deleting the local option to reject it. But there was much interest in revisions that would address many of the objections that have been advanced since the beginning. One approach is to change disclosure to a device that elucidates the issues as well as they can be understood at the beginning of an action, so as to give direction to subsequent discovery (if any). A staged sequence could be developed, beginning with the plaintiff's statement of the issues as presently understood and with an identification of the witnesses and documents that will be used to support the plaintiff's position on those issues. After an interval, the defendant would respond with a comparable statement of the issues as the defendant understands them, with comparable identification of the witnesses and documents the defendant will use to support its position on those issues. This system would greatly reduce the complaint that present disclosure forces each attorney to betray client interests and confidentiality, working to develop the other party's theories. It also might substantially alleviate the concern that the

limitation of disclosure to disputed issues alleged with particularity in the pleadings does not provide much guidance for disclosure. There is some prospect that both plaintiffs and defendants can agree on such a system; plaintiffs lawyers at the conference seemed to react to it with favor. Most of the bar would prefer to scale back disclosure. The subcommittee should prepare a statement of this approach for consideration by the Advisory Committee in October, understanding that likely there is not enough time to prepare actual draft language.

The disclosure alternatives submitted for discussion should include abolition of all disclosure. Even with staged disclosure, a defendant may not know enough about the case to be able to make meaningful disclosure early in the proceedings. Notice pleading complaints often tell very little.

It also may be appropriate to reconsider the expert disclosure requirements of Rule 26(a)(2). Providing both for a written expert witness report and a deposition seems unnecessary duplication. Federal cases require a large volume of paper as it is.

A second step that should be presented to the Advisory Committee for study is a two-staged discovery process. The first phase would be attorney-controlled, probably with substantial limits on the amount of discovery that can be had. The total hours of deposition time might be limited; the number of interrogatories might be reduced below the present level; some limit on document discovery could be added. In this area, the parties should be expected to manage discovery without interference or help from the court. This proposal might even omit the meeting now required by Rule 26(f). Only in case of special difficulties should the judge be invoked. Any party wishing discovery in excess of these limits would be required to propose a discovery plan, if possible with the concurrence of other parties. Judicial approval would be required. This approach would provide the judicial supervision that so many participants asked for during the discovery symposium.

It was asked why there should be attempts to amend the rules to take care of cases that are not now a problem. There are many cases with little or no discovery. They present no difficulty. The response was that a 100 mile-an-hour speed limit is a problem even if 95% of the travelers drive at 55. Requiring judicial supervision for discovery beyond some relatively low threshold would take care of those who now take untoward advantage of the outer boundaries of the present discovery rules. The system is a kind of tracking — it is the lawyers who initiate the tracking, rather than the court or some abstract formula provided by rule. It responds to the difficulty of drafting rules that tell the court to get involved when court involvement is desirable.

One approach to this lawyer-option tracking is to view it as a means the lawyers have for pushing judicial involvement. It should go beyond a management plan for the cases that need it, as seen by the parties, to include exhortations that the judge should be available for prompt disposition of discovery disputes. It

would be desirable to encourage informal submission of simpler disputes, without papers or memoranda, and oral disposition. Care must be taken, however. Some local rules require written supporting memoranda; to preempt them, an explicit contrary provision would be needed in the Civil Rules. And however an explicit provision might be drafted, there is a risk that it would encourage lawyers in the belief that they have a right not to submit discovery motions orally in all cases, not alone in the simpler disputes appropriate to this procedure.

Beyond these provisions, the desire for discovery cutoffs and early-set, firm trial dates might also be addressed. One approach would be through the discovery rules, setting a default rule that requires all discovery to be initiated within a defined period — perhaps six months after issue is joined. A rule also could require early setting of a trial date. This approach runs into the feeling of some that such matters are better handled as a matter of practice, not by Civil Rule. There is ample provision for this sort of planning through Rule 16 now. The case can be got moving by an early Rule 16 conference — the routine cases can meet this need by providing for handling by someone from the clerk's office. And when actual judge involvement is required, it can be by letter, by telephone, or by other means measured to the needs of the case. The Discovery Subcommittee will review these issues and prepare drafts.

The use of a "time clock" for depositions was discussed separately. Some local rules, and some state rules, provide time limits on depositions. Texas is considering rules proposals that would allocate a set time — 40 hours — for all depositions by each "side." A single side could allocate all of its 40 hours to one deposition, or to 40, or in any other proportion. It was objected that while a time clock may work at trial, where a judge supervises the allocation of time between each party, it will be very difficult to supervise during depositions. This topic will require further study, but should be part of the proposals brought to the full Committee.

Discussion turned to the question whether more help should be asked from the Federal Judicial Center. The FJC staff would like to undertake an inquiry into the discovery costs incurred by clients, information that has not been captured by any past studies. It seems clear that parties often incur great costs in responding to discovery, but there are not careful empirical studies to sketch the dimensions of the costs. If only the target would stand still, moreover, a present study by the FJC could provide an important source of comparative information for later studies of the effects of any discovery changes that might be made. It also is possible that the FJC might be able to find a way to measure the frequent complaint of lawyers that it is difficult to secure prompt judicial attention to discovery disputes and prompt discovery rulings. Comprehensive data on the time from submission of discovery disputes to the time of disposition would give an important basis for learning whether there are widespread general

problems, or only isolated and occasional difficulties. But it may be difficult to capture a full picture. Docket information, for example, may not reflect all discovery activity. There is a particular danger that docket information may not reflect the practices of judges who hold themselves available for telephone resolution of discovery disputes at any time. And it is fair to ask whether we should force judges to make records of such informal dispute resolution proceedings, either for present study purposes or as a long-range policy.

There is some indication that the Product Liability Advisory Council would like to submit party-cost information from its members. If in fact they should decide to provide such information, it is important that it be made readily available to all of the interested organizations that participated in the discovery symposium. Independent reactions will assist the committee in evaluating any information that might be provided. In addition, it is possible that some of the organizations could provide competing information, covering such matters as the internal discovery costs borne by plaintiffs. Such information would amplify statements at the symposium discovering the care that contingent-fee firms take in assessing the probable costs and benefits of proposed discovery programs. All of these groups have been helpful, and must continue to be involved in any further inquiries. Professor Marcus, as Special Reporter for the discovery project, will write to the bar groups that participated in the discovery symposium, thanking them for their participation and inviting submission of information about party costs.

It was concluded that some combination of the reporters and Judge Levi should discuss three projects with the FJC. The FJC should be asked to gather data on local federal rules and state rules that limit the time for individual depositions or limit the total time available for all depositions in a case. The FJC should be asked to consider the possible opportunities and to submit proposals about two added studies. One would explore the time required to dispose of discovery disputes. The other would explore the costs incurred directly by the parties in responding to discovery demands. And, of course, the FJC should be encouraged to finish the further steps it has in mind for using the data gained in its current discovery survey. The FJC will be asked to aim for a February 1 submission, to be ready in time for the spring Advisory Committee meeting.

Turning to other discovery items for the October agenda, it was agreed that the American College of Trial Lawyers proposal on the scope of discovery should be included. This proposal should be coupled with an alternative that would limit the scope of discovery only as to documents. Other proposals as well should be catalogued.

The protective order proposal published in 1995 should remain in the materials to be further considered.

The symposium provided much discussion of the practical

problems in developing Rule 26(b)(5) privilege logs. There also was discussion of the great costs incurred to screen documents to avoid inadvertent waiver of privilege. It was noted that this problem often is addressed by stipulated protective orders that include nonwaiver provisions, but recognized that such stipulations between the parties are not likely to bind nonparties. It also was noted that there are questions of Enabling Act competence to deal with waiver of state-created privileges, and of the special limits on addressing privilege rules through the Enabling Act. The Evidence Rules Committee should be consulted on any waiver provisions.

The symposium also emphasized the emerging problems that arise from computer storage of information. The problems are particularly acute in at least two special areas. One area involves formulation of the search queries for computer-stored information, and review of the results of the queries so as to develop further queries. The inquiring party may prefer to shape the inquiries — when it is possible to learn enough of the way the storage system is programmed — but there may be grave objections to providing access to all of the irrelevant and confidential information that is likely to be mixed in with the properly responsive material. Another area involves the great difficulties of knowing what has become of information that has been moved out of the organized storage system. Often there are vast quantities of information stored in back-up media, but stored in essentially random form and without any workable index. A party may know that these media have unknown contents, and can certify that there is no relevant information there only after incredibly expensive searches through mountains of material that would never have been considered during earlier and organized storage periods. In addition, there may be special problems with discarded information. Current technology frequently means that "erased" information remains available until something else is written over it. Again, parties may have much information that they believe they do not have at all. An inquiring party may prefer that its own experts attempt to retrieve the information through direct access to the storage device. And there may be a particularly acute problem that a discovery order prohibiting the destruction of any current information will literally freeze a computer system because of the risk that further ordinary use will write over "deleted" but not forgotten information.

The problems of discovering computer-stored information seem vast and unmanageable. A special subcommittee should be appointed, charged in part with coordinating with the Standing Committee's technology committee.

Respectfully submitted,

Edward H. Cooper, Reporter

Agenda Item III

CIVIL RULES ADVISORY COMMITTEE

Agenda Materials: October 6 & 7, 1997

DISCOVERY: The report of the Discovery Subcommittee is submitted as a separate book of material that can be kept for convenient use at future meetings.

RULE 23: The class action material is voluminous, but the volume need not be daunting. The two main items are relatively brief — a memorandum on "Rule 23 Issues Carried Forward" and a separate memorandum on the Amchem decision. The first memorandum covers issues discussed in May, 1997, and carried forward for further discussion, as well as two new issues raised for the first time at the May meeting. The second memorandum provides some preliminary reactions to the Amchem decision and its relationship to the new Rule 23(b)(4) that was published for comment in 1996.

In addition to these new materials, a number of familiar items are provided for convenience. The issues carried forward are fleshed out by the most immediately relevant portions of the memorandum that described them for the May meeting. This discussion can be supplemented by referring to the relevant portions of the draft Minutes for the May meeting, set out separately in this book. Settlement class issues are fleshed out by providing the May summary of comments on the published (b)(4) proposal, and by providing also the two settlement-class proposals advanced by Professors Coffee and Resnik, and by Judge Schwarzer. The importance of these supplemental materials will depend on the direction chosen by the Committee.

ADMIRALTY RULES: The proposals to amend Admiralty Rules B, C, and E are set out in a self-contained package. To accommodate the representatives from the Maritime Law Association and the Department of Justice, these proposals have been set for discussion on Tuesday morning, October 7.

CJRA REPORT: The Judicial Conference Report to Congress on the Civil Justice Reform Act included several items for consideration by the Standing Committee and this Committee. Many of these items are part of the continuing discovery project. The Report is included in full, with a brief note focusing on the items recommended to this Committee.

OTHER ITEMS: (1) The Policy and Agenda Committee has set two topics for the spring agenda. The first is a proposal by the Department of Justice to address problems that arise when a government officer is sued in an individual capacity on a "Bivens" claim. The proposal would amend Rules 4 and 12 to require service on the United States, and to allow a 60-day period to answer. The second is the longstanding proposal to do something about the Copyright Rules, which literally apply only to practice under the long-since superseded Copyright Act of 1909. (2) Offer-of-judgment bills continue to be introduced in Congress. Although there is no present occasion for extensive discussion, materials summarizing the Committee's most recent consideration of Civil Rule 68 are

included as a reminder of the complexity of these problems. There is no apparent reason to devote any time to this enterprise. The materials are there for anyone who wants to refresh the topic. (3) There is a technical change that needs to be made some time, perhaps in conjunction with a modestly growing collection of other technical changes. The Supreme Court has transmitted to Congress the proposal to amend Civil Rule 73, and to abolish Civil Rules 74, 75, and 76, to reflect repeal of the statutory provision that permitted the parties to agree that appeal from a final judgment entered by a magistrate judge would be taken to the district court. Civil Rule 6(b) refers to Civil Rule 74(a) as one of the rules setting a time period that cannot be extended by the district court. The reference to Rule 74(a) should be stricken from the list.

Agenda Item IV

Standing Committee Discussion of Rule 23(c)(1) Proposal

Schreiber opened the discussion by noting that certification "when" practicable is what is happening every day.

Easterbrook first repeated his skepticism about changing one part of Rule 23 separate from the rest. On the merits, he doubted the wisdom of the (c)(1) proposal. A fundamental choice was made in 1966 to require prompt certification decisions, so as to make the final disposition "res judicata both ways." This proposal will take us back to the days of one-way intervention. Certification rulings will be made only after summary judgment has been denied, and it looks as if the class will win. There are additional difficulties when the certification decision is delayed so long that the representative plaintiffs are mooted out — and in some kinds of benefits litigation, this is a frequent occurrence.

Perry suggested that the proposal may be more substantive than it first seems. Usually defendants want to limit discovery to class issues at the outset. Deferring certification could impact the balance, shifting discovery more toward the merits.

Hazard asked what are the purposes and interests involved in measuring "practicability"? A definitive rule identifying the purposes and interests is not likely — all that can be done in the rule is to provide a protocol. The impact on absentees is the most serious question. Inasmuch as the Committee has more Rule 23 work to do, perhaps they should try to articulate better what they want to do with (c)(1).

Waxman suggested an inclination to oppose the proposal because it is good to have an exhortatory element in the rule, even if we cannot live up to the aspiration in every case.

Wilson suggested that one problem at the district court level is the failure of some district judges to act on things.

Perry said again that the change will be used as a tool to argue against the bifurcation of discovery, doing class issues first. Even if there was very little comment on the proposal in the first round of hearings, there would be more comment if it were sent out by itself.

Veasey agreed with Easterbrook.

Niemeyer stated the assumption that the present vote on (c)(1) is only for further consideration by the Advisory Committee, not to abandon the proposal. There was no dissent from this statement.

The recommendation to send proposed Rule 23(c)(1) to the Judicial Conference failed on voice vote.

Agenda Item IV A

REPORTER'S MEMORANDUM

Rule 23 Issues Carried Forward

Several class-action issues were considered at the May, 1997 meeting, and held open for further action. These notes summarize those issues and propose draft language to address them. The drafts are often quite tentative, reflecting merely one choice among several competing approaches.

Although these notes are designed to stand alone, consideration of several of these issues can be eased by consulting the minutes of the May meeting, and perhaps by referring back to the memorandum that presented many of the issues on the May agenda. Portions of the memorandum are appended.

Rule 23 Issues Revisited
October, 1997

"Maturity": "Factor (C)" Revisited

Discussion of the "maturity" factor at the May, 1997 meeting centered on its origins in cases that pose the specific problems of scientific uncertainty. The situation that gave rise to the 1996 proposal can be illustrated by silicone gel breast implant litigation. The litigation was brought in a setting of great scientific uncertainty as to the effects that might be caused by the implants. There is real reason to fear that an attempt to reach a comprehensive class-wide resolution in such circumstances will prove wrong. Deserving plaintiffs may be denied compensation, uninjured plaintiffs may be awarded compensation, and both effects may occur simultaneously. Settlements may be reached that overcompensate the class or fail to achieve adequate compensation. Recent appellate decisions have focused attention on these problems.

Public comments and testimony suggested that a general maturity factor could cause unwarranted difficulties for cases that do not involve the scientific uncertainty involved in a few mass tort cases. There are many forms of class action, now "traditional," that involve complex issues of fact and novel issues of law. Often a class action is superior precisely because of the complexity of the facts and the novelty of the law. Effective litigation requires that the parties marshal the resources that are warranted only by a once-for-all proceeding. Delay to await completion of individual actions can only augment expense at best, and at worst may defeat any relief. The focus of the proposal should be on situations in which the court can be confident that there will be substantial numbers of individual actions, has strong reason to fear the inadequacy of the evidence that can be adduced, and has good reason to hope that significantly better evidence will be developed in the reasonably near future. It may be better, however, to resist the suggestion that maturity should be a factor only in cases that involve uncertain scientific knowledge about the causal nexus between underlying events and claimed injuries.

The discussion led to suggestion of this language for a revised factor (B):

> **(B)** the extent and nature of any related litigation, and the maturity of the issues involved in the controversy;

The Note might look like this:

> Subparagraph (B) has been modified in two respects. The focus on "litigation concerning the controversy already commenced by or against members of the class" has been simplified. The new focus on "the extent and nature of any related litigation" eliminates any requirement

that the related litigation have been commenced before the action in which class certification is requested. The court should be able to consider any related litigation, including the prospect that better means of resolving the controversy may be found in an action that has not yet been filed. The new focus also avoids the complications that might arise from focusing on litigation involving "members of the class." Account can be taken, for example, of related litigation that involves parties not within a proposed class definition, or parties who have opted out of the proposed class. The concept of "related" litigation should be given a practical meaning in other ways as well. What counts is not an abstract concept of relatedness but a realistic appraisal of the competing opportunities to resolve a dispute by one class action, several class actions, or other methods of aggregation such as transfer under 28 U.S.C. § 1407, voluntary joinder, or intervention.

The other respect in which subparagraph (B) has been modified is the new focus on the maturity of the issues involved in the controversy. The maturity element has been suggested by cases that rest on uncertain scientific premises about the causal connection between underlying events and asserted injuries. Premature certification of a class in such circumstances creates grave risks. A single determination for or against the class claim may be wrong, inflicting undeserved liability or denying deserved compensation. A settlement wrought in face of such uncertainties may likewise result in over- or under-compensation. If class certification is deferred, experience with individual litigation may help develop the information required for accurate adjudication, or may demonstrate that class treatment is not warranted. If the results of individual actions begin to converge, class certification may be supported; if the results continue to diverge, the risk of error in any class adjudication may defeat any certification.

Experience with individual litigation may illuminate the predominance requirement as well as the superiority requirement. Individual trials can show whether common issues will in fact predominate at trial, or whether so many individualized matters such as causation, comparative fault, injury, and damages typify the claims that class treatment is not appropriate.

The maturity element must be managed with caution. Class certification often may be supported, not defeated, by the presence of complex fact issues and novel legal issues. Examples are provided by many areas of familiar

class adjudication, including actions under the antitrust, civil rights, employment discrimination, and securities laws. Many, most, or even all class members may lack the means or incentive required to litigate their claims in separate actions. All parties and the courts may benefit from a single class action that brings together the resources required for effective litigation and the means to avoid unnecessary duplication. Delay of class treatment may only add to costs, encourage inconsistent results in ill-prepared litigation, and defeat recovery by some deserving class members.

The focus of the maturity requirement should be on situations in which the court can be confident that there will be substantial numbers of individual actions, has strong reason to fear the inadequacy of the evidence that can be adduced to support accurate decision on the merits, and has good reason to hope that significantly better evidence will be developed in the reasonably near future.

Rule 23(b)(3)(F) Revisited: "Just Ain't Worth It"

As published, proposed Rule 23(b)(3)(F) made a factor pertinent to the predominance and superiority requirements "whether the probable relief to individual class members justifies the costs and burdens of class litigation." This proposal drew more comment and testimony than any other of the 1996 proposals. Strong support was offered, and equally strong objections were advanced. It was clear that this factor invited reconsideration of the core purpose and justification of (b)(3) class litigation. The proper outcome of the reconsideration, however, has been far from clear.

The central issue has become so familiar that only a brief reminder is needed. On one view, a class action is justified only as an extension of traditional individual litigation. Courts are justified in making, developing, and enforcing the law only at the behest of a litigant who genuinely desires judicial relief. Neither courts nor the Rules Enabling Act process should assume to go beyond this point to authorize enforcement of the public interest through litigation initiated by self-appointed volunteers who would be private attorneys-general. Rule 23(b)(3) was adopted without any intent to authorize private attorney-general enforcement, and indeed any such intent would have reflected an improper substantive use of the rulemaking process. Practice has developed an undesirable substantive use of (b)(3) class actions, and the original purpose should be restored. The trimming back of Rule 23(b)(3) is not an improper substantive use of the Enabling Act but an overdue correction of an improper substantive extension of a rule adopted for more limited purposes.

The opposing view is implicit in the argument for retrenchment. Whatever was intended, the common-law process of judicial development has made Rule 23(b)(3) an indispensable tool for enforcing public law. Public agencies lack the resources required for effective enforcement. Private supplementation ensures vindication of modern regulatory and social policies, and at the same time provides remedies for the victims of unlawful behavior. Wrongdoers are made to internalize the costs of violating the law, and to disgorge ill-gotten gains. Congress has come to rely on these means of enforcement; it would be unfair to undermine this enforcement device, and to force Congress to repeatedly enact class-action enforcement provisions for each new statute that is enacted.

These views meet in addressing the specific details of the published proposal. It was frequently protested that virtually all (b)(3) classes would be defeated by literal application of proposed factor (F). The language seems to call for comparison of individual members' recovery to the aggregate costs and burdens of class litigation. Very few classes would include any members whose

claims would survive the comparison. In like vein, it was protested that private benefits, while important, are not the only reason for class actions. Public law-enforcement benefits must be reckoned as well. Finally, it was urged that administration of the probable relief element would entail precertification examination of the probable merits of the class claim. Focus on these protests led to several proposals for carrying factor (F) forward for further discussion. Four are discussed here; the fifth, integration of (F) with an opt-in class alternative, involves so many issues that it is addressed separately.

One alternative is to go forward with (F) as published. At a minimum, this approach will require two changes in the Note. First, it must be explained that it never was intended to require that every — or any — individual class member recovery equal or exceed the entire costs of the entire class litigation. A much-used illustration is provided by the wrong that causes a $100 injury to each of 100,000 people. A class action that imposes litigating costs of $1,000,000 would yield an aggregate recovery of $10,000,000. Class certification may readily be justified. The focus on individual benefits is intended to ask whether there is sufficient reason to presume that class members who do not opt out wish to participate in the litigation through representation, and whether the benefit to individual members is sufficient to justify adjudication. Second, the Note should take a position on the question whether measurement of "probable relief" entails consideration of the probable outcome on the merits. The Committee explicitly refused to take a position on this question in the Note that was first published. The widespread identification of the question and uncertainty as to the answer require that a position be taken.

The first alternative also may require resolution of other questions. Many class actions involve a wide spread of individual recoveries. If some class members have suffered injuries sufficient to warrant class certification, should smaller-stakes members be excluded nonetheless? If attempts are made to distinguish among class members, how is the class to be defined — in terms of the claims eventually submitted? What costs are to be counted, and how are they to be measured? Should courts simply accept high cost estimates advanced by those who oppose certification, or should an attempt be made to predict realistic levels of expense in relation to the apparent complexity and stakes of the litigation? Can such estimates be made without becoming entangled with the probable merits of the litigation? How are burdens on the judicial system to be quantified and weighed in the balance?

A second alternative is to abandon proposed factor (F) without attempting to find a substitute. This alternative does not require any further action.

A third alternative is to delete the reference to "probable relief." This reference was included in the published draft because of the belief that it is ineffective to refer to "requested relief." Very few class complaints demand insignificant individual relief. The reference, however, invites inquiry into the probable merits of the class claims. The Committee considered and explicitly rejected any threshold requirement that certification decisions include an estimate of the merits, finding that representatives of both plaintiffs and defendants prefer to avoid such preliminary inquiries. It may not be possible to avoid reference to the merits so long as the costs and burdens of the litigation are to be weighed, but at least this invitation can be eliminated. The proposed formula for expressing this alternative is:

> **(F)** whether the relief likely to be awarded if the class prevails justifies the costs and burdens of class litigation.

A fourth alternative is to focus on aggregate class relief, dropping the reference to individual relief. This could be accomplished in several ways. The most frequent suggestions were: "whether the probable relief to class members" justifies certification, or "whether the aggregate probable class relief" justifies certification. The first suggestion would permit simultaneous consideration of aggregate relief and individual relief; the second suggestion would focus solely on aggregate relief. The Note would reflect the choice made. This alternative could be combined with the third alternative in various ways. One form would be:

> **(F)** whether the relief likely to be awarded the class if it prevails justifies the costs and burdens of class litigation.

The final alternative identified at the May meeting was to integrate the role of individual relief with the creation of an opt-in class rule. This alternative is explored at length in the next section.

Opt-In Class Alternative For Small Claims

Earlier Rule 23 drafts provided a variety of approaches to opt-in classes. These efforts arose primarily from the belief that opt-in classes provide a convenient method of permissive joinder that might help in addressing the problems arising from dispersed mass torts. Several benefits were perceived. An opt-in class could be defined in relatively open-ended terms, since only those who in fact accept the invitation to join the action would be affected. By the same token, concerns about conflicts of interest among those brought together in the class would be substantially reduced. Opt-in classes could provide a basis for sharing the costs of litigation among all class members. The class could be defined in terms that require consent to particular choices of law and to defined means of resolving individual issues after common issues are resolved. Adequate representation would still be required, but those who opt in would be likely to protect their own interests in ways that reduce the problems of assuring adequacy. In effect, an opt-in class would provide a clear and well-defined framework, drawing from class-action practice, for permissive joinder.

The suggestion that an opt-in class provision be geared to the small-claims concerns identified by proposed Rule 23(b)(3)(F) responds to quite different concerns. The purpose of requiring affirmative action to join the litigation is to ensure that class members actually wish to be involved, to have their potential claims resolved through representation. Failure to opt out is thought weak evidence on this point. Small-stakes claimants, however, are the class members least likely to have any alternative means to enforce their claims. The presumption of consent seems if anything stronger for them than for class members who have a meaningful alternative in individual litigation. And if the presumption of consent is thought to turn on the realistic availability of separate litigation, most members of most opt-out classes have no meaningful alternative. Few claims of $500, $1,000, or even $5,000 will support separate individual litigation. The doubts most often expressed about small-stakes classes arise from sources other than the relationship between implied consent and claim size. Doubts about the fallibility of the factfinding process, the distorting pressures that arise from class certification, and the indeterminacy of much modern law are central to concerns about (b)(3) class actions. The connection between such doubts and the size of individual claims seems weak. At most, it can be said that the justification for any litigation is the actual desire of a party to win relief. We can assume that most people desire relief that is not insignificant, small, or trivial. We should not assume that most people desire small relief obtained at great cost. Class-action enforcement of many small claims is

appropriate only if actual interest is demonstrated by affirmative action to opt into the proposed class.

The next step involves the relationship between the general opt-out class provisions of Rule 23(b)(3) and any new opt-in class provision. The relationship is direct only if all (b)(3) classes are converted to opt-in classes. Otherwise the relationship must be determined. Should the court be allowed to choose freely between an opt-in and an opt-out class, as proposed by the Committee's first drafts? Or should the court be required to consider first the possibility of a (b)(3) opt-out class, turning to the opt-in possibility only after concluding that an opt-out class could not be certified even if there were no opt-in class alternative? If opt-in classes are tied to the small-claims concern, it likely will prove desirable to tie the opt-in small-claims class to an explicit (b)(3) provision. The most obvious approach is to continue something like factor (F) in (b)(3), and to allow consideration of an opt-in class only after certification of an opt-out class is denied for the reasons expressed in (F).

If the opt-in approach is tied to small claims, and particularly if it turns on prior denial of an opt-out class, it is necessary to decide whether the opt-in approach should apply to situations that involve a range of individual damages. If a significant number of claims are not insignificant, should an opt-out class be certified for the larger claims only, or also for the smaller claims that would not alone support certification? What should be done if the more substantial individual claims are not alone sufficient to warrant certification in relation to the costs of proceeding, but the whole set of claims is sufficient? How far should the court take account of the proposition that many people with individual claims of $100 or $1000 or even more will fail to opt in — not from indifference, but from fear of entanglement? Should these issues be postponed to the stage of administering relief by setting a threshold that cuts off claims below a designated amount?

It also may be useful to ask what reasons might support denial of an opt-in opportunity. If representatives appear and seek the opportunity to give notice and invite opt-ins, bearing the costs of notice, what burdens on the opposing party might justify a refusal to test the level of interest in participating through opt-in?

All of these questions go directly to the questions that surround an opt-in rule that is geared to small-claims "consumer" classes. Any opt-in proposal, including this one, must address a number of more general questions as well.

The first question is whether an opt-in class is a "class" in the accepted Rule 23 sense. It seems better to recognize the opt-in class as a framework for permissive joinder, no more. Class-action practice provides a familiar means of organizing a

proceeding in which most litigants participate only through representation. But the definition of the "class" serves only to define the universe of those who are invited to join the action. Those who do not choose to join do not become members of a class in any functional sense. They are not bound by the judgment and they remain free to bring independent actions. Any other approach would bring back all the headaches of opt-out classes, aggravated by the greater burden placed on class members. Members of an opt-out class who do nothing may lose their claims, but they also may win relief. If members of an opt-in class who do not elect to join may not win, but may lose, they must be given even greater protection than members of an opt-out class. Only then could there be sufficient assurance that the decision not to opt in represents an informed decision to waive the claim.

If an opt-in class does not bind those who fail to join, it must be decided whether to apply the general prerequisites in Rule 23(a). Typicality and common issues surely should be required. Adequacy of representation may seem more ambiguous, but the better answer seems to be that adequacy should be required. The only difference is that the opt-in character of the class may be considered in applying the always elusive tests of adequacy. Numerosity is the most obvious debating point, since the numbers in the class will not be known until the opt-in period has closed. Even here, however, it seems better to apply Rule 23(a). The court can, if it wishes, set an advance minimum number of opt-ins that will be required to support further class proceedings. Other than such case-specific thresholds, it should be enough that there is a reasonable prospect of sufficient opt-ins to justify going forward with notice.

A permissive-joinder concept eases the notice requirements for an opt-in class. In effect, notice can be whatever seems reasonably calculated to achieve the purpose of testing the breadth and depth of interest in the litigation. The difference cannot be exaggerated, however, lest the opt-in class be a fruitless exercise that imposes burdens on the party opposing the class without any real prospect of meaningful proceedings. The question is particularly sharp in small-claims consumer actions. Notice calculated to reach large numbers of dispersed class members is likely to be expensive, even if it relies only on repeated but noticeable advertisements in the mass media. A simple one-shot notice of modest dimensions is not likely to accomplish much.

Notice ties also to the binding effect of an opt-in class. Although those who fail to opt in should not be barred from pursuing individual actions, should they also be barred from seeking certification of a class — whether opt-out or opt-in — in another action? The analogy to preclusion by representation in present Rule 23, and to emerging concepts of mandatory intervention, might justify a rule that prohibits participation in

any other action by those who declined an invitation to opt in to the first class. But this theory is likely to work, if at all, only with respect to those who had notice cast in a form that gives a meaningful opportunity to opt in. Individual notice accompanied by a postcard reply form might well be sufficient, but the cost could be undue. If the rule is cast in a form that permits successions of opt-in classes, however, the preclusion benefits of an opt-out class may come to seem more attractive. This prospect raises the question whether a defendant should be able to ask for certification of an opt-out plaintiff class as an alternative to an opt-in class. The prospect of imposing representation of an opt-out class on unwilling representative plaintiffs may seem unattractive, but the prospect may not often be faced. Plaintiffs may well routinely seek certification of opt-out classes, viewing opt-in classes as an unattractive second-best alternative.

If an opt-in class judgment binds only those who in fact opted in, the specter of "one-way intervention" must be addressed. Opt-in classes could become very attractive if they enable plaintiffs to win for a vast class by way of nonmutual issue preclusion, while limiting the loss to those who actually opt in. The only obvious deterrent to routine filing of small opt-in classes, to be followed by large classes in which recovery can be guaranteed by way of issue preclusion, would be the fear that someone else would win the race to file the succeeding action. A defendant faced with the risk of nonmutual preclusion, moreover, would risk just as much in an opt-in class as in an opt-out class. The pressure to settle on terms that defeat any issue preclusion could be substantial. These are strong reasons for providing that the judgment in an opt-in class cannot be used against any party by anyone who did not participate in the action. (Although nonmutual preclusion might be held available to those who were not within the class invited to opt in, this compromise might lead to complicated gerrymandering of the initial class definition.)

A permissive joinder concept raises other questions about the consequences of an opt-in class. Should those who join be liable for a share of the costs of prosecuting the action — indeed, is there any reason for denying liability? How far should the court seek to regulate the terms of attorney-fee arrangements, and reflect them in the class notice that invites participation? How far are individual participants subject to discovery and counterclaims? Should the effect of filing on statutes of limitations differ — and should any difference be triggered by the decision to deny certification of a mandatory or opt-out class, by the certification of an opt-in class, by expiration of the period set for opting in, or some other event? Is it better to leave such issues to evolution in practice, or to address them head-on in Rule 23?

With all of these open questions, the following draft is

merely suggestive. The assumption is that some form of (b)(3)(F) will be recommended; the predicate for addressing a small-claims opt-in class would be quite different if there is no (b)(3)(F). The draft adopts the permissive joinder approach of earlier opt-in drafts, and addresses notice and binding effects in brief terms.

(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) certification of a (b)(3) class is denied by application of subparagraph (F), but the court determines that permissive joinder should be accomplished by allowing putative members to elect to be included in a class.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. * * *

(3) When ordering certification of an opt-in class action under subdivision (b)(4), the court shall direct that appropriate notice be given to the class in a manner calculated to accomplish the purposes of the certification. The notice must:

(A) concisely and clearly describe the action and the terms on which members can request to be included in the class;

(B) advise that the judgment will include only those who elected to be included in the class and who were not dismissed from the action on terms that exclude them from the judgment; and

(C) state that the judgment will bind the party opposing the class only as to those who are included in the judgment under subparagraph (B).

NOTE

New subdivision (b)(4) creates an opt-in class that is available only when a court has denied certification of a (b)(3) class by applying new subparagraph (b)(3)(F). Subparagraph (F) authorizes denial of certification when the tenuous nature of the benefits to individual class members raises serious questions whether failure to request exclusion reasonably implies consent to participate and be bound. Certification of an opt-in class can test the interest of class members in the litigation by creating an opportunity to request inclusion.

The opt-in class created under subdivision (b)(4) is a new permissive joinder device that is controlled by Rule 23 class-action principles. Class-action procedures are adopted because they provide a familiar framework for participation by representation. This framework is peculiarly well suited to effect the aggregation of small claims that do not warrant substantial expenditures of effort or money by each individual claimant. Because this remains a class action, the prerequisites of subdivision (a) must be satisfied, although application of the prerequisites should be adjusted to reflect the nature of the opt-in class. The numerosity prerequisite, in particular, can be applied in light of the number of class members who actually request to be included.

Some of the incidents of a (b)(4) opt-in class are specified by new subdivision (c)(3).

Notice to members of an opt-in class can be provided by means that are designed to accomplish the purpose of determining the value of class adjudication. Little good will be accomplished by notice that reaches only a small portion of those who may be interested in requesting inclusion. Expensive individual notice, on the other hand, would defeat one of the purposes of avoiding the costs associated with a (b)(3) opt-out class. Since members of the class will not be bound by the judgment unless they learn of the action and opt in, the concerns that support individual notice in (b)(3) classes are greatly reduced. The court should follow a pragmatic approach.

The notice must describe the subject of the action. It also must state the terms on which members can request to be included in the class. At a minimum, the identified terms should describe those who will be permitted to request inclusion; set a date that closes the opt-in period; and state whether and how those who opt in may be liable to share in the costs, expenses, and attorney fees attributable to the class. The court also may wish, when possible, to set out the apparent number of those who are eligible to intervene, and to state the parties' contentions as to the amounts of individual and aggregate recoveries. It might be desirable to offer advice on the limitations effects of inclusion, but few cases if any will present circumstances that support meaningful

information on this subject.

Notice of the preclusion effects of the judgment must state that the judgment will include only those who elected to be included in the class and who were not dismissed on terms that exclude them from the judgment. It might also state that those who do not elect to be included remain free to commence independent proceedings, including independent class actions.

The notice also must state that the judgment will bind the party opposing the class only as to those who are included in the judgment under subparagraph (B). An opt-in class judgment does not provide an appropriate basis for nonmutual issue preclusion. Members who had notice of the opportunity to request inclusion should not be able to remain aloof, hoping to win a risk-free adjudication of liability in circumstances that leave them free to initiate a second opt-in class should the first class fail. Preclusion also is inappropriate as to members who did not have notice of the action. Those who did not receive notice of the action have not been deprived of any opportunity by the action or judgment. Administering a preclusion line that depends on actual notice, particularly in a system that will rely in large part on published notice, would be difficult. And the party opposing the class should be able to conduct the litigation in ways measured by exposure to the opt-in class members, not all potential claimants who may remain.

Rule 23(c)(2) Opt-in Class Alternative

A different approach might be taken to the opt-in class alternative for small claims, building on Rule 23(c)(2) without touching Rule 23(b)(3). By definition, this approach would not need to be tied to any version of the published (b)(3)(F) proposal. Instead, it would build on the present curious Rule 23 structure. As Rule 23 now stands, there is nothing in subdivision (b) to indicate that (b)(1) and (b)(2) classes are "mandatory," while (b)(3) classes are opt-out. The opt-out right appears only in the provision that requires the notice to describe the right to request exclusion. The logic of this structure would support an alternative opt-in class structure, also built on the (b)(3) class. Without attempting to redraft all of (c)(2) to satisfy current style conventions, the rule could look like this:

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

~~member from the class if the member so requests by a specified date;~~ (~~B~~A) the judgment, whether favorable or not, will include all class members ~~who do not request exclusion~~; and (~~C~~B) any member ~~who does not request exclusion~~ may, if the member desires, enter an appearance through counsel. The notice also must advise each member that the court will exclude the member from the class if the member so requests by a specified date, unless the court determines that the class will include only those members who request to be included in the class. When the relief likely to be awarded to individual class members does not appear to justify the costs and burdens of class litigation and the court has reason to question whether class members would wish to resolve their claims through class representation, the notice must advise each member that the member will be included only if the member so requests by a specified date.

Repetitive Certification Requests

The Committee voted at the May, 1997 meeting to consider a new Rule 23(b)(3) factor focusing on the problems that arise from successive, competing, or otherwise multiple attempts to win certification of the same or similar classes. There is substantial anecdotal evidence that genuine problems arise from these efforts.

One set of problems arises when certification of a class is followed by competing efforts to win certification of the same class in another court, or to win certification of a class that overlaps the first class. Testimony and comments at the Rule 23 hearings, as well as early reports on the RAND class-action study, suggest that these problems increasingly arise from attempts to persuade state courts to certify nationwide classes. The most worrisome cases are said to involve efforts to win a free ride on the efforts of those who put together the first class, beating an earlier-certified action to judgment. Similar but lower-stakes problems may arise from efforts to gain a role in conducting the first-certified action, and with the role a share of attorney fees. It may be possible to address these problems through general doctrines that empower a court to protect its own jurisdiction. The court that first certified a class may be able to enjoin the parallel proceeding, and in any event can control its own proceedings so as to defeat any attempt to gain participation through the leverage of a parallel filing. These approaches could be bolstered by revising Rule 23 to reify a certified class. The revision would provide that a certified class is an entity created and controlled by the certifying court. Any attempt to interfere with the court's jurisdiction over the class would be met by an antisuit injunction. This approach was briefly considered by the Committee in 1995 and rejected as too conceptual. It would not in any event fully meet the problems of overlapping opt-out classes, since those who opt out would not longer be part of the class entity. That gap could be filled by allowing the court to condition the opportunity to opt out on terms that prohibit participation in any parallel action, individual or class. That approach was suggested in the earliest Committee drafts, but has vanished without discussion.

Another set of problems arises when one court certifies a class, and another court is then asked to certify a different but related class. Certification of a statewide class in one state, for example, could be followed by a request to certify a nationwide class in another court. Or certification of a present-claimants class could be followed by a request to certify a class of present and future claimants.

Yet another set of problems arises when one court refuses class certification and another court is then asked to certify the

same class or a similar class.

Many variations of these patterns can occur. They can arise when the same would-be representatives appear in successive actions. They can arise with different would-be representatives but the same counsel. They can arise from competition between groups of representatives and groups of counsel.

These variations defeat any realistic prospect that res judicata principles can resolve all problems. It would be possible to preclude the same would-be representatives from successive efforts to win certification of the same class for the same claims on behalf of the same class. Even then, issue preclusion might be defeated by pointing to differences in the relevant class-action rules that present different issues. If the same counsel seek out different figurehead representatives to cover for successive certification efforts, it might be possible to invoke pragmatic concepts of "privity" or "virtual representation" to support preclusion. But preclusion is likely to fail in other settings. If class certification is denied, the members of the class have not become parties and the conditional attempt at representation has failed. If class certification is granted, those who are not included in the class escape preclusion for the same reasons.

Many more issues are likely to arise in this context. It was not suggested that a comprehensive approach be adopted. Instead, it was suggested that Rule 23 simply direct consideration, as part of the superiority and predominance determination, of earlier decisions to grant or deny certification. The most obvious resting place for such a provision is in present factor B. Adapting this proposal to the ongoing "maturity" amendment of factor B, the factor might read:

> **(B)** the extent and nature of any related litigation, decisions granting or denying class certification in actions arising out of the same conduct, transactions, or occurrences, and the maturity of the issues involved in the controversy;

(If this single factor seems too long, it might be separated into three factors: (B) the extent and nature of any related litigation; * * * (E) decisions granting or denying class certification in actions arising out of the same conduct, transactions, or occurrences; and (F) the maturity of the issues involved in the controversy. This sequencing would carry forward the current designation of factors (C) and (D).)

The Note might look like this:

> Factor (E) is new. It calls attention to the problems that can arise from successive, competing, or otherwise multiple attempts to win certification of similar or overlapping classes. No specific response is

directed. If one court has certified a class, a later court should ask whether certification of a similar or overlapping class will prove a superior means of adjudication despite the risks of duplication, confusion, competition, and interference. If one court has refused certification, a later court should ask whether there have been such changes of circumstance, improved information, or changes in the proposed class to justify reconsideration of the certification issue. The reference to "conduct, transactions, or occurrences" is as broad and flexible as similar uses of these words in other rules. The greater the similarities, the greater the deference that may be due an earlier determination. Concepts akin to issue preclusion may be appropriate if the same representatives seek certification of substantially the same class in successive actions. In most circumstances, however, the governing concept is one of discretionary deference, not preclusion.

Common Evidence

Several of the comments and witnesses on the 1996 proposals advanced the new proposal that the purpose of the (b)(3) predominance requirement be restored by adding new language to the rule. The perception is that classes are certified too readily and too early, without adequate anticipation of the evidence demanded for actual trial of the class claims. Several courts of appeals have emphasized the need to consider the actual needs of trial at the certification stage, but actual practice falls short of this goal. Certification of classes that cannot really be tried creates offsetting risks. One risk is that the circumstances of a few class members will be allowed to substitute for actual proof of the elements required to prove the claims of each class member. In a fraud action that requires proof of reliance, for example, proof of reliance by the few most clearly relying representative class members will stand as if proof of reliance by many class members who may not have relied at all. The offsetting risk is that proof of the common class elements will be followed by unmanageable individual proceedings that cannot be brought to conclusion in the class-action court.

The broader form of this proposal would demand that the trial evidence be substantially the same as to all elements of the claims asserted by each class member. This approach would limit (b)(3) classes to situations in which individual damages are readily calculated by formulas looking to such events as the time and volume of trading in fraud-affected securities, the number or amount of consumer charges exacted, and the like. This approach might best be implemented as a prerequisite in (b)(3):

> (3) the court finds (i) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, (ii) that the trial evidence will be substantially the same as to all elements of the claims of each class member, and (iii) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. * * *

The Note for this approach might look like this:

> A new requirement is added to the familiar predominance and superiority requirements for certification of a (b)(3) class. This requirement reinforces the predominance requirement by demanding a finding that the trial evidence will be substantially the same as to all elements of the claims of each class member. Several courts have read this requirement into

the predominance requirement, beginning with *Alabama v. Blue Bird Body Co., 5th Cir.1978, 573 F.2d 309*. Actual practice appears to have departed from this requirement with some frequency, however, justifying its addition to the explicit list of requirements for certification. Item designations have been added to promote clarity.

A somewhat narrower form of this proposal would require that there be common proof as to the fact of injury to each class member, but would tolerate the need for individualized proceedings to prove the amount of individual damages. This approach might best be implemented by adding a new factor — here tentatively denoted as (G) — to the list of matters pertinent to the findings of predominance and superiority:

> **(G)** the ability to prove by common evidence the fact of injury to each class member [and the extent of separate proceedings required to prove the amount of individual injuries];

The Note might look like this:

> Subparagraph (G) is added to emphasize the problems that can arise if a class action seeks to dispose of claims that require individualized proof of the fact of injury to each class member. If a fraud theory requires proof of individual reliance by each victim, for example, a class that includes all who engaged in similar transactions may unwittingly bypass a required substantive element, or may break down at the stage of attempting to resolve the individual issues. Another example may arise from exposure to a toxic substance. Unless the applicable law provides compensation for exposure alone, without resulting injury, the fact of injury must be tried as to each class member. The difficulties of managing these proofs in a single proceeding may defeat the requirements of predominance or superiority. In some settings, however, these difficulties instead may be met by alternative solutions such as a narrower class definition, creation of subclasses, or certification of an "issues" class under subdivision C(4).

Agenda Item IV B

Amchem: First Thoughts

These notes are designed to open the discussion of Amchem, not to propose specific rules that might be adopted in response to the opinions. If Advisory Committee members can share their responses, the combined reactions will be the basis for a memorandum that – if successful – can establish a framework for discussion at the October meeting. The goal for the October meeting may be the relatively modest one of identifying any approaches that seem so attractive as to warrant development of detailed proposals for consideration at the spring meeting. Even with the wealth of comments addressed to the published Rule 23(b)(4) proposal, it is likely to be premature to aim at more ambitious goals for October. Not only will repeated deliberation provide greater reassurance. There is little advantage in recommending publication of proposals at the January, 1998 meeting of the Standing Committee. Publication in February or March might lead to recommendations for adoption in the fall, but the January, 1999 meeting of the Standing Committee is not likely to recommend that the March meeting of the Judicial Conference transmit proposals to the Supreme Court for action by the end of April.

The questions that continue after the Amchem decision fall into two broad and familiar categories. The role of settlement and of settlement classes continues to command attention. The more specific questions of mass tort litigation remain virtually unchanged. In addition, there may be a few related questions that deserve renewed attention.

Settlement Classes

The Published (b)(4) Proposal

The history of Advisory Committee deliberations on settlement classes can be roughly divided into three periods.

During the first period, various timid draft proposals relating to (b)(3) settlement classes were circulated but had little effect. It seems fair to characterize the relatively brief discussion of these proposals as hesitant. The Committee was confident that there are many important and difficult questions surrounding settlement classes, and diffident about the prospect of any specific answers.

The second period, overlapping the first, began with discussion of the Third Circuit opinion in the General Motors Pickup Truck litigation. Doubts were expressed whether the Third Circuit really meant to rule that a class could be certified for settlement purposes only if the same class would be certified for trial. The Third Circuit decision in the Georgine case resolved the doubts. Coupled with the frequent use of settlement classes found by the FJC study, the Georgine case was the stimulus that prompted the (b)(4) proposal. The proposal was intended only to overrule the aspect of the Georgine opinion that allowed certification of a settlement class only if the same class would be certified for trial. The Committee did not feel able to make more detailed proposals for settlement classes.

The third period remains open. It began with the prepublication letters addressed to the June, 1996 meeting of the Standing Committee by many academics. The cautions urged by these letters were renewed and expanded in many ways during the public comments and testimony on the (b)(4) proposal after it was published. The comments and testimony provide much advice to the Committees. The Advisory Committee has put off consideration of this advice pending decision of the Amchem case.

The Amchem decision appears to resolve the one question clearly addressed by the (b)(4) proposal. A (b)(3) class can be certified for settlement even though "intractable management problems" would defeat certification of the same class for trial. See the prefatory portions of Part IV, 65 Law Week 4643.

There is a strong argument that there is no need to proceed further with the published (b)(4) proposal. The Supreme Court has confirmed that courts can do under (b)(3) what many courts have long been doing — certify settlement classes that satisfy the prerequisites of subdivision (a) and meet the requirements of at least one paragraph of subdivision (b). Adopting a rule simply to confirm the Supreme Court's interpretation of Rule 23 is tricky business. If the only purpose is to enshrine the Court's ruling, the value of giving clear notice is offset by the risk that the rule will be misinterpreted. And it will be difficult to be sure that any proposal simply confirms the Supreme Court's opinion as it will come to be interpreted in the future. The published (b)(4) proposal, for example, was expressly limited to (b)(3) classes. It is possible to read the Supreme Court opinion to touch (b)(1) and (2) classes as well, particularly in the emphasis on class definition and the need for adequate representation (Part IV prefatory paragraphs, and Part IV B.)

Impact of Settlement on Certification

The most obvious area for expanding on the Supreme Court's opinion is the task of defining the role that settlement plays in a certification decision. The Court says expressly that "settlement is relevant to a class certification," 65 LW 4643 right. Again, it says that "settlement is a factor in the calculus," 65 LW 4644 right. And it cautions, n. 16, that settlement "does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 * * *, proposed settlement classes sometimes warrant more, not less caution on the question of certification." Justice Breyer responds that the Court does not give any significant guidance on the ways in which settlement is relevant. The more detailed explanations offered by the Court indeed leave many open questions.

Perhaps the broadest theme in the Court's discussion is that a class must have "sufficient unity so that absent members can fairly be bound by decisions of class representatives." 65 LW 4644 left. In the same vein, the predominance inquiry is said to

"test[] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." It is "class cohesion that legitimizes representative action in the first place."

The need for a unity of class interests is tied to the 23(e) review and approval of settlements. The 23(e) process is not a substitute for class unity. The requirements of 23(a) and (b) must be met, to avoid "certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." This concern is tied to two concerns made familiar by the Rule 23 hearings: both class counsel and the court would be "disarmed" if the (a) and (b) requirements were subordinated to a measurement of a settlement's fairness. "Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, see Coffee," and the court would be deprived of adversary investigation and presentations on the fairness of the settlement.

The more specific focus on predominance contributes some negative observations about the role of settlement. Settlement may advance the interests of class members in achieving prompt and fair compensation at low cost and without the risk of litigation. But that interest is not enough; predominance must be measured by "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." 65 LW 4644 right. (Justice Breyer finds this statement inconsistent with the ruling that settlement is relevant to certification, 65 LW 4647 right - 4648.) An evaluation of the fairness of a settlement does not provide a predominating common question [even if it is in some sense the only question submitted as to the class].

The actual terms of the settlement play a more obvious role in the Part IV B discussion of adequate representation. The settlement covers both "currently injured" and "exposure-only" plaintiffs. There are manifest conflicts of interest between these groups. Future plaintiffs, for example, likely would be interested in inflation adjustments for future payments, in an opportunity to opt out after injury becomes manifest, and in recognition of future medical advances that may expand the categories of injuries caused by asbestos. These interests are part of the bargaining process in which the defendants surrender money and various defenses, and in which presently injured plaintiffs may trade an unfair part of the future-injury plaintiffs' interests for greater present benefits. Only subclasses could provide the "structural assurance of fair and adequate representation for the diverse groups and individuals affected."

None of this provides any obvious guidance in framing a rule that might describe the ways in which settlement bears on certification. The opinion is focused on the actual setting, in which settlement is accomplished at the time of certification. Unlike the (b)(4) proposal, however, there is nothing in the opinion that suggests that it is improper to certify a class for settlement before an actual agreement has been reached. At the

same time, there is perforce nothing that bears on the question whether different considerations shape certification if settlement is merely a prospect, not a concrete agreement. The Court notes, but does not reach, additional problems presented by the Amchem case itself — particularly the problem of claimed conflicts of interest affecting class counsel, see n. 20. If rule provisions are to be proposed for measuring the impact of settlement on the calculus of Rule 23(a) and (b), they must be generated out of sources other than the Court's opinion.

One way to begin thinking about the bearing of settlement on certification is to reflect on the settlement attempted in the Amchem case. There are many reasons to recoil aghast from the attempt if it is viewed from the traditional perspectives of individual litigation due process. But there also are strong attractions to the settlement. Asbestos litigation is nothing if not mature. The lawyers who represented the plaintiffs were not simply selected by the defendants — they had years of experience in asbestos litigation, and they were — or were connected with — the cochairs of the plaintiffs' steering committee that first attempted settlement under the court's auspices. The bargain they reached may have achieved more fairness for more victims than could possibly be achieved by litigation in any structure. The Court's opinion may hint that the advantages of the settlement lie too much on the legislative side of things to support judicial approval. Certainly the result suggests that a settlement does not support class certification if the settlement is unduly "creative" in seeking ways out of the problems of transaction costs, inconsistent results, choice of law, and the like.

Another way to begin thinking about the bearing of settlement is to go through the prerequisites of 23(a) and the class categories of 23(b).

As to the 23(a) prerequisites, settlement is not likely to justify a lower numerosity threshold; if anything, the threshold might well be set higher for settlement than for litigation. Commonality (and predominance) are difficult to grasp in the settlement context, unless by analogy to the likely course of litigation if settlement fails. Typicality offers the same difficulty to the extent that it is related to commonality. Typicality also ties to adequacy of representation, and the Court's clear emphasis on the need to sort through actual and potential conflicts of interest. Conflicts of interest may take quite different shape in settlement than at trial, in ways that may be shown by examination of the settlement agreement but also in ways that cannot be known without detailed supervision of the settlement process. Although 23(a) does not list it explicitly, the very definition of the class is tied to all of these prerequisites. Here too the fact of settlement may have a great impact; the class definition may be tailored to the deal that was possible. The Amchem case itself shows clearly the possibility that the class definition was controlled by the defendants' overriding need to achieve global peace. All of these multifold possibilities could

be expanded by numerous illustrations. Trying to capture them in a rule will be difficult.

Application of the class categories of 23(b) may be subject to similar complications. The predominance and superiority requirements of (b)(3) are the most obvious illustrations. There may be less obvious illustrations. Settlements of (b)(2) class actions, for example, often suggest that public official defendants are acquiescing in remedial measures that they find attractive but are unable to wring from legislative bodies. Decrees regulating conditions and practices in prisons, hospitals, and schools are familiar examples.

The Court is clear that Rule 23(e) approval of a settlement as fair cannot substitute for honoring the requirements of (a) and (b). But application of (a) and (b) in light of settlement, actual or merely potential, seems a process as variable as the subjects of litigation and the possibilities of settlement. At least at first blush, there is little hope that a rule can capture and illuminate the ways in which settlement affects the certification decision.

Settlement Proceedings

Regulation of the settlement process was discussed at length during the recent hearings. The proposal sketched out by Professors Resnik and Coffee is the most concrete model we have. This discussion explores adoption of one or both of two distinct approaches.

One approach is to define by rule the structure and steps of the settlement process. The earliest points of regulation might be the means of selecting class representatives and class counsel. Definition of the class might be shaped in various ways, most obviously by seeking out as many potential subclasses and subclass representatives as possible to participate during the negotiation process before tradeoffs are made. (The corresponding impediments are obvious.) It might be insisted that there be some measure of discovery or exchange of information on the merits, and that this information be made readily available to objectors. The role of objectors might be institutionalized, at least by providing financial and information support. Appointment of a class "guardian" or steering committee might be considered — one obvious form would be to appoint a group of class members who were not involved in the settlement negotiations to investigate and present objections. Special emphasis might be placed on the "maturity" factor with respect to dispersed mass injuries — the contrast between asbestos and the silicone gel breast implant litigations is illustration enough.

Another approach is to require that the court be more closely involved in the settlement process, whether through the district judge, a magistrate judge, or a "special master" of some sort. The need to separate participation from later 23(e) evaluation is manifest — the model followed in Amchem, where the fairness hearing was conducted by a judge not involved with the settlement process,

is an obvious illustration.

The structural and judicial-involvement models could be combined. The greater the regulation, the greater will be the transformation of class actions away from bargaining in the shadow of litigation. That may be to the good. All of the conversation, however, seems to be infused with the belief that it is plaintiff classes that need protection. There is at least room for considering whether the system should be designed also to protect defendants against settlements coerced by the costs and magnified risks of class litigation.

Settlement Review

The most familiar questions are those explored by Judge Schwarzer's proposal that Rule 23(e) should be expanded to require findings on specified matters as part of the settlement approval process. His detailed list has been before the Advisory Committee for some time. The main question is whether it is better to adopt such checklists into the body of Rule 23, or to leave such matters to more flexible embodiment in the Manual for Complex Litigation.

Some of the references to Rule 23(e) in the Amchem opinion may imply a wish for expansion. The Court notes that "The Advisory Committee's sole comment on this terse final provision * * * restates the rule's instruction without elaboration * * *." 65 LW 4643 left. In the next paragraph, the Court cites Judge Schwarzer's article in a context that has no obvious connection to 23(e). Later references to 23(e) are in the context of establishing it "as an additional requirement, not a superseding direction" that might justify class certification in disregard of the 23(a) and (b) provisions. 65 LW 4644 left.

MASS TORTS

The Amchem decision also may provide some stimulus to renew the Advisory Committee's attention to mass tort litigation.

The Court's opinion provides tantalizing hints. In part III, it notes the "tugs of individual autonomy" and quotes Professor Kaplan for the proposition that the individual interest in individual control can be high where the stake of each member "bulks large." 65 LW 4642 right. Then it seems to suggest that Rule 23(b)(3) is best used to aggregate small claims. 65 LW 4643 left. Three paragraphs later, however, it notes that "ever more 'adventuresome'" uses have been made of Rule 23, reflecting "concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue." Later, 65 LW 4645 left, it observes that common disaster mass tort cases may satisfy the (b)(3) predominance test. Then it quotes the 1966 Advisory Committee Note cautioning against certification of mass tort classes, but notes that the caution is not a categorical exclusion and that such cases are being certified in increasing numbers. The "warning, however, continues to call for caution when individual stakes are high and disparities among class members great."

The disposition of the Amchem case, and the remand in the Fifth Circuit asbestos case, will enhance the continuing pressure to think about mass tort classes. The Advisory Committee has considered and put aside some rather modest approaches to mass tort classes, beginning with the proposal that collapsed the 23(b) class categories and permitted opt-in classes. The opt-in class was thought a promising means of addressing the interest in individually controlling individual litigation, and resolving choice-of-law problems. There was a parallel provision that would allow the court to control the preclusion consequences of opting out, a device that could easily achieve greater uniformity in mass tort outcomes without forcing participation in a class. Several of the (b)(3) factors proposed in the 1996 publication bore on mass torts; the "maturity" factor continues on the agenda. In addition, two items new to the Rule 23 agenda may bear on mass tort classes: the effort to regulate repetitive requests to certify the same class, and the enhanced "common evidence" requirement.

Beyond these possible changes in present Rule 23, and others that might be proposed, the Advisory Committee has periodically considered the possibility of drafting a new Rule 23.x specifically for mass torts. The greatest uncertainty is whether the more desirable possible approaches can be adopted through the Rules Enabling Act process. Justice Breyer's opinion in the Amchem case presents forcefully the advantages of substituting a claims-processing structure for the costs and inconsistencies of traditional litigation. The need to conserve potentially inadequate assets for later claimants is equally apparent. The direct means of addressing these concerns are manifestly substantive. It is quite uncertain how far reasonable success can be achieved by indirect but more nearly procedural means.

Definition of a "mass tort" remains the most obvious threshold problem in drafting a special mass tort rule. Personal physical injury and death cases may be the most workable focus. A necessarily arbitrary numerical threshold may be important. Probably "single event" as well as dispersed torts should be included.

Choice of law problems are central, even in a single-event tort that typically involves many defendants and a variety of contending laws. Legislative attempts to draft choice provisions show just how intrinsically difficult the chore is. Attempting to find solutions that fit within the Rules Enabling Act will be challenging indeed.

The means of resolving individual issues after common issues are resolved on a centralized basis are equally challenging, particularly because of the interdependence that often exists between individual and common issues. A finding that a product is defective for lack of proper warnings, for example, is difficult to separate from a defense of individual misuse. At the extreme, it may be argued that the Seventh Amendment defeats some combinations of common and individual litigation — that a jury determination of

the common issue cannot be reexamined by a second jury, while the second jury's determination of the individual issue cannot be distorted by precluding reconsideration of the common issue on evidence that conduces to an inconsistent determination.

The greatest benefits of mass tort class actions may be achieved by settlements that defy all acceptable theories of individualized due process and that disregard many of the substantive rules that would control individualized litigation. That possibility ties back to settlement class issues, and also underscores Rules Enabling Act concerns.

Mass torts also involve "futures" plaintiffs, a problem the Advisory Committee has repeatedly put aside. One early draft provided — by rather circumspect means — a right to opt out of the class after individual injury becomes apparent. This provision disappeared in face of vehement observations that no defendant could settle on terms that left open the possibility that the class might disintegrate in face of massive later opting out. The opinion in the Amchem case illustrates the conflicts of interest between present- and future-injury class members by the strict limits on "back-end" opt-outs included in the settlement, 65 LW 4645 right. Futures plaintiffs also present great problems of notice — the Amchem opinion notes that millions of dollars were spent on notice, refrains from passing on the adequacy of notice, but "recognize[s] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous" as the exposure-only class members. 65 LW 4646 left.

These are the mass-tort class problems made familiar by past Advisory Committee deliberations. The Judicial Conference and several of its committees remain interested in efforts to devise new and better approaches. The Court noted in the Amchem opinion that Congress has failed to accept the 1991 Judicial Conference recommendation, based on the ad hoc committee report, that legislation be adopted to address asbestos problems. The most effective approaches probably are available only through legislation. Whether worthy alternatives can be found within the limits of the Rules Enabling Act remains uncertain.

Discovery Classes

One feature of the Resnik-Coffee proposal for settlement classes deserves separate attention. Their model includes provisions that contemplate class procedures limited to pretrial "litigation." There can be enormous advantages in arranging for common discovery, once-for-all, in settings that involve issues common to any appreciable number of plaintiffs. These advantages are reflected in part in the ongoing Rule 26(c) protective-order proposals, and in the "on hold" proposal to prohibit destruction of discovery materials.

Class status has some potential advantages in establishing a common discovery system. A federal discovery class could be the

basis for prohibiting duplicative discovery in other courts, state as well as federal. It is not clear whether there is any other advantage in borrowing Rule 23 as the framework for common discovery. If not, it should be possible to develop an adequate justification for control by nonclass theories.

Common discovery includes such matters as document depositories, and raises difficult questions of sharing discovery costs among discovery beneficiaries. In our crazy-quilt of privilege rules, it also presents choice-of-law problems. The obvious approach of allowing discovery of anything that would be discoverable under any one of the possibly applicable rules may be sufficient, but care must be taken.

Time still remains for integrating the possibility of common discovery with the discovery project. The integration question should be addressed as soon as possible.

Reading The Tealeaves

The true fun has yet to begin. The sport of reading important meanings into the subtleties of Supreme Court opinion writing will generate many suggestions for Rule 23 revision. A few of the most obvious possibilities may be noted as an invitation to join the game.

Footnote 14 is attached to the observation in text that state law varies widely on such matters as the viability of exposure-only claims, and the availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury. Footnote 14 itself simply notes the assertion of the objectors that statewide recoveries for mesothelioma in California average 209% above the $200,000 settlement maximum for most mesothelioma claims. Does this suggest that nationwide classes are improper because the street value of a claim depends not only on the substantive law, but on the actual damages awards typical of different state court systems? Or that nationwide classes are proper, but that some sort of adjustment must be made for this reality in settlement, or even in litigation? California plaintiffs get more — and North Dakota juries are told to pretend that they are Californians?

At 65 LW 4642 left the Court, drawing from Professor Kaplan, notes that Rule 23(b)(3) was the most adventuresome of the 1966 changes. It also notes that the Advisory Committee was "[s]ensitive to the competing tugs of individual autonomy," and that Kaplan urged that a "close look" should be taken at certification of (b)(3) classes. Are these notes of caution? To what effect? In the same passages, however, the Court also notes that Rule 23 aims to "'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated * * *.'" Does this enhance the desire for uniformity in ways that support "adventuresome" use of Rule 23?

(Bench Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMCHEM PRODUCTS, INC., ET AL. *v.* WINDSOR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96–270. Argued February 18, 1997—Decided June 25, 1997

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. Never intending to litigate, the settling parties—petitioners and the representatives of the plaintiff class described below—presented to the District Court a class action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos-manufacturing companies that are petitioners in this suit, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so-called "exposure-only" claimants, alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.

The exhaustive agreement, *inter alia*, (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the

range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. The Third Circuit ultimately vacated the District Court's orders. Although the objectors maintained that the case was not justiciable and that the exposure-only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court nevertheless homed in on the settlement's terms in examining aspects of the case under Rule 23 criteria. The Court of Appeals explained that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. The court therefore ordered the class decertified.

Held:

1. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. This Court therefore declines to resolve objectors' assertions that no justiciable case or controversy is presented and that the exposure-only claimants lack standing to sue. Cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. ___, ___. The Court follows this path mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right. Pp. 17–18.

2. The sprawling class the District Court certified does not satisfy Rule 23's requirements. Pp. 18–35.

(a) Rule 23 gained its current shape in a 1966 revision. Its

subdivisions (a) and (b) enumerate criteria that must be met for a class to be certified. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23(b)(3), a class must satisfy the requirements of Rule 23(a), among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23(b)(3) criteria that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." To alert Rule 23(b)(3) class members to their right to "opt out," Rule 23 requires "the best notice practicable under the circumstances." Rule 23(c)(2). Finally, Rule 23(e) specifies that a class action cannot be settled without the court's approval, and that notice of the proposed compromise must be given to all class members in such manner as the court directs. Pp. 18–25.

(b) Because settlement is relevant to the propriety of class certification, the Third Circuit's statement that Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement" bears modification. But the Third Circuit did not, in fact, ignore the settlement. The court homed in on settlement terms in explaining why it found absentees' interests inadequately represented. The Third Circuit's inspection of the settlement agreement in that regard was altogether proper. Whether trial would present intractable management problems, see Rule 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial. But other specifications of the rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23(c) and (d). And, of overriding importance, courts must be mindful that they are bound to enforce the rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Rule 23(e)'s settlement prescription was designed to function as an additional requirement, not a superseding direction, to the class-qualifying criteria of Rule 23(a) and (b). Cf. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 176–177. The dominant concern of Rule 23(a) and (b)—that a proposed class have sufficient unity so that absentees can fairly be bound by class representatives' decisions—persists when settlement, rather than trial, is proposed. Those subdivisions' safeguards provide practical checks in the settlement context. First, their standards serve to inhibit class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. Second, if a Rule 23(e)

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fairness inquiry controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted by the rulemakers—that if a settlement is "fair," then certification is proper. Pp. 25–28.

(c) Rule 23(b)(3)'s predominance requirement is not met by the factors relied on by the District Court and the settling parties: class members' shared experience of asbestos exposure; their common interest in receiving prompt and fair compensation, while minimizing the risks and transaction costs inherent in the tort system's asbestos litigation process; and the settlement's fairness. The benefits asbestos-exposed persons might gain from a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. In contrast, the Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by faint-hearted or self-interested class representatives; the Rule 23(e) prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy Rule 23(b)(3)'s predominance requirement, that vital prescription would be stripped of any meaning in the settlement context. The predominance criterion is not satisfied by class members' shared experience of asbestos exposure, given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions. No settlement class called to the Court's attention is as sprawling as the one certified here. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great. The certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design. Pp. 28–31.

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(d) Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s adequate representation inquiry. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 157–158, n. 13. Representatives must be part of the class and possess the same interest and suffer the same injury as the class members. *E.g., East Tex. Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403. In this case, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318, 331. The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the District Court's finding that petitioners' assets suffice to pay settled claims. Although this is not a Rule 23(b)(1)(B) "limited fund" case, the settlement's terms—*e.g.*, no inflation adjustments, only a few claimants per year permitted to opt out at the back end, and loss-of-consortium claims extinguished—reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated under a proper understanding of their representational responsibilities. That assessment is on the mark. Pp. 31–34.

(e) In light of the conclusions that the class does not satisfy the requirements of common issue predominance and adequacy of representation, this Court need not rule, definitively, on the adequacy of the notice given here. The Court recognizes, however, the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. Pp. 34–35.

(f) The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it. P. 35.

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83 F. 3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined. O'CONNOR, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 96-270

AMCHEM PRODUCTS, INC., ET AL., PETITIONERS
v. GEORGE WINDSOR ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 25, 1997]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal-injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I

A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See *Georgine* v. *Amchem Products, Inc.*, 83 F. 3d 610, 618, and n. 2 (CA3 1996) (citing commentary). A United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See *id.*, at 3, 27–35; see also *id.*, at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting

"passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415, 422–424 (JPML 1991).[1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims

[1] In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906, 910 (JPML 1977); *In re Asbestos Products Liability Litigation (No. II)*, MDL–416 (JPML Mar. 13, 1980) (unpublished order); *In re Asbestos School Products Liability Litigation*, 606 F. Supp. 713, 714 (JPML 1985); *In re Ship Asbestos Products Liability Litigation*, MDL–676 (JPML Feb. 4, 1986) (unpublished order); *In re Leon Blair Asbestos Products Liability Litigation*, MDL–702 (JPML Feb. 6, 1987) (unpublished order).

not yet filed.

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks—later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action—co-chaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee.[2] Although the MDL order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving . . . future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also *Georgine* v. *Amchem Products, Inc.*, 157 F. R. D. 246, 266 (ED Pa. 1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution

[2]The CCR Companies are Amchem Products, Inc.; A. P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C. E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I. U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

by plaintiffs' counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." *Id.*, at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos-related claims—claimants the parties to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." *Id.*, at 294; see also *id.*, at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs'

lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits.[3]

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.[4]

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed.[5] Untold numbers of individuals may

[3] It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

[4] Also on the same day, the CCR defendants filed a third-party action against their insurers, seeking a declaratory judgment holding the insurers liable for the costs of the settlement. The insurance litigation, upon which implementation of the settlement is conditioned, is still pending in the District Court. See, *e.g.*, *Georgine* v. *Amchem Prods., Inc.*, No. 93–0215, 1994 WL 502475 (ED Pa., Sept. 2, 1994) (denying motion of insurers to compel discovery).

[5] The complaint defines the class as follows:

"(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U. S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

"(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13–14.

fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings;

it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims—claims that do not fall within the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the most highly compensated category—are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims.[6]

[6]Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary"; mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL–CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F. R. D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. *Ibid.*[7]

In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see *Carlough* v. *Amchem Products, Inc.*, 834 F. Supp. 1437,

[7]These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group." Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos in the late 1940s and was diagnosed with mesothelioma in May 1994, after expiration of the opt-out period, see *infra*, at 11, 13. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the federal District Court's anti-suit injunction. Casimir Balonis died in October 1996. See Brief for Balonis Respondents 9–11.

1467–1468 (ED Pa. 1993), and he approved the settling parties' elaborate plan for giving notice to the class, see *Carlough* v. *Amchem Products, Inc.*, 158 F. R. D. 314, 336 (ED Pa. 1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. See 157 F. R. D., at 325, 331–332. He also found that adequate notice had been given to class members, see *id.*, at 332–334, and that final class certification under Rule 23(b)(3) was appropriate, see *id.*, at 315.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement,[8] see *ibid.*, a matter no one debates. The Rule 23(a)(2) and (b)(3) requirements of commonality[9] and preponderance[10] were also satis-

[8]Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

[9]Rule 23(a)(2) requires that there be "questions of law or fact common to the class."

[10]Rule 23(b)(3) requires that "the [common] questions of law or fact . . . predominate over any questions affecting only individual

fied, the District Court held, in that

> "[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." *Id.*, at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3),[11] and that, as Rule 23(b)(3) demands,[12] the class settlement was "superior" to other methods of adjudication. See *ibid.*

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement.[13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular, objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly-formed class.

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members."

[11] Rule 23(a)(3) states that "the claims . . . of the representative parties [must be] typical of the claims . . . of the class."

[12] Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

[13] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See *id.*, at 317–319, 326–332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See *id.*, at 318–319. Reasoning that the representative plaintiffs "have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any*, or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." *Id.*, at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See *Georgine* v. *Amchem Products, Inc.*, 878 F. Supp. 716, 726–727 (ED Pa. 1994).

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See *Georgine* v. *Amchem Products, Inc.*, 83 F. 3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." *Id.*, at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for the [class action] certification." *Ibid.* Turning to the class-certification issues and

finding them dispositive, the Third Circuit declined to decide other questions.

On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F. 3d 768 (CA3), cert. denied, 516 U. S. ___ (1995) (hereinafter *GM Trucks*), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F. 3d, at 799–800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F. 3d, at 625. But cf. *In re Asbestos Litigation*, 90 F. 3d 963, 975–976, and n. 8 (CA5 1996), cert. pending, Nos. 96–1379, 96–1394. While stating that the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F. 3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See *id.*, at 630–634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See *id.*, at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See *id.*, at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See *id.*, at 626, 628. "These factual differences," the Third Circuit explained,

"translate[d] into significant legal differences." *Id.*, at 627. State law governed and varied widely on such critical issues as "viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." *Ibid.*[14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, *ibid.*, barred a determination, under existing tort law, that common questions predominated, see *id.*, at 630.

The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). *Ibid.* Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: "'[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.'" *Ibid.* (quoting 157 F. R. D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F. 3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted

[14] Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15% of current mesothelioma claims arise in California, where the statewide average recovery is $419,674—or more than 209% above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5–6, n. 5 (citing 2 App. 461).

with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See *ibid.* They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993." *Id.*, at 630–631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See *id.*, at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question: "both look to the potential for conflicts in the class." *Id.*, at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." *Ibid.*

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." *Ibid.* The court elaborated most particularly, however, on the unfairness of binding exposure-only plaintiffs who might be unaware of the class action or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See *id.*, at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. *Id.*, at 634.

The Third Circuit, after intensive review, ultimately

ordered decertification of the class and vacation of the District Court's anti-suit injunction. *Id.*, at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." *Ibid.* He added that in his view, named exposure-only plaintiffs had no standing to pursue the suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." *Id.*, at 638.

We granted certiorari, 519 U. S. ___ (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U. S. C. §1332(a).

As earlier recounted, see *supra*, at 13, the Third Circuit declined to reach these issues because they

"would not exist but for the [class action] certification." 83 F. 3d, at 623. We agree that "[t]he class certification issues are dispositive," *ibid.*; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. ___, ___ (1997) (slip op., at 21) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U. S. C. §2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend . . . the [subject matter] jurisdiction of the United States district courts").[15]

III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court

[15]The opinion dissenting in part does not find the class certification issues dispositive—at least not yet, and would return the case to the Third Circuit for a second look. See *post*, at 2, 13. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure-only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see *Metro-North Commuter R. Co.* v. *Buckley*, *ante*, p. __ (Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §51 *et seq.*, interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 375–400 (1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Fed. Rule Civ. Proc. 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 696–697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U. S. C. App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B. C. Ind. & Com. L. Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded. See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1777, p. 517 (2d ed. 1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379–400. Rule 23(b)(3) "opt out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt in") device. See 7A Wright, Miller, & Kane §1753, at 28–31, 42–44; see also Adv. Comm. Notes, 28 U. S. C. App., p. 695.

Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U. S. C. App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy."

In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover 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." *Ibid.* Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action . . . ." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U. S. C. App., p. 698. They elaborated:

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class

> may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." *Ibid.*

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.") (footnote omitted). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F. 3d, at 633.

While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace* v. *Van Ru Credit Corp.*, 109 F. 3d 338, 344 (1997).

To alert class members to their right to "opt out" of a

(b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 173–177 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U. S. C. App., p. 699.

In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L. Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, *e.g.*, T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61–62 (1996) (noting large number of such cases in

districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.

In *GM Trucks*, 55 F. 3d, at 799–800, and in the instant case, 83 F. 3d, at 624–626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. See, *e.g.*, *In re Asbestos Litigation*, 90 F. 3d, at 975 (CA5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions §11.28, at 11–58 (3d ed. 1992)); *White* v. *National Football League*, 41 F. 3d 402, 408 (CA8 1994) ("adequacy of class representation . . . is ultimately determined by the settlement itself"), cert. denied, 515 U. S. 1137 (1995); *In re A. H. Robins Co.*, 880 F. 2d 709, 740 (CA4) ("[i]f not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied *sub nom. Anderson* v. *Aetna Casualty & Surety Co.*, 493 U. S. 959 (1989); *Malchman* v. *Davis*, 761 F. 2d 893, 900 (CA2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U. S. 1143 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S. Ct. No. 1 CXIX, CLIV to CLV (Aug. 1996) (Request for Comment). In response to the publication of this

proposal, voluminous public comments—many of them opposed to, or skeptical of, the amendment—were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, *e.g.*, Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." 83 F. 3d, at 626 (quoting *GM Trucks*, 55 F. 3d, at 799). That statement, petitioners urge, is incorrect.

We agree with petitioners to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see *supra*, at 14, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' interests inadequately represented. See 83 F. 3d, at 630–631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the

settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Fed. Rule Civ. Proc. 23(c), (d).[16]

And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U. S. C. §§2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right." §2072(b).

Rule 23(e), on settlement of class actions, reads in its entirety: "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." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. *Eisen*, 417 U. S., at 176–177 (adequate representation does not eliminate additional requirement

[16] Portions of the opinion dissenting in part appear to assume that settlement counts only one way—in favor of certification. See *post*, at 1–2, 13. But see *post*, at 7. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F. 3d 610, 626–635 (1996), proposed settlement classes sometimes warrant more, not less caution on the question of certification.

to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1379–1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, *e.g.*, *Kamilewicz* v. *Bank of Boston Corp.*, 100 F. 3d 1348, 1352 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U. S. ___ (1997).

Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court

of Appeals' opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23's requirements.[17]

A Command

We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact . . . predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F. R. D., at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see *supra*, at 2–3, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.[18]

[17] We do not inspect and set aside for insufficient evidence district court findings of fact. Cf. *post*, at 5, 9–10. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

[18] In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context—just as in the context of Rule 24(b)(2) governing permissive intervention—"manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond* v. *Charles*, 476 U. S. 54, 76–77 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518–519.[19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become faintheartened before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane §1797, at 340–341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.

The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants . . . ." 157 F. R. D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding. See 83 F. 3d, at 626–627. Given the greater number of questions peculiar to the several categories of class

[19] This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See *Georgine* v. *Amchem Products, Inc.*, 157 F. R. D. 246, 318 (ED Pa. 1994); see also *id.*, at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.*, at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See *id.*, at 627 (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 823 (1985)).

No settlement class called to our attention is as sprawling as this one. Cf. *In re Asbestos Litigation*, 90 F. 3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due

to the huge number of individuals and their varying medical expenses, smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U. S. C. App., p. 697; see also *supra*, at 21–22. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways." *Ibid.* And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. *Ibid.* But the text of the rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. See Resnik, From "Cases" to "Litigation," 54 Law & Contemp. Prob. 5, 17–19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design.

B

Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See

General Telephone Co. of Southwest v. *Falcon,* 457 U. S. 147, 157–158, n. 13 (1982). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc.* v. *Rodriguez,* 431 U. S. 395, 403 (1977) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U. S. 208, 216 (1974)).[20]

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest* v. *EEOC,* 446 U. S. 318, 331 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and expo-

[20] The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest* v. *Falcon,* 457 U. S. 147, 157, n. 13 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See *id.,* at 157–158, n. 13. Like the Third Circuit, we decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

sure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F. R. D., at 291. Although this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see *supra,* at 8–9, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 982 F. 2d 721, 742–743 (CA2 1992), modified on reh'g *sub nom. In*

re Findley, 993 F. 2d 7 (CA2 1993).

The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities. See 83 F. 3d, at 630–631. That assessment, we conclude, is on the mark.

C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. *Id.*, at 633; cf. *In re Asbestos Litigation*, 90 F. 3d, at 999–1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category—future spouses and children of asbestos victims—could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F. 3d, at 633–634, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.[21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed. 1994); cf. 83 F. 3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

[21] The opinion dissenting in part is a forceful statement of that argument.

SUPREME COURT OF THE UNITED STATES

No. 96–270

AMCHEM PRODUCTS, INC., ET AL., PETITIONERS
v. GEORGE WINDSOR ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 25, 1997]

Justice BREYER, with whom Justice STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "settlement is relevant to a class certification," *ante*, at 25, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

These difficulties flow from the majority's review of what are highly fact-based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions,

and their judgments are to be reviewed by the Court of Appeals only for abuse of discretion. See *Califano* v. *Yamasaki,* 442 U. S. 682, 703 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion . . . with respect to matters involving the certification" of class actions. *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 345 (1979); cf. *Cooter & Gell* v. *Hartmarx Corp.,* 496 U. S. 384, 402 (1990) (district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. *E.g., Georgine* v. *Amchem Products, Inc.,* 83 F. 3d 610, 626 (CA3 1996) (holding that "*considered as a litigation class,*" the class cannot meet Rule 23's requirements) (emphasis added). There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently close to warrant further detailed appellate court review under the correct legal standard. Cf. *Reno* v. *Bossier Parish School Bd.,* 520 U. S. ___ (1997) (slip op., at 14). And I shall briefly explain why this is so.

I

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace—over the past 40 or 50 years—but the most severe instances of such exposure probably occurred

three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6–7 (Mar. 1991) (Judicial Conference Report); App. 781–782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787–788 (4th ed. 1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See *In re Joint Eastern and Southern Dist. Asbestos Litigation,* 129 B. R. 710, 936–937 (E and SD N. Y. 1991) *(Joint Litigation).* About half of the suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. *In re School Asbestos Litigation,* 789 F. 2d 996, 1000 (CA3 1986); see also Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10–11.

Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments: See Judicial Conference Report 2 ("'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a

litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments—if ever obtained—can be collected'") (quoting Rand Corporation Institute for Civil Justice); *id.*, at 13 ("The transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," and citing Rand finding that "of each asbestos litigation dollar, 61 cents is consumed in transaction costs . . . . Only 39 cents were paid to the asbestos victims"); *id.*, at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally"); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, *supra*, at 389–395.

Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the co-chairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. *Georgine* v. *Amchem Products, Inc.*, 157 F. R. D. 246, 266–267, (ED Pa. 1994); App. 660–662. These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F. R. D., at 268, 287. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including

"confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. *Id.*, at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. *Ibid.* In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." *Id.*, at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." *Ibid.* The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law

predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Ante*, at 28 (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, *e. g.*, *In re A. H. Robins Co.*, 880 F. 2d 709, 740 (CA4), cert. denied *sub nom. Anderson* v. *Aetna Casualty & Surety Co.*, 493 U. S. 959 (1989); *In re Beef Industry Antitrust Litigation*, 607 F. 2d 167, 177–178 (CA5 1979), cert. denied *sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Assn.*, 452 U. S. 905 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions §11.27, pp. 11–54 to 11–55 (3d ed. 1992).

Nor do I understand how one could decide whether common questions "predominate" in the abstract—without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective—"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23(b)(3), 28 U. S. C. App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 160 (1982); see also C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure §1785, p. 107, and n. 34 (1986). I am not saying that the "settlement counts only one way." *Ante*, at 26 n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability . . . to make informed certification decisions." *In re Asbestos*, 90 F. 3d 963, 975 (CA5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," *ante*, at 29, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F. R. D., at 316.

The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue—a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance of (a) the

common fact of exposure, (b) the common interest in receiving *some* compensation for certain rather than running a strong risk of *no* compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. *Ibid.*

Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is *how much* these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. *Id.*, at 292.

These differences might warrant subclasses, though subclasses can have problems of their own. "There can be a cost in creating more distinct subgroups, each with its own representation. . . . [T]he more subclasses created, the more severe conflicts bubble to the surface and inhibit settlement. . . . The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court—reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact-specific Rule 23 determinations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Ante*, at 32.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, *supra*, at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference Report 34–35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled'") (citation omitted). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed.

But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." Wright, Miller, & Kane, 7A Federal Practice and Procedure, §1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the "'real and present danger'" described by the Judicial Conference

Report above. The majority's use of the lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, *ante*, at 32–33, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F. R. D., at 292. For these reasons, and others, the District Court found that the distinction between present and future plaintiffs was "illusory." 157 F. R. D., at 317–318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To

choose one more brief illustration, the majority chastises the settlement for extinguishing loss-of-consortium claims, *ante*, at 33, 34, but does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F. R. D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. *Ante*, at 31–34. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation . . . while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F. R. D., at 316 (citation omitted); see also *id.*, at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, [these]

unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the . . . defendants"); *id.*, at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" and will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid before"); *id.*, at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL–CIO (and its Building and Construction Trades Department), which represents a "'substantial percentage'" of class members, 157 F. R. D., at 325, and which has a role in monitoring implementation of the settlement, *id.*, at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. 157 F. R. D., at 312–313, 336. Every notice emphasized that an individual did not currently have to be sick to be a class member. And in the end, the

District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. *Id.*, at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District Court. *Ante*, at 34. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See *Reiter*, 442 U. S., at 345; *Yamasaki*, 442 U. S., at 703.

II

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeal on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corporation; Asbestos Claims Management Corp **; National Services Industries, Inc.; Nosroc Corporation; Pfozer, Inc.; Quigley Company, Inc.; Shook & Fletcher Insulation Company; T & N, PLC; Union Carbide Corporation **; United States Gypsum Company.

Stephen F. Brock, Manta & Welge, Philadelphia, PA, Joseph T. Mallon, Dunn, Haase, Sullivan, Mallon, Cherner & Broadt, Media, PA, R. Jeff Carlisle, Aaron L. Bowers, Lynberg & Watkins, Los Angeles, CA , Elit R. Felix, II, Margolis, Edelstein & Scherlis, Philadelphia, PA, James J. Rodgers, Dilworth, Paxson, Kalish & Kauffman, Philadelphia, PA, Wilson M. Brown, III, Drinker, Biddle & Reath, Philadelphia, PA, Thomas C. DeLorenzo, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, PA, Robert R. Reeder, William P. Shelley, Cozen & O'Connor, Philadelphia, PA, Lawrence M. Silverman, Silverman, Coopersmith, Hillman & Frimmer, Philadelphia, PA, John P. O'Dea, Stradley, Ronon, Stevens & Young, Philadelphia, PA, Daniel P. Lynch, Timby, Brown & Timby, Philadelphia, PA, Marc I. Bressman, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Cherry Hill, NJ, David J. D'Aloia, Saiber, Schlesinger, Satz & Goldstein, Newark, NJ, Allan C. Molotsky, Post & Schell, Philadelphia, PA, Theresa W. Hajost, Chadbourne & Parke, Washington, DC, Lisa B. Zucker, German, Gallagher & Murtagh, Philadelphia, PA, Rudolph Garcia, Saul, Ewing, Remick & Saul, Philadelphia, PA, Joseph L. Ruby, Wiley, Rein & Fielding, Washington, DC, for Remaining Appellees.

Dan Morales, Attorney General, Jorge Vega, First Assistant Attorney General, Laquita A. Hamilton, Deputy Attorney General for Litigation, Paul Elliott, Assistant Attorney General, Chief, Natural Resources Division, Brian E. Berwick, Assistant Attorney General, Office of Attorney General of Texas, Environmental Protection Division, Natural Resources Division, Austin, Texas, for State of Texas-Amicus Curiae.

Arthur H. Bryant, Leslie A. Brueckner, Trial Lawyers for Public Justice, Washington, DC, Roberta B. Walburn, Robins, Kaplan, Miller, & Ciresi, Minneapolis, MN, for Asbestos Victims of America and Trial Lawyers for Public Justice-Amicus Curiae.

W. Donald McSweeny, Robert H. Riley, Catherine Masters Epstein, Schiff, Hardin & Waite, Chicago, IL, James D. Miller, King & Spalding, Washington, DC, Philip McWeeny, David L. Gray, Owens-Illinois, Inc., Toledo, Ohio, for Owens- Illinois, Inc.-Amicus Curiae.

Robert G. Vial, Dallas, Texas, Gordon S. Rather, Jr., Little Rock, Arkansas, for American Board of Trial Advocates-Amicus Curiae.

Before: BECKER, GREENBERG, and WELLFORD, Circuit Judges. [FN***]

FN*** Honorable Harry W. Wellford, United States Circuit Judge for the Sixth Circuit, sitting by designation.

***617** OPINION OF THE COURT

BECKER, Circuit Judge.

Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case. It is a

class action that seeks to settle the claims of between 250,000 and 2,000,000 individuals who have been exposed to asbestos products against the twenty companies known as the Center for Claims Resolution (CCR). [FN1] Most notably, the settlement would extinguish asbestos-related causes of action of exposed individuals who currently suffer no physical ailments, but who may, in the future, develop possibly fatal asbestos-related disease. These "futures claims" of "exposure-only" plaintiffs would be extinguished even though they have not yet accrued.

> FN1. The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp. (formerly known as National Gypsum Co.); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic Inc.; GAF Building Materials Corp.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T & N, plc; Union Carbide Corp.; and United States Gypsum Co.
> All of the CCR defendants stopped manufacturing asbestos products circa 1975. The assets of the CCR companies, together with their insurance coverage, represent a significant portion of the funds that will ever be available to pay asbestos-related claims.

The settlement, memorialized in a 106 page document, was not crafted overnight. Indeed, more than a case, this is a saga, reflecting the efforts of creative lawyers and an extremely able district judge to deal with the asbestos litigation explosion. Asbestos litigation has burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system. The resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue.

However, against the need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system. Scholars have complained that the use of class actions to resolve mass toxic torts, particularly those involving futures claims, improperly involves the judiciary in the crafting of legislative solutions to vexing social problems. These criticisms are not merely abstract; they are levied in terms of the fundaments of the federal judicial polity: jurisdiction, justiciability, notice, and the requirements of Federal Rule of Civil Procedure 23.

This opinion addresses appeals of the district court's September 22, 1994, preliminary injunction, which prohibits members of the so-called Georgine class from pursuing asbestos-related personal injury claims in any other court pending the issuance of a final order in this case. The appellants ("objectors") are three groups of individuals with aligned interests who challenge the district court's injunction: the "Windsor Group"; the New Jersey "White Lung Group"; and the "Cargile Group" (mesothelioma victims from California). The objectors challenge the district court's jurisdiction (both personal and subject matter) over the underlying class action, the justiciability of the case, the adequacy of class notice, and the propriety of class certification under Federal Rule of

Civil Procedure 23.

Although we have serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members, we will, for reasons explained below, pass over these difficult issues and limit our discussion to the class certification issues. We conclude that this class meets neither the 23(a) requirements of typicality and adequacy of representation, nor the 23(b)(3) requirements of predominance and superiority. In In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir.) [Hereinafter GM Trucks], cert. denied sub nom. General Motors Corp. v. French, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995), we held that, for settlement classes, the 23(a) requirements must be applied as if the case were going to be litigated. We now hold that, because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, ***618** and because "[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," id. at 799, the 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.

Examined as a litigation class, this case is so much larger and more complex than all other class actions on record that it cannot conceivably satisfy Rule 23. Initially, each individual plaintiff's claim raises radically different factual and legal issues from those of other plaintiffs. These differences, when exponentially magnified by choice of law considerations, eclipse any common issues in this case. In such circumstances, the predominance requirement of Rule 23(b) cannot be met. Furthermore, this amalgamation of factually and legally different plaintiffs creates problematic conflicts of interest, which thwart fulfillment of the typicality and adequacy of representation requirements of Rule 23(a). Primarily, the interests of the exposure only plaintiffs are at odds with those of the presently injured: the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits.

This class also fails Rule 23(b)'s superiority prong. Even utilizing the management techniques pioneered by the Federal Judicial Center, we do not see how an action of this magnitude and complexity could practically be tried as a litigation class. This problem, when combined with the serious fairness concerns caused by the inclusion of futures claims, make it impossible to conclude that this class action is superior to alternative means of adjudication.

For the reasons we have preliminarily outlined, and which we will now explain in depth, we will vacate the district court's order certifying the plaintiff class and remand with directions to decertify the class and vacate the injunction. We recognize that our decision undermines the partial solution to the asbestos litigation crisis. However, in doing so, we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks. We thus leave legislative solutions to legislative channels.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Reciting the background facts and procedural history of this case could consume pages by the dozen. This history is, however, already well known. It has been

ronicled in the opinion of the district court, see Georgine v. Amchem Prods., c., 157 F.R.D. 246, 254-67 (E.D.Pa.1994); in the Cornell Law Review, see mposium, Mass Tortes: Serving Up Just Desserts, 80 Cornell L.Rev. 811 (1995); d has even surfaced on the Continuing Legal Education (CLE) circuit, see Legal telligencer (Philadelphia), Jan 31, 1996, at 34 (announcing a CLE Course on the essons of Georgine"). [FN2] In short, the asbestos law world knows this case ckwards and forwards. We shall, therefore, set forth only the essentials.

FN2. In addition to the Cornell Law Review Symposium, numerous articles have addressed the issues raised in this case. See, e.g., John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343 (1995) (arguing for prudential limits on mass tort class actions and using this class action as a case study); Richard A. Nagareda, Turning From Tort to Administration, 94 Mich. L.Rev. 899 (1996) (discussing judicial review of mass tort settlements and focusing in part on this case); Note, And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers, 109 Harv. L.Rev. 1066 (1996) (addressing the justiciability of futures claims).

A. The Genesis of the Case

iis case arises against the background of an asbestos litigation crisis:
[This] is a tale of danger known in the 1930s, exposure inflicted upon millions Americans in the 1940s and 1950s, injuries that began to take their toll in e 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past d current filing data, and because of a latency period that may last as long as years for some asbestos related diseases, a continuing stream of claims can be pected. The ***619** final toll of asbestos related injuries is unknown. edictions have been made of 200,000 asbestos disease deaths before the year)0 and as many as 265,000 by the year 2015.
he most objectionable aspects of asbestos litigation can be briefly mmarized: dockets in both federal and state courts continue to grow; long ays are routine; trials are too long; the same issues are litigated over and er; transaction costs exceed the victims' recovery by nearly two to one; iaustion of assets threatens and distorts the process; and future claimants lose altogether.
re Asbestos Prods. Liab. Litig. (No. VI), 771 F.Supp. 415, 418-19 P.M.L.1991) (quoting Report of The Judicial Conference Ad Hoc Committee on estos, 1-3 (1991)) (footnote omitted).
eking solutions to the asbestos litigation crisis, eight federal judges with nificant asbestos experience wrote to the Judicial Panel on Multidistrict igation ("MDL Panel"), urging it to consolidate all the federal asbestos igation in a single district. These judges argued that consolidation would cilitate global settlements, and allow the transferee court to fully explore national disposition techniques such as classes and sub-classes under Rule " Georgine, 157 F.R.D. at 265 (citation and internal quotations omitted). MDL Panel agreed, transferring all pending federal court asbestos cases that e not yet on trial to the Eastern District of Pennsylvania, and assigning them Judge Charles R. Weiner for consolidated pretrial proceedings. See In re

Asbestos Prods. Liab. Litig. (No. VI), 771 F.Supp. at 424.

After the MDL Panel transfer, steering committees for the plaintiffs and defendants were formed and commenced global settlement negotiations. Judge Weiner appointed two of the class counsel in this case, Ronald Motley and Gene Locks, as co-chairs of the Plaintiffs' Steering Committee. Counsel for CCR were active participants on the Defendants' Steering Committee.

When these negotiations reached an impasse, class counsel and CCR began negotiations to resolve CCR's asbestos liability. After a year of discussions, the two sides reached a settlement agreement, and then filed this class action.

B. Proceedings in the District Court

On January 15, 1993, the named plaintiffs filed a complaint on behalf of a class consisting of (1) all persons exposed occupationally or through the occupational exposure of a spouse or household member to asbestos-containing products or asbestos supplied by any CCR defendant, and (2) the spouses and family members of such persons, who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action was commenced. [FN3] Five of the named plaintiffs allege that they have sustained physical injuries as a result of exposure to the defendants' asbestos products. Four named plaintiffs allege that they have been exposed to the CCR defendants' asbestos- containing products but have not yet sustained any asbestos-related condition. On December 22, 1993, the settling parties stipulated to the substitution of Robert A. Georgine for Edward J. Carlough as the lead plaintiff, and the caption of the case has been ***620** changed accordingly. See Georgine, 157 F.R.D. at 257 n. 1. We thus refer to the plaintiff class as the Georgine class.

> FN3. The complaint defines the class as follows:
> (a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).
> (b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

The complaint asserts various legal theories, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff seeks unspecified

damages in excess of $100,000.

On the same day, the CCR defendants filed an answer, denying the allegations of the plaintiffs' class action complaint and asserting eleven affirmative defenses. Also on the same day, the plaintiffs and defendants ("the settling parties") jointly filed a motion seeking conditional class certification for purposes of settlement accompanied by a stipulation of settlement. [FN4] Simultaneously, the settling parties concluded another agreement: class counsel agreed to settle their inventories of pending asbestos claims--claims that were expressly excluded from the class action--against the CCR defendants for over $200 million.

> FN4. Additionally, on January 15, the CCR defendants filed a third party action against their insurers, seeking a declaratory judgment that the insurers are liable for the costs of the settlement. The insurance litigation is still pending in the district court. See, e.g., Georgine v. Amchem Prods., Inc., No. 93-0215, 1994 WL 502475 (E.D.Pa. Sept. 2, 1994).

The stipulation of settlement purports to settle all present and future claims of class members for asbestos-related personal injury or wrongful death against the CCR members that were not filed before January 15, 1993. The stipulation establishes an administrative procedure that provides compensation for claimants meeting specified exposure and medical criteria. If the exposure criteria are met, the stipulation provides compensation for four categories of disease: mesothelioma, lung cancer, certain "other cancers" (including colon- rectal, laryngeal, esophageal, and stomach cancer), and "non-malignant conditions" (asbestosis and bilateral pleural thickening). The stipulation provides objective criteria for medical diagnoses. For those claimants that qualify, the stipulation fixes a range of damages that CCR will award for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that may be paid in any given year.

Claimants found to have "extraordinary" claims can be awarded more than the cap allows, but only a limited number of claims (three percent of the total number of qualified mesothelioma, lung cancer and "other cancer" claims, and up to one percent of the total number of qualified "non-malignant conditions" claims) can be found to be "extraordinary." Furthermore, the total amount of compensation available to victims with such claims is itself capped. Payment under the settlement is not adjusted for inflation.

The stipulation does allow some claimants who qualify for payment but are dissatisfied with the settlement offered by CCR to pursue their claims in court. However, the stipulation severely limits the number of claimants who can take advantage of this option. Only two percent of the total number of mesothelioma and lung cancer claims, one percent of "other cancer" claims, and one-half of a percent of "non-malignant conditions" claims from the previous year may sue in the tort system. Although the plaintiffs are generally bound to the settlement in perpetuity, the defendants are not so limited. Each defendant may choose to withdraw from the settlement after ten years.

The claims asserted by the exposure only plaintiffs--claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring--receive no payment under the stipulation of settlement. In addition, "pleural"

claims, which involve asbestos-related plaques on the lungs but no physical impairment, receive no cash compensation, even though such claims regularly receive substantial monetary payments in the tort system.

On the other hand, the settlement does provide exposure-only and pleural claimants with significant benefits. First, the stipulation tolls all statutes of limitations, so that any claim that was not time-barred when the class action was commenced may be filed at any time in the future. Thus, unlike in the ***621** tort system, where pleural claimants may have to rush to file suit on discovery of changes in the lining surrounding their lungs (before their full injuries are known), under the stipulation claimants do not submit their claims until they develop an impairing illness. Second, the stipulation provides certain "comeback" rights, so that claimants who have been compensated for a non-malignant condition may file a second claim and receive further compensation if they later develop an asbestos-related cancer. It is estimated that almost 100,000 claims will be paid under the settlement over the course of the next ten years. [FN5]

> FN5. The terms of the Stipulation are discussed in greater detail in Georgine, 157 F.R.D. at 267-86.

On January 29, 1993, Judge Weiner conditionally certified this opt-out class. He then referred the matter to Judge Lowell A. Reed for the establishment of settlement procedures and the resolution of objections to the settlement. Judge Reed held hearings on a number of aspects of the case and issued several comprehensive opinions. On October 6, 1993, he ruled that the court had subject matter jurisdiction and that the action presented a justiciable case or controversy. See Carlough v. Amchem Prods., Inc., 834 F.Supp. 1437 (E.D.Pa.1993). On October 27, 1993, he concluded that the proposed settlement satisfied a threshold level of fairness sufficient to warrant class notice and approved a notice plan. See Carlough v. Amchem Prods., Inc., 158 F.R.D. 314 (E.D.Pa.1993). We summarize the highlights of these decisions in the margin. [FN6]

> FN6. First, Judge Reed rejected the objectors' contentions that exposure-only plaintiffs, who may not presently have sufficient physical harm to state a valid cause of action, lack standing to pursue this litigation. Carlough, 834 F.Supp. at 1446-56. He reasoned that Article III standing is not dependent upon the plaintiffs' ability to state a valid cause of action, but that it depends upon whether these plaintiffs have "suffered an injury in fact which is concrete and particularized, and actual or imminent rather than merely conjectural or hypothetical." Id. at 1450 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)). He concluded that "exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court." Id. at 1454.
> Second, with respect to amount-in-controversy, Judge Reed noted that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and the case will not be dismissed unless it appears to a

"legal certainty" that the $50,000 amount cannot be satisfied. Id. at 1456 (citations and internal quotations omitted). He then rejected the objectors' argument that exposure-only plaintiffs did not meet this standard. Judge Reed held first that "it is enough that the kind of factual injuries alleged by the exposure-only plaintiffs--physical, monetary and emotional injuries--plainly support a claim to more than $50,000." Id. at 1459 (citation omitted). He also ruled that, even if he were required to do a claim-by-claim analysis of the exposure-only plaintiffs' claims, it could not be said to a legal certainty that a jury might not award $50,000 to any plaintiff. See id. at 1462.

Third, Judge Reed rejected the objectors' claim that the litigation was "collusive"--and therefore did not present a case or controversy--because the Stipulation of Settlement was negotiated before class counsel formally filed the complaint. Id. at 1462-66. He held that this case "is one involving genuinely adverse interests, but, because of the settlement, it lacks a dispute as to the remedy." Id. at 1465.

On October 27, 1993, Judge Reed ruled that "the proposed settlement is fair for the preliminary purpose of deciding whether to send notice to the class in that it appears to be the product of serious, informed, non-collusive negotiations, it has no obvious deficiencies, it does not improperly grant preferential treatment to class representatives or segments of the class, and it clearly falls within the range of possible approval." Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 320 (E.D.Pa.1993) (footnotes omitted). He then analyzed the notice plan, concluding that the proposed notice (with certain specified modifications) "satisf[ied] the requirements of Rules 23(c)(2) and (e) and the due process clause of the Constitution." Carlough, 158 F.R.D. at 333.

Finally, Judge Reed rejected the objectors' contention that, regardless of the content or form of the notice plan, notice regarding potential future personal injury claims for past toxic exposure is per se unconstitutional, either because such claimants may not understand that they are members of the class or because they cannot make an informed opt-out decision without knowing what disease, if any, they may suffer in the future. Id. at 334-36.

On February 22, 1994, after several months of pre-trial proceedings, discovery, and motions, Judge Reed commenced a hearing to assess the fairness of the settlement. The hearing took eighteen days and involved the testimony of some twenty-nine witnesses. On August 16, 1994, Judge Reed filed an opinion approving the Stipulation of Settlement and finally certifying the Georgine settlement ***622** class. In the course of his opinion, he held that the class met the requirements of Federal Rule of Civil Procedure 23, that the settlement was fair and reasonable, and that notice to the class met the requirements of Rule 23 and the Due Process Clause. See Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D.Pa.1994). [FN7]

FN7. Judge Reed later established a new notice and opt-out period, voiding a prior notice and opt-out period, to remedy alleged improper communications made by counsel opposing the settlement. See Georgine v. Amchem Prods.,

Inc., 160 F.R.D. 478 (E.D.Pa.1995).

The settling parties then moved for a preliminary injunction barring class members from initiating claims against any CCR defendant pending a final judgment in this case. On September 21, 1994, he granted the motion, explaining that the injunction is necessary because "the cost and time expended defending claims in multiple jurisdictions would likely result in the disintegration of the Georgine settlement." Georgine v. Amchem Prods., Inc., 878 F.Supp. 716, 723 (E.D.Pa.1994). These appeals followed.

C. The Contentions on Appeal

Although this opinion will address only the class certification issues, these appeals have not been so circumscribed. Indeed, far from acceding to any of Judge Reed's rulings, see supra note 6, the objectors have also vigorously pressed challenges to justiciability, subject matter jurisdiction, personal jurisdiction over absent class members, and the adequacy of class notice.

First, the objectors argue that this is a feigned suit--and thus is not a justiciable case or controversy under Article III of the Constitution--because neither plaintiffs nor plaintiffs' counsel had any intention of litigating their "futures" claims, but merely seek approval of a result that plaintiffs and defendants have jointly pursued. This contention is supported by the fact that class counsel presented the suit and settlement together with counsel for the CCR defendants in one package, after having negotiated with CCR a side- settlement of over $200 million for cases in their "inventory." Second, the objectors contend that the exposure only plaintiffs lack standing to bring their claims because they currently suffer no actual injuries. Third, they assert that the court lacks subject matter jurisdiction over the exposure-only plaintiffs' claims because such claims cannot exceed the $50,000 minimum required by the diversity statute. Fourth, they argue that the court cannot assert personal jurisdiction over class members lacking minimum contacts with the forum, because such class members have not had a meaningful opportunity to opt out and thus have not consented to jurisdiction. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985).

Finally, the objectors have marshalled a powerful three-pronged argument that, in this futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of Rule 23 or the Constitution. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950). The objectors argue that notice is problematic for futures plaintiffs because (1) such plaintiffs may not know that they have been exposed to asbestos within the terms of this class action; (2) even if aware of their exposure, these plaintiffs, who suffer no physical injuries, have little reason to pay attention to class action announcements; and (3) even if class members find out about the class action and realize they fall within the class definition, they lack adequate information to properly evaluate whether to opt out of the settlement.

[1] The settling parties counter these contentions, arguing that the jurisdiction of the district court is secure and that the strictures of due process have been satisfied. First, to rebut the objectors' argument that this suit is feigned, the settling parties point out that the district court's

resolution of that issue in their favor rested largely on fact findings, and that this appeal does not challenge any factual determinations of the district court. The settling parties also allege that, against the background of bitter adversarial litigation that has gone on for many years between plaintiffs and asbestos companies (and between counsel in this case), this suit was no more or less "collusive" than ***623** other similar actions brought and settled. Second, regarding the existence of the requisite amount in controversy, the settling parties cite to precedent (within a checkered body of caselaw) holding that claims for future injury and medical monitoring with accompanying emotional distress meet the jurisdictional threshold. [FN8]

FN8. The settling parties also contend that a prior decision in this case, Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir.1993) [Hereinafter Gore], decided the jurisdictional challenges raised in this appeal. We are unpersuaded. After the Georgine class action had commenced but prior to the establishment of an opt-out period, the Gore plaintiffs (several absent members of the Georgine class) filed a class action complaint in West Virginia state court. The Gore plaintiffs sought a declaration that they were authorized to "opt out" of the Georgine action on behalf of a West Virginia class and to initiate their own asbestos class action. The district court granted a preliminary injunction as "necessary in aid of [its] jurisdiction" under the All-Writs and Anti-Injunction Acts, enjoining the Gore plaintiffs from prosecuting their separate class action. On appeal to this Court, the Gore plaintiffs argued that the district court lacked jurisdiction to enjoin them because the district court had issued the injunction before providing absent plaintiffs an opportunity to opt out of the Georgine class, which is necessary to establish personal jurisdiction over plaintiffs lacking minimum contacts with the forum, and before the district court found that it had subject matter jurisdiction over the Georgine action. The panel upheld the district court's injunction because, after issuing its injunction, the district court established an opt-out period and found that it had subject matter jurisdiction. Id. at 200-01. Although the district court should have inquired into its jurisdiction before issuing the injunction, we held that the district court's subsequent orders constituted an "initial jurisdictional inquiry" necessary to support its preliminary injunction. Id. at 201. Given its unique posture, we read Gore very narrowly. Gore held that a district court may issue a preliminary injunction against an attempt to opt out en masse--which threatens to completely undermine the federal class action--without a full-scale determination of its jurisdiction. Where a federal class action is threatened with destruction before the notice and opt-out period even commences, an "initial jurisdictional inquiry"--which "may be based on the information reasonably and immediately available to the court," id.--is sufficient to support the court's jurisdiction to issue a protective preliminary injunction. Gore did not reach the question raised in this case: the propriety of the district court's assertion of jurisdiction, after completion of the notice and opt-out period, to enjoin individual plaintiffs from pursuing collateral litigation.

Third, as to the adequacy of class notice, the settling parties submit that the class members, having the terms of the settlement before them, were in a better position to exercise a choice than the usual notice recipient who has no idea how the case will come out. Finally, they assert, though far less convincingly in the wake of GM Trucks, that the requisites of Rule 23 are met as well.

[2][3][4] Although the existence of justiciability and subject matter jurisdiction are not free from doubt, and although we have serious concerns as to the constitutional adequacy of class notice, we decline to reach these issues, and pass on to the class certification issues. The class certification issues are dispositive, and we believe it prudent not to decide issues unnecessary to the disposition of the case, especially when many of these issues implicate constitutional questions. See, e.g., Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) (expressing the rule that courts will avoid constitutional questions when possible). In doing so, we offend no principle of constitutional law, for the jurisdictional issues in this case would not exist but for the certification of this class action. Absent the class certification, there is no need for a determination of jurisdiction over futures claims, the justiciability of such claims, the adequacy of notice, or the propriety of a nationwide protective injunction. Moreover, a court need not reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party. See Norton v. Mathews, 427 U.S. 524, 528-33, 96 S.Ct. 2771, 2773-76, 49 L.Ed.2d 672 (1976); Elkin v. Fauver, 969 F.2d 48, 52 n. 1 (3d Cir.), cert. denied, 506 U.S. 977, 113 S.Ct. 473, 121 L.Ed.2d 379 (1992); United States v. Weathersby, 958 F.2d 65, 66 (5th Cir.1992); Wolder v. United States, 807 F.2d 1506, 1507 (9th Cir.1987).

II. APPELLATE JURISDICTION

Although we deem it wise not to decide most of the jurisdictional issues posed by this case, we are obliged to consider the threshold question whether we have appellate jurisdiction to review the propriety, under Federal ***624** Rule of Civil Procedure 23, of the district court's class certification.

[5] Although the district court has approved the stipulation of settlement and certified the Georgine settlement class, it has not entered a final judgment because the stipulation of settlement is expressly conditioned on the CCR's insurers assuming liability for the settlement. See supra note 4. This is an appeal of the district court's September 22, 1994, preliminary injunction, which prohibits Georgine class members from pursuing claims for asbestos-related personal injury in any other court pending the issuance of a final order. The district court issued the preliminary injunction pursuant to the All-Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283, which provide authority to enjoin collateral litigation if "necessary in aid" of the court's jurisdiction. See Gore, 10 F.3d 189, 201- 04 (3d Cir.1993). The district court found that the injunction is necessary because collateral litigation would undermine implementation of the settlement.

[6][7][8] An order granting or denying class certification is generally not appealable until a final order has been issued. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (class certification not appealable under 28 U.S.C. § 1291); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978) (class certification not

appealable under 28 U.S.C. § 1292(a)(1)). This Court has jurisdiction, of course, under 28 U.S.C. § 1292(a)(1) to review the preliminary injunction issued by the district court. We further conclude that we have pendent appellate jurisdiction to review class certification.

[9] In Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir.1982) (in banc), we held that class certification is reviewable on appeal from issuance of a preliminary injunction if "the preliminary injunction cannot properly be decided without reference to the class certification question." Id. at 449. We reasoned that if the propriety of class certification "directly controls disposition of the [injunction], or [if] the issues are, in some way, inextricably bound[,] then both issues must be addressed in order to resolve properly the section 1292(a)(1) preliminary injunction." Id. (emphasis in original) (footnote omitted); accord Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 208-09 (3d Cir.1990). To do otherwise would impinge on the right to a 1292(a)(1) appeal. See Kershner, 670 F.2d at 449.

In this case, class certification "directly controls disposition of the [injunction]." The entire basis for the district court's injunction is to protect the underlying class action. If the class was not properly certified, the district court was without authority to issue its preliminary injunction. To give full effect to the appellants' right to review of the injunction, we must reach class certification. We also note that concerns that might militate against review are not present in this case. Most notably, there is no indication that the district court might alter its class certification order. Compare Kershner, 670 F.2d at 449 (expressing this concern).

III. CLASS CERTIFICATION

[10] To obtain class certification, plaintiffs must satisfy all of the requirements of Rule 23(a) and come within one provision of Rule 23(b). See Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 248 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1995). Rule 23(a) mandates a showing of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation:

> 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.

Fed. R. Civ. P. 23(a).

[11] We held in GM Trucks that, although class actions may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. See 55 F.3d 768, ***625** 799-800 (3d Cir.), cert. denied sub nom. General Motors Corp. v. French, --- U.S. ----, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995). Strict application of the criteria is mandated, even when the parties have reached a proposed settlement, because

> Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and adequately protect class interests.... To allow lower standards for the requisites of the rule in the face of the hydraulic pressures confronted by

courts adjudicating very large and complex actions would erode the protection afforded by the rule almost entirely.

Id. at 799 (citation omitted). Therefore, despite the possibility that settlement-only class actions might serve the "useful purpose of ridding the courts" of the "albatross[ ]" represented by mass tort actions, the rule in this circuit is that settlement class certification is not permissible unless the case would have been "triable in class form." Id.

In addition to satisfying the Rule 23(a) requirements, a putative class must meet the conditions of one of the parts of subsection (b). In this case, the settling parties seek certification pursuant to 23(b)(3), which requires findings of predominance and superiority--i.e., "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

[12][13] In GM Trucks we reserved the question whether, in the case of settlement classes, [FN9] the fact of settlement may be considered in applying the 23(b)(3) requirements. 55 F.3d at 796. The settling parties assert that in contrast to the 23(a) factors, which protect absent class members' rights, the 23(b)(3) factors promote the "fair and efficient resolution of justice." The fact of settlement, they argue, goes to the heart of Rule 23(b)(3)'s "manageability concerns" and thus must be considered.

> FN9. A settlement class is a device whereby the court postpones formal class certification until the parties have successfully concluded a settlement. If settlement negotiations succeed, the court certifies the class for settlement purposes only and sends a combined notice of the commencement of the class action and the settlement to the class members. By conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart. For a more detailed description of settlement classes and their costs and benefits, see GM Trucks, 55 F.3d at 786-92.

We disagree. The 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements. More importantly, we based our pronouncement in GM Trucks that "a class is a class is a class" in large part on the fact that "[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes." Id. at 799. Whatever the Advisory Committee on Civil Rules (and, of course, Congress) may ultimately determine the better rule to be, we do not believe that the drafters of the present rule included a more liberal standard for 23(b)(3). [FN10]

> FN10. The settling parties argue that In re School Asbestos Litig., 789 F.2d 996 (3d Cir.), cert. denied sub nom. Celotex Corp. v. School District, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117, and National Gypsum Co. v. School Dist. of Lancaster, 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986), requires the Court to take the possibility of settlement into account in applying Rule 23(b)(3). We reject this contention. In re School Asbestos

> Litig. stated, in relevant part:
> Concentration of individual damage suits in one forum can lead to formidable problems, but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.
> Id. at 1009. This statement, whatever its import, does not constitute a holding. Its language is broad, general, and grammatically permissive. Moreover, this statement appears in a section in which the Court does both a Rule 23(a) and 23(b) analysis. Thus, insofar as In re School Asbestos Litig. requires a consideration of settlement, this requirement would apply to Rule 23(a) as well as 23(b). But GM Trucks held that Rule 23(a) must be applied without reference to settlement, thereby rejecting the settling parties' argument.

***626** The district court did not have the benefit of GM Trucks when it decided the Rule 23 issues, and it applied an incorrect standard. First, it took the view that Rule 23 requirements are lower for settlement classes. See, e.g., Georgine v. Amchem Prods., 157 F.R.D. 246, 315 (E.D.Pa.1994) ("The Rule 23 requirements for class certification . . . are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context."). Second, the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority. See Georgine, 157 F.R.D. at 314-19. But each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated. See GM Trucks, 55 F.3d at 799.

[14] With a proper understanding of the Rule 23 factors, we turn now to their application. For the reasons explained below, we conclude that this class, considered as a litigation class, cannot meet the 23(a) requirements of typicality and adequacy of representation, nor the 23(b) requirements of predominance and superiority. [FN11] We will discuss each of these requirements. Instead of addressing them in the conventional sequence, we will use a functional arrangement, linking related provisions.

> FN11. This class, which may stretch into the millions, easily satisfies the numerosity requirement.

A. Commonality & Predominance

[15] Rule 23(a)(2) requires that "there are questions of law or fact common to the class," and Rule 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23. Because 23(b)(3)'s predominance requirement incorporates the commonality requirement, we will treat them together.

All of the putative class members assert claims based on exposure to the

asbestos sold by the CCR defendants. The capacity of asbestos fibers to cause physical injury is surely a common question, though that issue was settled long ago. See, e.g., In re School Asbestos Litig., 789 F.2d 996, 1000 (3d Cir.), cert. denied sub nom. Celotex Corp. v. School Dist., 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117, and National Gypsum Co. v. School Dist., 479 U.S. 915, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986). Although not identified by the district court, there may be several other common questions, such as whether the defendants had knowledge of the hazards of asbestos, whether the defendants adequately tested their asbestos products, and whether the warnings accompanying their products were adequate. See id. at 1009. [FN12]

> FN12. The only common questions identified by the district court are (1) the fairness of the settlement--an impermissible consideration--and (2) the harmfulness of asbestos exposure. See Georgine, 157 F.R.D. at 316.

However, beyond these broad issues, the class members' claims vary widely in character. Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma--a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

The futures plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories. ***627** These factual differences translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

Furthermore, because we must apply an individualized choice of law analysis to each plaintiff's claims, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985) (constitutional limitations on choice of law apply even in nationwide class actions), the proliferation of disparate factual and legal issues is compounded exponentially. The states have different rules governing the whole range of issues raised by the plaintiffs' claims: viability of futures claims; availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and comparative/contributory negligence. In short, the number of uncommon issues in this humongous class action, with perhaps as many as a million class members, is colossal.

The settling parties point out that our cases have sometimes stated a very low threshold for commonality. In Neal v. Casey, 43 F.3d 48, 56 (3d Cir.1994), for example, we stated that "[t]he commonality requirement will be satisfied if the

named plaintiffs share at least one question of fact or law with the grievances of the prospective class." And, in In re School Asbestos Litigation, 789 F.2d at 1010, we stated that "the 'threshold of commonality is not high.' " (citation omitted). But those cases are quite different from this one. Neal involved a class action for injunctive relief, and thus raised infinitely fewer individualized issues than are posed here. And In re School Asbestos Litigation upheld the certification of a nationwide class action for damages associated with asbestos removal explicitly on the ground that case involved only property damages. See, e.g., 789 F.2d at 1009 ("[T]he claims are limited to property damage, and school districts are unlikely to have strong emotional ties to the litigation."). [FN13] We believe that the commonality barrier is higher in a personal injury damages class action, like this one, that seeks to resolve all issues, including noncommon issues, of liability and damages.

> FN13. Moreover, In re School Asbestos Litigation involved vastly fewer individualized questions than this one. Cf. id. at 1010 (noting that the complexity of causation questions in personal injury suits is much greater than for property damage suits). And, choice of law arguably did not greatly magnify the number of disparate issues. Class counsel had made a credible argument that the applicable law of the different states could be broken into approximately four patterns, see id., and we noted that the district court could decertify the class if this prediction proved to be faulty. Of course, this case could not be broken into anywhere near that small a number of patterns.

Nevertheless, we do not hold that this class fails the commonality requirement because the test of commonality is subsumed by the predominance requirement, which this class cannot conceivably meet. We proceed cautiously here because establishing a high threshold for commonality might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery.

Turning to predominance, we hold that the limited common issues identified, primarily the single question of the harmfulness of asbestos, cannot satisfy the predominance requirement in this case. Indeed, it does not even come close. We start by noting the Advisory Committee's well-known caution against certifying class actions involving mass torts:

> 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.

Fed. R. Civ. P. 23(b)(3) Advisory Notes to 1966 Amendment.

***628** [16] While, notwithstanding this cautionary note, mass torts involving a single accident are sometimes susceptible to Rule 23(b)(3) class action treatment, the individualized issues can become overwhelming in actions involving long-term mass torts (i.e., those which do not arise out of a single accident).

As the Ninth Circuit stated in In re Northern District of California Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847 (9th Cir.1982), cert. denied sub nom. A.H. Robins Co., Inc. v. Abed, 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983):

> In the typical mass tort situation, such as an airplane crash or a cruise ship food poisoning, proximate cause can be determined on a class-wide basis because the cause of the common disaster is the same for each of the plaintiffs.
>
> In products liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

Id. at 853 (citations omitted).

Other cases are in accord. See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir.1988) ("In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy."); cf. Watson v. Shell Oil Co., 979 F.2d 1014, 1023 (5th Cir.1992) (approving a class of some 18,000 plaintiffs injured in an oil refinery explosion but noting that "[t]his litigation differs markedly from toxic tort cases such as Jenkins, Fibreboard, and [In re] Tetracycline [107 F.R.D. 719 (W.D.Mo.1985)], in which numerous plaintiffs suffer varying types of injury at different times and through different causal mechanisms, thereby creating many separate issues"), reh'g granted, 990 F.2d 805 (5th Cir.1993), appeal dismissed, 53 F.3d 663 (5th Cir.1994). These concerns recently led the Sixth Circuit to decertify a nationwide class action for injuries caused by penile prostheses. See In re American Medical Sys., Inc., 75 F.3d 1069, 1081 (6th Cir.1996) ("Proofs as to strict liability, negligence, failure to warn, breach of express and implied warranties will also vary from plaintiff to plaintiff because complications with an AMS device may be due to a variety of factors....").

Although some courts have approved class certification of long-term mass torts, these cases have generally involved the centrality of a single issue. See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166-67 (2d Cir.1987) (expressing concern over the difficulties of managing mass tort suits but finding that class certification was justified because of the centrality of the military contractor defense), cert. denied sub nom. Pinkney v. Dow Chem. Co., 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988); In re A.H. Robins Co., Inc., 880 F.2d 709, 747 (4th Cir.) ("Just as the military [contractor] defense was central to the case in Agent Orange, so the question whether Aetna was a joint tortfeasor here was the critical issue common to all the cases against Aetna, and one which, if not established, would dispose of the entire litigation."), cert. denied sub nom. Anderson v. Aetna Casualty and Sur. Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989). This case, of course, lacks any single central issue.

The lack of predominant common issues has been a particular problem in asbestos-related class actions. For example, in In re Fibreboard Corp., 893 F.2d 706 (5th Cir.1990), the Fifth Circuit stated:

> The 2,990 [asbestos personal injury] class members cannot be certified for trial as proposed under Rule 23(b)(3). Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting individual members." There are ***629** too many disparities among the various plaintiffs for their common concerns to predominate. The plaintiffs suffer from different diseases, some of which are more likely to have been caused by asbestos than others. The plaintiffs were exposed to asbestos in various manners and to varying degrees. The plaintiffs' lifestyles differed in material respects. To create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged.

Id. at 712 (citations omitted). In In re Temple, 851 F.2d 1269 (11th Cir.1988), the Eleventh Circuit expressed similar concerns:

> Although the record on commonality and typicality of the class is sparse, the district court's order on its face encompasses a potentially wide variety of different conditions caused by numerous different types of exposures. We have no indication that claimants' experiences share any factors other than asbestos and Raymark in common.

Id. at 1273 (footnote and citations omitted).

We also draw instruction from Yandle v. PPG Industries, Inc., 65 F.R.D. 566 (E.D.Tex.1974), where the district court refused to certify a much more narrowly circumscribed asbestos class action--one brought by former employees of an asbestos plant. The court stated:

> [T]he Pittsburgh Corning plant was in operation in Tyler for a ten year period, during which some 570 persons were employed for different periods of time. These employees worked in various positions at the plant, and some were exposed to greater concentrations of asbestos dust than were others. Of these employees it is only natural that some may have had occupational diseases when they entered their employment for Pittsburgh Corning. There are other issues that will be peculiar to each plaintiff and will predominate in this case, such as: The employee's knowledge and appreciation of the danger of breathing asbestos dust and further, whether the employee was given a respirator and whether he used it or refused to use it....
>
> Additionally, the plaintiffs have asserted various theories of recovery against the defendants, and the nine defendants have alleged differing affirmative defenses against the plaintiffs. For example, the statute of limitations may bar some plaintiffs, but not others. During the ten year period the state of medical knowledge was changing, which has a significant bearing on the defendants' duty to warn of dangers. Taking all these factors into consideration, the Court is convinced that the number of uncommon questions of law and fact would predominate over the common questions, and the case would therefore 'degenerate ... into multiple lawsuits separately tried.'

Id. at 570-71.

Many of the cases cited by the settling parties in support of class certification are distinguishable because they involved only partial

certification of common issues. See Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 184 (4th Cir.1993) ("[T]he district court exercised its discretion under Fed.R.Civ.P. 23(c)(1) and 23(c)(4)(A) to certify the class conditionally ... on eight common issues."); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 471 (5th Cir.) ("Accordingly, [the district court] certified the class as to the common questions, ordering them resolved for the class by a class action jury."), reh'g denied, 785 F.2d 1034 (5th Cir.1986); Payton v. Abbott Labs, 83 F.R.D. 382, 386 (D.Mass.1979) (certifying class as to limited common issues), vacated, 100 F.R.D. 336 (D.Mass.1983). Other cases relied on by the settling parties are mass tort cases where it appeared possible to try a number of common issues and leave the individual issues to trials of small groups of plaintiffs. See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir.1988) ("[I]ndividual members of the class still will be required to submit evidence concerning their particularized damage claims in subsequent proceedings."). These cases did not seek to resolve anywhere near the number of individual issues presented in this case.

In view of the factors set forth at pages thirty-five to thirty-six, and for the reasons stated on pages thirty-six to forty-two, we ***630** conclude that this class fails the test of predominance. Even if we were to assume that some issues common to the class beyond the essentially settled question of the harmfulness of asbestos exposure remain, the huge number of important individualized issues overwhelm any common questions. Given the multiplicity of individualized factual and legal issues, magnified by choice of law considerations, we can by no means conclude "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

B. Adequacy of Representation

[17][18] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy of representation inquiry has two components designed to ensure that absentees' interests are fully pursued. First, the interests of the named plaintiffs must be sufficiently aligned with those of the absentees. GM Trucks, 55 F.3d at 800. This component includes an inquiry into potential conflicts among various members of the class, see id. at 800- 01, because the named plaintiffs' interests cannot align with those of absent class members if the interests of different class members are not themselves in alignment. Second, class counsel must be qualified and must serve the interests of the entire class. Id. at 801.

Although questions have been raised concerning the second prong of the inquiry, we do not resolve them here. As we have briefly noted above, the objectors have forcefully argued that class counsel cannot adequately represent the class because of a conflict of interest. In the eyes of the objectors, class counsel have brought a collusive action on behalf of the CCR defendants after having been paid over $200 million to settle their inventory of previously filed cases. The objectors also adduce evidence that class counsel, as part of the settlement, have abjured any intention to litigate the claims of any futures plaintiffs. These allegations are, of course, rife with ethical overtones, which have been vigorously debated in the academy. See Symposium, Mass Tortes: Serving Up Just Desserts, 80 Cornell L.Rev. 811 (1995). However, Judge Reed resolved this issue

in favor of class counsel largely on the basis of fact findings that the objectors have not challenged. See Georgine, 157 F.R.D. at 326-330.

As to the first prong of the inquiry, however, we conclude that serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement. The district court is certainly correct that "the members of the class are united in seeking the maximum possible recovery for their asbestos-related claims." Georgine, 157 F.R.D. at 317 (citation omitted). But the settlement does more than simply provide a general recovery fund. Rather, it makes important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others. For example, under the settlement many kinds of claimants (e.g., those with asymptomatic pleural thickening) get no monetary award at all. The settlement makes no provision for medical monitoring or for payment for loss of consortium. The back-end opt out is limited to a few persons per year. The settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars. In short, the settlement makes numerous decisions on which the interests of different types of class members are at odds.

The most salient conflict in this class action is between the presently injured and futures plaintiffs. As rational actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather ***631** than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out like the one employed in Bowling v. Pfizer, Inc., 143 F.R.D. 141, 150 (S.D.Ohio 1992) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject guaranteed compensation and sue for damages at that time).

In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more people locked into the settlement, the more likely it is to survive. [FN14] In sum, presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa.

> FN14. The conflict between futures and presently injured plaintiffs is obvious. Consider, for example, the deposition testimony of representative plaintiff Anna Baumgartner, whose husband died of mesothelioma. She testified that the "pleurals," i.e., people who suffer only pleural thickening, and who remain uncompensated under the settlement, "don't

> deserve to be compensated by anyone," despite the fact that such plaintiffs currently win large awards in the tort system.

This conflict (as well as other conflicts among different types of claimants) precludes a finding of adequacy of representation. The class is not unlike the one in GM Trucks, where a conflict between individual and fleet truck owners prevented a finding of adequacy of representation. See GM Trucks, 55 F.3d at 801 ("[W]e must be concerned that the individual owners had no incentive to maximize the recovery of the government entities; they could skew the terms of the settlement to their own benefit.").

Absent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs does not rectify the conflict. This principle was explained by the Second Circuit in In re Joint Eastern & Southern District Asbestos Litigation, 982 F.2d 721 (2d Cir.1992), modified sub nom. Findley v. Blinken, 993 F.2d 7 (2d Cir.1993), a case arising out of the Manville Bankruptcy reorganization. In addressing a conflict created by placing both asbestos victims and co-defendant manufacturers in the same subclass, the court observed, "Their interests are profoundly adverse to each other. The health claimants wish to receive as much as possible from the co- defendant manufacturers, and the latter wish to hold their payment obligations to a minimum." Id. at 739. The court concluded:

> The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Id. at 743. The lack of any structural protections in this case thwarted the adequate representation of the disparate groups of plaintiffs.

C. Typicality

[19][20] Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23. The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees. See Neal v. Casey, 43 F.3d 48, 57 (3d Cir.1994); Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.), cert. denied sub nom. Weinstein v. Eisenberg, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290, and Wasserstrom v. Eisenberg, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290, and Pelino, Wasserstrom, Chucas and Monteverde, P.C. v. Eisenberg, 474 U.S. 946, 106 S.Ct. 343, 88 L.Ed.2d 290 (1985). The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented. See Neal, 43 F.3d at 57.

***632** [21] Some commentators believe that the concepts of commonality and typicality merge. See 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1764, at 243-47 (1986). Both criteria, to be sure, seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented. See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.

13, 102 S.Ct. 2364, 2371 n. 13, 72 L.Ed.2d 740 (1982). But despite their similarity, commonality and typicality are distinct requirements under Rule 23. See Hassine v. Jeffes, 846 F.2d 169, 176 n. 4 (3d Cir.1988) (" '[C]ommonality' like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff...."); Weiss v. York Hosp., 745 F.2d 786, 810 n. 36 (3d Cir.1984), cert. denied, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836, and cert. denied sub nom. Medical and Dental Staff of York Hospital v. Weiss, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). We think that typicality is more akin to adequacy of representation: both look to the potential for conflicts in the class.

As our discussion of commonality and predominance make clear, this class is a hodgepodge of factually as well as legally different plaintiffs. Moreover, as our discussion of adequacy of representation shows, these differences create problematic conflicts of interest among different members of the class. These problems lead us to hold that no set of representatives can be "typical" of this class. Even though the named plaintiffs include a fairly representative mix of futures and injured plaintiffs, the underlying lack of commonality and attendant conflicts necessarily destroy the possibility of typicality. See In re American Medical Sys., Inc., 75 F.3d 1069, 1082 (6th Cir.1996) ("[W]e know from the amended complaint that each plaintiff used a different model, and each experienced a distinct difficulty.... These allegations fail to establish a claim typical to each other, let alone a class."). The claims of the named futures plaintiffs are not typical of the injured class members, and, conversely, the claims of the named injured plaintiffs are not typical of the futures class members.

Even if this class included only futures plaintiffs, we would be skeptical that any representative could be deemed typical of the class. In addition to the problems created by differences in medical monitoring costs, the course of each plaintiff's future is completely uncertain. As we pointed out in our discussion of commonality, some plaintiffs may ultimately contract mesothelioma, some may get asbestosis, some will suffer less serious diseases, and some will incur little or no physical impairments. Given these uncertainties, which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative. It is simply impossible to say that the legal theories of named plaintiffs are not in conflict with those of the absentees, see Neal, 43 F.3d at 57; Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.1985), or that the named plaintiffs have incentives that align with those of absent class members, see Neal, 43 F.3d at 57.

D. Superiority

[22][23] Rule 23(b)(3) requires, in addition to predominance, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The rule asks us to balance, in terms of fairness and efficiency, the merits of a class action against those of "alternative available methods" of adjudication. See Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.) (en banc), cert. denied, 419 U.S. 885, 95 S.Ct. 152, 42 L.Ed.2d 125 (1974). We conclude that in this case a class action has serious problems, which, when compared to other means of adjudication, are not outweighed by its advantages.

The proposed class action suffers serious problems in both efficiency and fairness. In terms of efficiency, a class of this magnitude and complexity could not be tried. There are simply too many uncommon issues, and the number of class members is surely too large. Considered as a litigation class, then, the difficulties likely to be encountered in the ***633** management of this action are insurmountable. See Fed. R. Civ. P. 23(b)(3)(D). [FN15]

> FN15. Rule 23(b)(3) specifically directs the court to consider: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.
> Fed. R. Civ. P. 23(b)(3).

This class action also suffers from serious problems in the fairness it accords to the plaintiffs. Each plaintiff has a significant interest in individually controlling the prosecution of separate actions. See supra note 15 (Fed. R. Civ.P.23(b)(3)(A)). This is not a case where "the amounts at stake for individuals [are] so small that separate suits would be impracticable." Fed. R. Civ. P. 23(b)(3) Advisory Notes to 1966 Amendment. Rather, this action involves claims for personal injury and death--claims that have a significant impact on the lives of the plaintiffs and that frequently receive huge awards in the tort system. See Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 572 (E.D.Tex.1974) ("[T]he court finds that the members of the purported class have a vital interest in controlling their own litigation because it involves serious personal injuries and death in some cases."). Plaintiffs have a substantial stake in making individual decisions on whether and when to settle.

Furthermore, in this class action, plaintiffs may become bound to the settlement even if they are unaware of the class action or lack sufficient information to evaluate it. Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable. First, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action. Many, especially the spouses of the occupationally exposed, may have no knowledge of the exposure. For example, class representatives LaVerne Winbun and Nafssica Kekrides did not learn that their husbands had been occupationally exposed to asbestos until the men contracted mesothelioma. Second, class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements. Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued. Third, even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to opt out of the settlement. [FN16]

> FN16. Of course, these concerns would be alleviated to the extent the class

action provided for an opt-in rather than opt-out procedure, or allowed plaintiffs to opt-out after they contract a disease. But this case, encompassing a huge number of futures plaintiffs, is an opt-out class action in which back-ended opt outs are greatly limited.

mplify, the fairness concerns created by the difficulties in providing ate notice are especially serious because exposure-only plaintiffs may ually contract a fatal disease, mesothelioma, from only incidental exposure bestos. Although only a small fraction of exposure- only plaintiffs will op mesothelioma, the disease is presently always fatal, generally within two of diagnosis. Prior to death, mesothelioma victims invariably suffer great and disability. Mesothelioma can be caused by slight and incidental ure to asbestos fibers. The disease has been known to occur in persons who with an asbestos-exposed parent, or in household members who washed the es of people who worked with asbestos. Unlike other asbestos-related rs, mesothelioma has only one medically established cause: asbestos ure. The unpredictability of mesothelioma is further exacerbated by the latency period between exposure to asbestos and the onset of the disease, ally between fifteen to forty years. As a result, persons contracting the se today may have little or no knowledge or memory of being exposed. It is listic to expect every individual with incidental exposure to asbestos to e that he or she could someday contract a deadly disease and make a ned decision about whether to stay in this class action.

We make no decision on whether the Constitution or Rule 23 prohibits ng futures plaintiffs to a 23(b)(3) opt-out class action. However, it is s that if this class action settlement were approved, some plaintiffs would nd despite a complete lack of knowledge of the existence or terms of the action. It is equally obvious that this situation raises serious fairness ns. Thus, a class action would need significant advantages over ative means of adjudication before it could become a "superior" way to e this case. See Yandle, 65 F.R.D. at 572 (stating, as a reason the ority requirement was not satisfied, that "because of the nature of the es claimed, there may be persons that might neglect to 'opt-out' of the and then discover some years in the future that they have contracted osis, lung cancer or other pulmonary disease"). advantages are lacking here. Although individual trials for all claimants wholly inefficient, that is not the only alternative. A series of ide or more narrowly defined adjudications, either through consolidation Rule 42(a) or as class actions under Rule 23, would seem preferable. See illiam W Schwarzer, Structuring Multiclaim Litigation: Should Rule 23 Be d?, 94 Mich. L.Rev. 1250, 1264 (1996) ("These alternatives 'are hardly ed to the class action, on the one side, and individual uncoordinated ts, on the other.' "). (quoting Benjamin Kaplan, Continuing Work of the Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 L.Rev. 356, 386 (1967)).

E. Summary and Observations

ve concluded that the class certified by the district court cannot pass under Rule 23 because it fails the typicality and adequacy of

representation requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b). Indeed, GM Trucks requires an order of vacatur on these facts. Moreover, we cannot conceive of how any class of this magnitude could be certified.

The desirability of innovation in the management of mass tort litigation does not escape the collective judicial experience of the panel. But reform must come from the policy-makers, not the courts. Such reform efforts are not, needless to say, without problems, and it is unclear through what mechanism such reform might best be effected. The most direct and encompassing solution would be legislative action. The Congress, after appropriate study and hearings, might authorize the kind of class action that would facilitate the global settlement sought here. Although we have not adjudicated the due process issues raised, we trust that Congress would deal with futures claims in a way that would maximize opt-out rights and minimize due process concerns that could undermine its work. On the other hand, congressional inhospitability to class actions, as reflected in the recently enacted Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67, 109 Stat. 737 (1995), and by its recently expressed concern about the workload of the federal courts, might not bode well for such a prospect.

In a different vein, Congress might enact compensation-like statutes dealing with particular mass torts. [FN17] Alternatively, Congress might enact a statute that would deal with choice of law in mass tort cases, and provide that one set of laws would apply to all cases within a class, at least on issues of liability. Such legislation could do more to simplify (and facilitate) mass tort litigation than anything else we can imagine.

> FN17. For example, Judge Weinstein calls for a broad compensatory legal framework to give mass tort victims a means of recovery independent of tort law. See Jack B. Weinstein, Individual Justice in Mass Tort Litigation (1995).

Another route would be an amendment to the Federal Rule of Civil Procedure 23. We are aware that the Judicial Conference Advisory Committee on Civil Rules is in fact studying Rule 23, including the matter of settlement classes. One approach the Rules Committee might pursue would be to amend Rule 23 to provide that settlement classes need not meet the requirements of litigation classes. The Rules Committee, of course, ***635** should minimize due process concerns, but it might address them via opt-in classes, or by classes with greater opt-out rights, so as to avoid possible due process problems.

The Rules Committee might also 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. This kind of balancing might engender confidence in the integrity of classes thus developed. But this approach has problems too, not only in terms of the potential for satellite litigation, but also in terms of the impact of the threshold decision on the outcome of the case.

Perhaps this case, with its rich matrix of factual and legal issues, will serve as a calipers by which the various proposals before the Rules Committee might be measured. While we hope that these observations are useful, we express doubts

that anything less than statutory revisions effecting wholesale changes in the law of mass torts could justify certification of this humongous class. In short, we think that what the district court did here might be ordered by a legislature, but should not have been ordered by a court.

The order of the district court certifying the plaintiff class will be vacated and the case remanded to the district court with directions to decertify the class. The injunction granted by the district court will also be vacated. The parties will bear their own costs.

WELLFORD, Circuit Judge, concurring:

I fully subscribe to the decision of Judge Becker that the plaintiffs in this case have not met the requirements of Rule 23. I have some reservations, however, about any intimation that Congress might or should enact compensation-like statutes to deal with mass torts or that we approve any suggestion of Judge Weinstein "for a broad compensatory legal framework to give mass tort victims a means of recovery independent of tort law." See n.17. I concur in the observation, however, that Rule 23 might be amended to aid in the process of mass settlement in the class action context.

I am of the view, moreover, that the "futures claims" presented by certain plaintiffs, as described in the court's opinion, do not confer standing to these exposure only plaintiffs. Plaintiffs of this type do not claim presently to suffer from any clinically diagnosable asbestos-related condition; they merely assert that they were exposed to asbestos fibers at some time in the past. In Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we were reminded that federal courts under the Constitution have jurisdiction to consider only real cases and controversies. Id. at 559, 112 S.Ct. at 2135. At a minimum, standing requires:

> First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, see [Allen v. Wright] id. [468 U.S. 737], at 756 [104 S.Ct. 3315, 3327, 82 L.Ed.2d 556 (1984)]; Warth v. Seldin, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-741, n. 16, 92 S.Ct. 1361, 1368-1369, n. 16, 31 L.Ed.2d 636 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Whitmore [v. Arkansas], supra [495 U.S. 149], at 155 [110 S.Ct. 1717, 1722, 109 L.Ed.2d 135 (1990)] (quoting Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly ... trace [able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> Lujan, 504 U.S. at 560-61, 112 S.Ct. at 2136 (footnote omitted).

Plaintiffs bear the burden of establishing federal jurisdiction and their standing to proceed. Lujan, 504 U.S. at 561, 112 S.Ct. at 2136; FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603 ***636** (1990); Warth v. Seldin, 422 U.S. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343 (1975).

I do not believe exposure only plaintiffs have demonstrated any "injury in fact" as of the time of filing. Furthermore, I would conclude that such plaintiffs have not presented a "likely" as opposed to a mere "speculative," current injury that could be redressed at trial. The court's decision in such a case would necessarily be conjectural at best. Fear and apprehension about a possible future physical or medical consequence of exposure to asbestos is not enough to establish an injury in fact. I do not believe that Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), a case involving actual nuclear power emissions, supports the plaintiffs' position. The case, moreover, did not contain claims for money damages. Nor does Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), constitute precedent on which these plaintiffs can rely to support standing. Helling involved a plaintiff who was continuously exposed to tobacco smoke in limited quarters and claimed that he had certain health problems caused by exposure to cigarette smoke and that he feared further injury if he continued to be exposed involuntarily to this hazard. Id. at 28, 113 S.Ct. at 2478. Standing was not discussed by the Supreme Court, nor by the court of appeals (see McKinney v. Anderson, 924 F.2d 1500 (9th Cir.1991)), presumably because the plaintiff claimed present injury.

In re "Agent Orange" Products Liability Litigation (Ivy v. Diamond Shamrock Chemicals Co.), 996 F.2d 1425, 1434 (2d Cir.1993), cert. denied, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 (1994), may suggest to the contrary, but I would adopt here a prudential limitation on standing, under these particular circumstances, as to exposure only plaintiffs who have not yet manifested a distinct and palpable injury-in-fact. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Col. Law Rev. 1343, 1422-1433 (1995). I do not intimate that prudence would always preclude any and all suits by "future claimants" who have been exposed to some calamitous occurrence or substance. This view in this case is supported by the testimony of the plaintiffs themselves. The exposure only class representatives admitted under oath that they would not have continued with the litigation in the absence of a settlement. Robert Georgine responded to questioning:

Q. Have you ever gone to a lawyer for your own personal reasons to file a claim for yourself?

A. No.

Q. --for asbestos related injury?

A. No.

Q. And why is that?

A. I haven't had a problem.

Q. Is that still true today? That you haven't had a problem?

A. Well, I don't--I breathe normal--I don't have any problems that I'm aware of. That's not to say that one can't develop.

Q. Oh, I understand that.

A. Okay.

Q. And God forbid, I hope nothing ever does develop, but until you develop an asbestos-related problem, you have no intention of filing a lawsuit for damages, do you?

A. Other than the present--present case?

Q. Well, in the present case, do you believe that the asbestos companies owe you money? M-O-N-E-Y.
A. Owe me personally?
Q. Yes.
A. I believe that if there was anything that happened to my lungs that was asbestos-related, that they would owe me money, yes.
Q. But as of today, nothing has happened to your lungs that's asbestos- related that you know of?
....
A. For myself, that's right.
....
Q. As you sit here today, you are not suffering any emotional distress because you might come down with an asbestos--
A. No, I am not. I am not.

J/A 1204-06 (emphasis added). At the fairness hearing, Ambrose Vogt testified similarly:

Q. Now, prior to your participation in this class action, you had never consulted ***637** with a lawyer for the purpose of filing a claim as a result of your asbestos exposure, isn't that right?
A. Yes.
Q. You testified under oath on January 12th, 1994, that you were not seeking money damages at the time that you agreed to be a class representative in this case, and at the time that the lawsuit was filed? You testified that way under oath then, isn't that correct?
A. Yes.
Q. And that was true then, is that right?
A. Yes.
Q. And it is true today, it is not, you are not seeking money damages today?
A. Not today, no.

Id. at 1280-81. At his deposition, class representative Ty Annas also made clear that he would not have brought suit had it not been for the settlement. Id. at 1179. On cross-examination, Annas stated:

Q. As of today, can you think of any out-of-pocket loss that you've had as a result of your exposure to asbestos?
A. Not from mine.
Q. So, Mr. Annas, would it be fair to say that you don't believe you've lost any money at all as a result of your exposure to asbestos?
A. No, sir.
....
Q. So you, on January 15, 1993, had no interest in recovering money for yourself from the asbestos companies; is that right?
A. Yes.

Id. at 1178-79. At the fairness hearing, Mr. Annas reiterated even more clearly that he did not seek damages of any kind from the CCR defendants:

Q. At deposition you testified that as of January 15th, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?
A. That's right.

Q. And that is correct today?
A. Yes, sir.
Q. And when you appeared at deposition, you testified I believe that you got involved in this case in order to help to get the case resolved and to help people before the money runs out, is that correct?
A. That's my statement.
....
Q. If they're [people exposed to asbestos] not impaired they should receive no compensation whatsoever?
A. That's my feelings.

Id. at 1269-72. Representative plaintiffs Timothy Murphy and Carlos Raver also stated emphatically that they were not seeking damages of any kind at the time the complaint was filed. At his deposition, Murphy testified as follows:

Q. Let's go back, let's say, a month in time, prior to the communication that you had with Mr. Weingarten [counsel for Greitzer & Locks] three or four weeks ago. Before that communication, did you know what it was that you were claiming in this lawsuit?
A. I know what I--that I claimed that I was occupationally exposed to asbestos over a long period of time.
Q. Did you know that you were claiming money damages?
A. No.
Q. To this day, do you believe you are claiming money damages in this case?
A. No.
Q. So you are not seeking any recovery in terms of money damages in this case; is that right?
A. No. Not at this time.

Id. at 1124 (emphasis added). Raver testified to the same effect:

Q. Did you conclude in 1991, sir, that based on your physical condition at that time that you, in your words, didn't deserve any money and didn't need any money? Was that a decision that you made?
A. Yes, sir.
Q. When you filed this lawsuit, the one that was filed in January of 1993, at the time that you filed the lawsuit, had you decided that based on your condition at that time that you didn't deserve any money and didn't want any money at that time?
***638** A. That's true, sir. I didn't want any money at that time. Still don't want any money.

Id. at 1147-49. These representative plaintiffs clearly conceded at the fairness hearing that, absent the settlement, they did not intend to pursue the claims in the class complaint. They claimed no damages and no present injury. I would hold, accordingly, that the exposure only plaintiffs had no standing to pursue this class action suit.

I concur in the court's decision to reverse the district court, vacate the order certifying the plaintiff class, and remand with instructions to vacate the injunction. I would also hold further that exposure only plaintiffs have no standing to pursue their claims.

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD,

ALITO, ROTH, LEWIS, McKEE, SAROKIN, Circuit Judges and WELLFORD, [FN1] District Judge.

FN1. As to panel rehearing only.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

June 27, 1996

The petitions of plaintiffs/appellees Robert A. Georgine, et al., on behalf of themselves and all others similarly situated, and of defendants/appellees Amchem Products, Inc. Ltd. (other than GAF Corporation) for rehearing having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Judge SCIRICA would grant rehearing.

END OF DOCUMENT

Agenda Item IC

August, 1996 Rule 23 Proposals: Review

Introduction

Five years of Advisory Committee study led up to the Rule 23 revisions published for comment in August, 1996. The Committee process reflected the important role that class actions have come to play. The Committee participated in several symposia, sought advice from an array of individual lawyers and lawyers' associations, and continually revised its drafts. Many significant issues were put aside at the time of publication, not because they had been studied and found unworthy, but because the Committee sought the maximum advantage to be gained by narrowing the focus of the comments and testimony. The comments and testimony have indeed proved invaluable. Great effort and careful thought were lavished by many. Not only the Committee but the bench and bar are indebted to the many lawyers who voluntarily assumed the responsibility of participating in the rulemaking process.

Helpful advice does not always make for easier work. The public comments and testimony did not generate many surprises. The central issues remain the familiar issues that have been studied and debated at length within the Committee. The many and various cogent expressions of deeply held views, however, demonstrate anew the difficulty of choosing between opposing values. These expressions also underscore the difficulty of implementing whatever choices are made. Any language chosen to effect a new choice will be pushed and pulled through the shredder of adversary contention. Arguments that might seem captious to those sympathetic to a new approach will be made by those hostile to the approach. The hostile arguments may at times succeed, and invariably will generate uncertainty, delay, and expense. Even with the best of good will, moreover, the sheer variety of substantive and factual complexities that beset many class actions assures that unanticipated ambiguities and some measure of unanticipated consequences will attend any change.

The immediate task is to determine whether all, some, or none of the published proposals should go forward with a recommendation for adoption. This task is coupled with the task of deciding whether to pursue further other proposals that were put aside in 1996, or still other proposals that have emerged from the public comments and testimony.

The central issues are identified in Judge Niemeyer's March memorandum. They are substantively and tactically interdependent. Interdependence affects the order of discussion. The most that can be attempted is to reduce the effects of interdependence by beginning with relatively clear issues and working toward the more difficult. To this end, the published proposals are gathered in three groups. New proposals are explored at the end.

The first group of published proposals covers the "when practicable" revision of Rule 23(c)(1) and the proposed interlocutory appeal addition of Rule 23(f). There was little controversy about Rule 23(c)(1). There was substantial debate about Rule 23(f), but it was addressed directly to the prospect of

permissive interlocutory appeals. One or both of these amendments could be proposed for adoption now, without concern that the proper disposition should depend on the fate of other proposals. The only likely basis for deferring action would be that other proposals that are not ready for proposal now will soon be ready, and that a single package is better than piecemeal amendment.

The second group of published proposals covers proposed Rule 23(b)(3) factors (A), (B), and (C). (A) and (C) drew substantial comment; (B) drew very little. The comments reflected significant disagreement about the likely effects these amendments would have, and also about the desirability of the different projected effects. The case for going forward with these proposals now is that the public comment process has illuminated the issues about as well as can be done. If the Committee concludes that they should be adopted as published, or with modifications too modest to require a second round of public comment, they could go forward now. The possible grounds for deferring action — apart from the intrinsic merits of these proposals — arise from possible interdependence with other proposals, present or future, and from the lack of any real need for immediate action. As for interdependence, these factors were proposed in large part in reaction to the problems that surround mass tort class litigation, and particularly dispersed mass tort class litigation. The Committee may wish to consider mass tort litigation further for several reasons. The most prominent reasons for further consideration are the interdependence of mass tort class litigation with settlement classes, and the deeper questions that have been raised about the use of class actions in this setting. As for urgency, there is no indication that district courts are regularly acting in ways inconsistent with the policies underlying these proposals. Present adoption might contribute in some small ways to more thoughtful evaluation of class-certification requests, but no fundamental transformation can be expected.

The third group of published proposals covers the small claims balancing factor in (b)(3)(F), the (b)(4) settlement class, and the hearing requirement added to (e). These proposals are those most likely to require further deliberation. Factor (b)(3)(F) has met with substantial support and vehement attack. It also is tied to some of the suggestions for amendments different than those published in 1996. One quite specific tie has been the suggestion that doubts about the cost/benefit ratio of a small-claims class might be resolved not by denying any class but by certifying an opt-in class. Settlement classes involve issues now pending in the Supreme Court. It would be folly to attempt to go forward with a rule before the Supreme Court decision. Even if the Supreme Court should deliver a clear and simple decision well in advance of the Committee meeting, the underlying problems are so complex, and the public comments so rich, that much hard thought will be required to justify a possible determination to recommend final adoption of (b)(4) as published. The hearing requirement was added to (e) as

part of the settlement-class discussion. So long as settlement classes remain on the agenda, there are strong reasons to keep subdivision (e) on the agenda. Many of the comments have suggested that (e) should be amended along the lines suggested by Judge Schwarzer, requiring specific findings on each of a number of identified factors bearing on the fairness of the settlement. And there is little need for prompt action; it has been recognized from the beginning that most courts require hearings as part of process of reviewing and approving class-action settlements.

In addition to the proposals published last summer, the comments and testimony suggested consideration of several other Rule 23 amendments. Some of these amendments have been considered and put aside by the Committee. Some are new. In no particular order, these suggestions include: preliminary consideration of the merits as part of the certification decision; generating a new and separate rule for mass torts; adding a (b)(3) factor that would emphasize the need for common evidence — implicitly moving away from the focus of earlier Committee drafts that promoted the use of issues classes; requiring greater pleading particularity in class actions, in part to serve the same purposes as would be pursued by the "same evidence" and preliminary look at the merits proposals; adding an opt-in class alternative, or substituting an opt-in procedure for the opt-out procedure now attached to (b)(3); ensuring an effective opt-out opportunity for "futures" class members; adding an opt-out opportunity to (b)(1) and (b)(2) classes; addressing attorney fees; reducing the problems created by overlapping and competing class actions; defeating the power of state courts to certify nationwide classes, more likely by suggesting legislation than by rulemaking; enhancing the quality of notices to class members; permitting notice by sampling in small-claims classes; and measuring the need for class certification against the prospect that effective relief might be obtained by other regulatory agencies.

II Proposals In Mid-Ground

Proposed Rule 23(b)(3) factors (A), (B), and (C) are brought together in this mid-ground section. None of them drew the firestorms of conflicting argument that were drawn by proposed factor (b)(3)(F) or by the (b)(4) settlement class proposal. There were, however, substantial protests, particularly as to factor (A). These three factors are brought together, however, by ties other and more important than these rough assessments of controversiality. All three factors were inspired largely by a desire to remind district courts of concerns that are important in approaching requests to certify mass tort classes. Each is to some extent tied to settlement class issues through this mass-tort nexus. None of the three responds to a pressing need for immediate action; to the contrary, a growing number of appellate decisions have provided much of the focus that these proposals would have brought to the text of Rule 23(b)(3). If the Committee determines to study further the role of class actions in mass-tort litigation, there are strong arguments for including these factors in that study.

Beyond these ties lie two more fundamental connections to the issues raised by the (b)(3)(F) proposal. One is the role of the (b)(3) option to request exclusion from the class. The factor (A) discussion focuses on the pragmatic factors that may make the opt-out opportunity a more or less meaningful device for protecting the interest in individual litigation. The factor (F) discussion, on the other hand, forces attention to the very legitimacy of opt-out classes and the conceptual justification for preclusion by representation. The other connection, closely bound to the first, is presented by the "goldilocks" protest that (A) and (F) together seem calculated to limit class litigation to claims that are not too large, nor too small, but "just right." Together, these issues challenge the very existence of (b)(3) classes and raise troubling questions that reach out to (b)(1) and (b)(2) classes as well.

The frequent cost of proposing relatively minor amendments is underscored by a final common aspect of the comments and testimony on all four proposed (b)(3) factors, (A), (B), (C), and (F). Each is clearly intended to be merely an identification of one factor that should be weighed in the complex calculations of predominance and superiority. None was intended to be in any way an independent requirement that must be satisfied to warrant class certification. None was intended to be, standing alone, a uniquely salient factor in the discretionary certification decision, with the possible exception of factor (F). Lawyer after lawyer, however, made it clear that any change in the form of these proposals will become the occasion for vigorous partisan advocacy, seeking to wrest unintended advantage from intentionally modest shadings of emphasis and degree. The cost of achieving modest improvements in the rule, expressing concerns that enter many well-informed certification decisions today, will be several years of fractious litigating

efforts to obscure and extend the intended meaning. These comments may have been intended in part to intimidate by overstatement. The risk, however, is sufficiently real to be weighed in deciding whether to press for immediate adoption. The risk may be underscored by the many comments that Rule 23 works well now. These comments were made most frequently with respect to antitrust and securities litigation, with employment discrimination added at times.

(C) Maturity

Proposed factor (C) amends present factor (B) to emphasize the maturity of "related litigation" and make other changes:

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

There was substantial – although far from unanimous – support for the view that a class action should not be certified to resolve a claim that rests on uncertain and still developing scientific evidence. Set against this proposition was concern that any focus on maturity may be seriously out of place in better-established fields of class litigation. More elaborate reactions were built around this core, focusing in part on the fear that relief for class members may be delayed inordinately while the class court awaits the maturing of the class claim.

The importance of maturity was most often illustrated by mass torts. It was urged that there is a race to file the first class action, often hard on the heels of the first announcement of a new theory of injury and causation. The race is prompted by the desire to become class counsel, or at least a member of a steering committee. With little experience of the outcome of individual actions, there is a great pressure to settle and little guidance as to appropriate terms. Time and experience with individual litigation are needed. Only time will enable real science, developed by agencies independent of the litigation, to displace "junk science," bolstering the claims, sorting out the good from the bad, or refuting them. Experience facilitates realistic settlement.

Challenges to the proposal took several directions. In the familiar vein of fears that a concept growing out of mass tort will disrupt settled areas of practice, it is argued that maturity is out of place in regulatory enforcement actions. A securities law violation, for example, should be corrected by a single class action without awaiting the results of individual actions challenging the same violation. Far from needing time to develop fact information, fact information is much better developed and presented in the framework of a single class action that supports the full investment of resources required for full exploration of the facts.

In another familiar vein, it is urged that there is no definition, no "index" of maturity. The lack of definition will confuse practice, and will provide yet another excuse for judges hostile to class actions to deny certification. Meeting this argument, it was suggested that maturity could be defined – most likely in the Note – in various ways. One, attributed to the Manual for Complex Litigation, is that a class claim is mature when

individual actions show that it has merit. Another, and the most popular, was that maturity emerges when individual actions begin to converge on consistent outcomes.

The lack of definitions also was noted with respect to the concept of "related" litigation. How much similarity is contemplated in the dimensions of subject-matter, named parties, format, or locale? There also may be a drafting misstep in referring to related litigation "involving class members." This phrase is a style version of the present rule, which refers to litigation by or against "members of the class." The parties to related litigation may not be class members, however, because they have been excluded from the class definition or have opted out of the class. It would be better to refer only to "related litigation," leaving any need for amplification to the Note.

Delay is yet another common theme in addressing the (b)(3) proposals. With respect to maturity, the proposition is quite direct. The attempted class action is stayed, and most likely all discovery is stayed as well, until some indeterminate time when an undefined number of individual case outcomes demonstrate maturity. Who is to be charged with maintaining vigil over the maturing process? When is ripeness achieved? How long are courts prepared to wait if, as may well happen, the individual actions settle in such large numbers that actual litigated results — most likely to be in cases that are unusually strong for claim or defense, and thus most likely to lead to disparate results — establish maturity? As maturity plods its patient way, moreover, the courts will be swamped with individual actions.

Specific suggestions to amend the proposal come from a variety of perspectives. Some are related to suggestions made with respect to other of the proposals. It is suggested that the Note should state that maturity depends on part on the state of government enforcement efforts — that the need for class certification, and thus maturity, cannot be resolved until there is no clear prospect of government enforcement. In a different direction, it is suggested that one of the advantages of maturity is that experience with the litigation of several individual actions will facilitate a determination whether certification will meet a "common evidence" test that proof of the class claim will also prove all elements of individual class members' claims. This connection should be described in the Note, or added to a new factor that focuses on common evidence.

The amendment most often suggested is that maturity should be a factor only in mass tort classes, and perhaps should be limited to cases involving scientific evidence of causation. The focus should be on "the state of existing knowledge."

Other amendments are quite specific. Some way should be found to ensure that courts will consider as related actions only those that are sufficiently similar to the proposed class action. It

should be made clear that the focus is on the maturity of the class claim, not simply the progress of individual actions toward judgment. The progress of the attempted class action should not be stayed to await the outcome of related individual litigation — if there is a risk of interfering with the individual actions, the individual plaintiffs can be excluded from the class definition or can opt out of the class. Related litigation should be considered only if it is pending at the time of the certification hearing. And the Note should not refer to the progress of individual actions — the concern that the class action may intrude can be met through wise application of factors (A) and (B), and through opting out of the class.

Together, these comments and suggestions may support rather modest changes in factor (C) and the note, but do not reveal unanticipated flaws. The fears mostly anticipate improvident administration, and the continual prospect that any change will generate an initial period of uncertainty. The central focus of the proposal has been on situations in which the court can be confident that there will be substantial numbers of individual actions, has strong reason to fear the inadequacy of the evidence that can be adduced, and has good reason to hope that significantly better evidence will be developed in the reasonably near future. Dispersed mass torts provided the impetus, and well may provide most — even all — occasions for application. There is no harm in saying so in the Note. Beyond that central point, there is little reason to fear that defendants will beguile courts into unwise delay, or that courts will be lost without a definition of maturity.

As with factors (A) and (B), the prospect that factor (C) need not cause significant harm does not make out an urgent case for adopting it. The problem has been clearly identified by the courts of appeals. There may be little remaining need to highlight this aspect of superiority in the text of Rule 23(b)(3). And there will be strong reasons for deferring action as long as related portions of Rule 23 remain open, including settlement classes.

Factors (A), (B), (C) Note

Many of the suggestions have addressed the Note discussion of proposed factors (A), (B), and (C). The following draft illustrates the Note that could be drafted in response to several of the suggestions. The draft follows the present pattern by using several paragraphs to introduce all of the new (b)(3) factors, including factor (F). As before, redlining is used to indicate portions of the present note that seem to present a particularly close balance in the choice between continuation, amendment, or deletion.

NOTE

Subdivision (b)(3). Subdivision (b)(3) has been amended ~~in several respects~~ by adding several new factors that are pertinent in finding whether common questions predominate and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These factors, as with the present rule, are only factors. None of them establishes a threshold requirement that must be satisfied in every case as a condition of class certification. Any of them may be important in one particular action, and irrelevant in another. Each of them is to be applied with discretion and a pragmatic view of the needs of successful class-action administration. Parties who oppose class certification must not be allowed to wield these factors as weapons of cost, delay, and confusion. Courts must be particularly reluctant to allow consideration of these factors to degenerate into attempts to preview the merits of the class claims, issues, or defenses, or to countenance efforts to entangle individual class members in the certification debate.

~~Some of the changes are~~ The new factors are designed in part to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual litigation and the aggregation of claims that would not support individual litigation. Current attempts by courts and lawyers to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected ~~in part~~ in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. Factors (A), (B), and (C) are particularly designed to emphasize elements that are likely to weigh heavily in determining whether to certify class treatment of dispersed mass tort claims.

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to

claims that involve highly uncertain facts that may come to be better understood over time. Problems of uncertain scientific understanding of the connection between perceived injuries and a suspected cause provide the central examples. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity [premature?] 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 of exacting far too much from the defendant or according far too little to the plaintiffs.

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

Subparagraph ~~Factor~~ (C), formerly subparagraph ~~factor~~ (B), has been amended in several respects. Other litigation can be considered so long as it is related ~~and involves class members~~; there is no need to determine whether the other litigation somehow concerns the same controversy. The requirement that the other litigation involve class members is deleted in recognition of the fact that closely related litigation may involve litigants who have opted out of the class or who are otherwise excluded from the class definition. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action.

The more important change in factor (C) authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. This dimension of maturity may encourage a court to exclude parties from the class definition, or to take other steps to protect their interests in completing the related litigation. When multiple claims arise out of dispersed events, ~~however,~~ maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis. This dimension of maturity has been illustrated primarily by dispersed personal-injury mass torts. It does not imply a need to

insist on multiple individual adjudications before class certification in the better-settled areas of class-action practice.

III (b)(3)(F), (b)(4), and the Nature and Future of Class Actions

The full package of proposals published in 1996 was seen by the Committee as a modest revision of Rule 23. More sweeping revisions were deliberately put aside, often without full examination, as at best premature. Comments and testimony addressed to the published proposals were necessarily framed by the perspective of the proposals. The deepest issues were not framed for debate. Nonetheless, examination of "just ain't worth it" and settlement classes stimulated much discussion that, followed to its roots, challenges the very assumptions of contemporary class-action practice. Judge Niemeyer's March 15 Memorandum and Preface neatly identifies the nature of these challenges. The following notes provide a more discursive exploration. For want of any clearly coherent organization, they begin with a general statement, identify some of the broad conceptual issues, and then return briefly to the specifics of the (b)(3)(F) and (b)(4) proposals.

Rule 23: Representation Challenged

Rule 23 is but one rule, yet it has developed to serve an astonishing array of functions. Many of these functions were not foreseen at the times of drafting and adopting Rule 23. Unintended and uninvited as they may be, they may represent the wise product of a common-law process that continues to evolve and improve. Even if unwise or dangerously harmful, these functions have become interwoven with substantive law enforcement in ways that may put them beyond amendment through the Rules Enabling Act process. The argument that the Enabling Act process surely must be able to undo what it has created — that if Rule 23 is a valid product of a process that cannot abridge, enlarge, or modify any substantive right, the same process can correct its unintended substantive effects — may be sound, but it is not alone the test of practical Enabling Act limits. There are constraints of gathering the information necessary for wise decision, of weighing the information and resolving the manifold conflicts of perception and policy, and of shepherding the final product through the final step of congressional acquiescence. Some of the concepts described below are surely beyond practical reach, at least during the near future. Yet they are indispensable foundations for the issues that may be open.

The functions of Rule 23 begin with the (b)(1) and (b)(2) classes that the Committee has chosen to accept. These classes are thought to represent the core of the traditional and continuing legitimate class-action functions. Early drafts would have authorized the court to permit class members to opt out of these classes, perhaps subject to conditions, and one draft would have required separate certification of an opt-out class if damages were to be awarded incident to a (b)(2) class. These limited incursions on present practice have been put aside, and the public comments and testimony have touched only incidentally on (b)(1) and (b)(2)

classes. There is no reason to suppose that the core of these classes should be opened to reconsideration. These uses of Rule 23 will endure. The "mandatory," non-opt-out character of these classes, however, is necessarily implicated by the repeated challenges to the adequacy of opt-out opportunities. The core justification for representation of unwilling nonparties has been put in issue. The old suggestion that opt-in classes should be added to Rule 23, and the new suggestions that opt-in classes should displace some (or even all) present uses of (b)(3) opt-out classes, require identification of a theory of representation.

Virtually all of the comments and testimony have — appropriately enough — focused on (b)(3) classes. The one clear conclusion is that (b)(3) serves widely divergent purposes. The extremes are relatively easy to identify. At one end lies the class whose members all have suffered very small individual damages. At the other end lies the class whose members all have suffered serious personal physical injury or death. In between lie classes whose members have been affected by conduct that may violate any of many different substantive laws, and who have been affected in ways that would — if the facts of violation, causation, and damages were proved — support a remarkably wide and variable level of individual recovery. Many of the comments have suggested that at least the mass tort class does not belong in this common procedural pool. Many other comments have suggested that the very small individual damages classes do not belong in any class-action rule. Much as it is easy to make light of the "Goldilocks" "not too big, not too small, but just right" argument, it may reflect important issues.

The different uses served by Rule 23 shape the nature of the concerns that surround it. Challenges to classes that seek redress for small individual claims are quite different from challenges to classes that bring together claims that could — and indeed often would — support individual litigation. There may be connections, however, in questions about the substitution of representation for individual initiation and control of litigation.

Defenders of small claims classes point to willful violations of clear law amply proved. They invoke the public interest in enforcing regulatory requirements, and rely as well on the view that even small awards have important symbolic meaning to all class members and may have important tangible meaning to some class members. Many of the examples they select are compelling. These examples are bolstered by pointing to the many classes that include a wide spectrum of dollar claims, and by urging that none of the claims should be denied the benefits of class justice.

Those who attack small claims classes point to quite different examples. Often they place a thin veil, or none at all, on arguments that the underlying substantive law is too indeterminate, or too foolish, to deserve full-bore enforcement. The public

interest may be better served, on this view, by no enforcement. Going beyond these substantive doubts, they focus on the fallibility of adversary civil procedure. The cost of class litigation and the uncertainty of outcome — particularly with jury trial — are said to coerce settlement of worthless claims. The effect of a 10,000-member class is said to be far greater than the prospect that 10,000 members might bring 10,000 separate actions. Given the vagaries of our courts and procedure, there may be a .10 probability of losing any one of those individual lawsuits. The expected risk of the 10,000 potential individual actions, however, is much lower than the expected risk of the single class action. Even if there were a 90% chance of winning the class action, the stakes may be so high that the risk cannot be run. The very fact of class certification, moreover, may itself alter the prospect of success. The sheer number of putative victims may have an irrational impact that aggravates the seeming wrong, and in any event the tribunal may be intimidated by the responsibility of denying any recovery to so many. A class trial, moreover, is likely to focus on a carefully selected set of representatives whose individual claims are the strongest in the class. If the defendant should win 90 of the first 100 individual actions, moreover, it is not likely that all of the remaining 9,900 potential actions will be brought.

Similar arguments surround the mass-tort classes. Reliance on individual litigation, or nonclass aggregation, means enormous delay and court congestion. It may jeopardize the prospect that resources will be available to compensate all victims, leaving those who came late to the queue with no remedy at all. It may fail utterly to achieve the distinctive treatment of each individual case according to its distinctive merits, as hundreds or even thousands of victims become nominal "clients" of attorneys who settle their inventories of cases in large batches with no effective constraint on the terms or allocation of the settlements. The only remedies available are those awarded in traditional litigation based on unique events that affect no more than a few people. The transaction costs are staggering; it is common to observe that something like two-thirds of the money devoted to asbestos litigation goes to the costs of litigation, leaving barely one-third for victim compensation. Class treatment can avoid these problems, and carefully crafted settlements can provide superior remedies that simply are not available through adjudication.

Mass-tort classes are subject to attacks as vigorous as the attacks addressed to traditional piecemeal litigation. They are said to trade strong claims for weak, exerting a homogenizing influence that transforms but cannot reduce the inescapable conflicts of interest among class members. The state laws that provide the foundation of most mass-tort claims are given similar homogenizing treatment, defeating the attempts of different states to enforce different substantive principles. Settlements — the fate of most mass-tort classes — are particularly assailed as the

fruit of a "reverse auction" process in which defendants buy "global peace" at bargain-basement prices by pitting would-be class representatives against each other, and even shopping different courts in the quest for approval by an acquiescent judge. It is pointed out that no single court can possibly try the individual issues of causation, proportional fault, and damages that inhere in mass torts. The most that could be achieved as an alternative to settlement is disposition of common issues, to be followed by individualized determination of issues that in fact cannot be resolved without retrying the supposedly common issues. Disposition of issues of comparative fault and individual causation are held out as particularly compelling demonstrations of the distortions that must arise from any attempt to avoid complete relitigation of all issues.

The justifications for substituting representation for individual litigation are forced to the front by these divergent views. Here too, the questions raised by small claims are quite different from those raised by large claims. Despite obvious blurring in a significant middle range, large claims raise the concern that class litigation may diminish or destroy the value of a claim that would have yielded more in separate litigation controlled by the individual class member. This is the concern that has animated most of the vigorous opposition to the settlement class proposal in (b)(4). Small claims raise the concern that there is no legitimate justification for judicial intervention to adjudicate matters that never would be litigated by an individual class member. This is the concern that has animated most of the vigorous opposition to the small-claims proposal in (b)(3)(F).

The risk that a settlement class may impair the positions of many, most, or virtually all class members has been amply debated in the comments and testimony. By far the most poignant illustrations have drawn from mass torts that inflict grievous personal injury and death. The conflicts of interest among class members, and perhaps between class counsel and the class, are clear and deep. Most of the countervailing testimony has focused on experience with antitrust and securities litigation. Classes in these areas commonly involve many members whose claims — even quite sizable claims — would not support individual litigation. Often they involve little apparent conflict of interest as to damages, in part because damages may seem susceptible to calculation by formulas based on reasonably objective facts.

Representation for class settlement must draw on quite different justifications in these quite different settings. The antitrust and securities actions involve the common justifications: justice is provided to many class members whose injuries otherwise would go unredressed, members who could sue alone benefit from sharing the expenses and other burdens of litigation, courts realize important efficiencies, a single adjudication avoids the danger of inconsistent outcomes, and important public policies are

fully enforced.

The mass tort cases severely try the force of these justifications. The concerns raised can be protected in important ways by sophisticated administration of present Rule 23. The central concern is that there cannot be adequate representation; Rule 23(a)(4) requires adequate representation, and even now is administered to require adequate representation by counsel as well as by the representative parties. The Rule 23(a)(3) requirement that the claims of the representative parties be typical of the claims of the class further bolsters the adequacy requirement. The predominance and superiority requirements of (b)(3) add to these protections. The opportunity to opt out, however, remains crucial. The substantial concerns that remain after accounting for the other protections built into the rule would disappear if the opportunity to opt out gave assurance that every class member has made a well-advised decision that class litigation is a better choice than individual litigation (or deliberate waiver of the claim). The opt-out protection has been given substantial support in the comments and testimony. No one, however, has cared to advance the full-protection hypothesis. And no one has dared to advance any hypothesis that would support in these terms termination of the opt-out right as to future claimants who may not even be aware of exposure or injury during the class notice and settlement process. Even apart from these "future" claimants, at any rate, there will be some class members who are caught up in class litigation and settlement who, fully informed, would have chosen to opt out in favor of individual litigation. Some of them would fare better in individual litigation, even after accounting for the efficiencies of class litigation. Representation requires strong justification in these circumstances.

This challenge to Rule 23 representation cannot be confined to settlement classes. The same problem arises in any class action, and is particularly acute in mandatory (b)(1) and (b)(2) classes that do not allow class members to opt out. Our deep-rooted historic tradition is that everyone should have his own day in court, *Martin v. Wilks*, 1989, 490 U.S. 755, 761, 109 S.Ct. 2180, 2184. The Committee's early drafts implicitly recognized this concern by providing that the trial court could allow class members to request exclusion from any class, whether certified on (b)(1), (b)(2), or (b)(3) grounds. The concerns reflected in (b)(1) and (b)(2) classes that separate litigation might have unfair consequences for other class members or those opposing the class were addressed not only by the power to deny any opportunity to opt out but also by creating the power to impose conditions on the right to opt out. The conditions could extend even to denying any day in court by prohibiting any separate action. Although renewal of any such proposal seems bound to stir substantial opposition, there is much to commend it in principle.

If representation is to continue to allow settlement classes

— a matter soon to be illuminated by the Supreme Court — much may be done to supplement representation by imposing greater burdens on the courts. The Committee has not yet considered any detailed proposal to increase judicial responsibility. There are at least three major approaches that can be taken separately or in combination. One is to specify by rule the structure of the representation and settlement process. The second requires the court to become directly involved, through the judge or judicial adjuncts, in the settlement process. The third requires more elaborate methods of reviewing the actual settlement terms, both by increasing the procedural support for challengers and by specifying review procedures and criteria for the court. Sketches of some of these possibilities are set out below.

Small-claims cases present quite different challenges to the representation theory. These challenges draw from the same roots as established justiciability concepts that draw both from prudential concerns and from the core conceptualization of the Article III "judicial power." Among the separately labeled justiciability concepts, standing provides the closest analogy. The prudential rules that limit third-party standing are particularly close, in part because they focus on Rule-23-like concerns with the need for, and adequacy of, representation. Part of the focus on representation often asks whether there is a nonlitigating relationship between the party and the nonparties whose rights are asserted. Ordinarily it is clear that there is a case or controversy between the party and its judicial adversary; the only question is whether the party can, by relying on the rights of others, sustain its position and win for itself relief that it could not win in its own right. So in a small-claims class, ordinarily it is clear that there is a case or controversy between at least the representative class members and their adversary. But unlike third-party standing cases, the rights and interests of the nonparticipating class members are supposed to be the same as those of the representatives. The representatives can, in theory, win the same relief for themselves without any need to act on behalf of others. Representation is used solely for the purpose of championing those who have not sought to enforce their own rights. The only indications that absent class members wish to enforce their rights come from failure to opt out and — if occasion should arise — by participating in the claims process.

The small-claims balancing process embodied in proposed (b)(3)(F) was supported in the March, 1996 draft Note on grounds that reflect doubts about reliance on representation in this setting. The most pertinent portions of the draft, lines 446 to 499, said this:

> The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on

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

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

slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

A different perspective was suggested by some of the comments and testimony. Anecdotes were provided of responses to class-action notices by class members who expressed vigorous disapproval of the class action nominally brought in their interests. Although relatively few in number, these anecdotes draw added force from the effort taken by the class members to unravel the notice, decide to opt out, and express an opinion about the attempt to enlist them in a cause they disapproved. It is not merely that some unknown number of class members are indifferent to enforcement of their claims. It is that some unknown number — perhaps small, and perhaps not so small — actively oppose enforcement of their nominal claims. What theory of representation justifies enforcing the "rights" of those who reprehend the right?

Doubts about the justification for representation in any setting could be met easily by rather straight-forward changes in Rule 23. A right to opt out could be added for all (b)(1) and (b)(2) classes, subject to conditions protecting the rights of remaining class members and the party opposing the class. (b)(3) classes could be limited to members who affirmatively opt in. Some effort might be required to reinforce the rather porous boundaries between these separate class categories, but it might be enough to begin with comments in the Committee Note. If the concept is clear and the drafting easy, however, winning acceptance likely would be difficult. Even if more than three decades of experience suggest that the brilliant invention of opt-out classes in the 1966 amendments has metastasized beyond any sufficient justification, the growth has come as the process of deliberate evolution at the hands of courts that need not have gone so far but that believed in the rightness of the cause.

An intermediate alternative would be to preserve the present structure of (b)(1), (b)(2), and (b)(3) classes, adding a new alternative that allows "permissive joinder [to] be accomplished by allowing putative members to elect to be included in a class." This alternative was included in several of the recent drafts, and was dropped without direct review as part of the decision to go forward only with a package of relatively modest changes. Informal reactions suggested that the greatest concern was that courts hostile to class actions would seize this opportunity as an excuse to deny (b)(3) certification. That fear could be addressed — but probably would not be much allayed — by a requirement that an opt-in class could be certified only after explicit findings that the (b)(3) requirements for an opt-out class were not met.

A more modest opt-in alternative has emerged from the comments

and testimony on proposed (b)(3)(F). Some version of the balancing process sketched in (F) could be used, not to deny any certification but to control the choice between an opt-out class and an opt-in class. This approach would be a limited adoption of the view that class actions should not become the occasion for purely private enforcement of predominantly public values. The theory of representation of individual interests of individual claimants is stretched thin when the relief to class members is nearly meaningless. The more persuasive justification for class enforcement lies in the public interest of disgorging the gains from unlawful conduct and deterring future unlawful conduct. Private enforcement of public values is easily accepted when specifically authorized by Congress, and also when it is an incident of providing relief to claimants who genuinely desire relief. But a clear substantive choice is made when Rule 23 is used for public enforcement without any legislative direction or meaningful indication that class members wish relief. Adoption of an opt-in alternative would retrench this unintended substantive use of Rule 23. If class members opt in at a rate that supports enforcement, well and good. If so few opt in that the litigation founders for want of support, so be it.

Publication of an opt-in proposal would direct discussion squarely to the point of public enforcement values. The Committee has been uncertain of the justifications for using the Enabling Act to expand the substantive law by providing a remedy that may sweep far beyond anything contemplated by Congress. The source of these doubts is exemplified by substantial parts of the public comments and testimony. Enforcement decisions at the inception of a class action are made not on a balance of the public interest by public officials nor in realistic pursuit of individual private interests, but to press a view of the law and facts that may be doubted or denied by public agencies and even class members. The view of the merits urged on behalf of the class often represents sincere conviction, sincerely held. At times the view of the merits may be tinged with hopes of counsel fees. Although courts must be enlisted, and might seem to protect against the mere self-interest or excess enthusiasm of the class's self-appointed champions, there is strong support for the view that this protection is inadequate. Weak claims can and do survive motions to dismiss or for summary judgment, and the risks and costs of class litigation may force settlements that thwart, rather than advance, public policies and interests.

If individual class members continue to have an opportunity to assert their claims by opting in to a class, the justifications that have been advanced to overcome doubts about private enforcement of public values can be evaluated in their own terms. The confusion of private benefit with public values will be much reduced. Proponents must face the task of explaining why the right to opt out is a meaningful protection that justifies representation, while the right to opt in does not provide a

meaningful method of protecting individual interests. The obvious explanation is that every class-action practitioner knows that there is a great gap between opt-out rights and opt-in opportunities. Inertia, the complexity of class notices, and the widespread fear of any entanglement with legal proceedings will lead many reluctant class members to forgo the opportunity to opt out, and likewise will deter many willing class members from seizing the opportunity to opt in. This explanation, however, casts real doubt on the justification for representation assumed to arise from failure to opt out.

In the end, any modification of the familiar Rule 23(b) structure must overcome powerful arguments for holding to the present course. To be sure, there are profound reasons to doubt the adequacy of the conceptual theories of representation that make (b)(1) and (b)(2) classes mandatory, and that rely on the uncertain opt-out process for (b)(3) classes. More important, there are compelling illustrations of class actions run amok. If much good has been done through Rule 23(b)(3), there are at least occasional instances of significant harm. But many believe that the balance between good and bad weighs heavily in favor of the present rule. Wise administration of the protections built into the rule can avoid the bad results in almost all cases. And any modified rule must be drawn with great care if it is to achieve a better balance between good and bad class actions.

Even if there is no change in the structure of Rule 23, all of these doubts about representation provide new support for examining notice requirements. The draft that was put aside at the time of the decision to go forward with the 1996 published proposals is invoked with the separate discussion of notice below.

(b)(3)(F) Responses

Proposed factor (b)(3)(F) would make pertinent to the determinations of predominance and superiority "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The volume of comment and testimony on this proposal was nearly overwhelming. Before attempting redrafting, at least three core issues must be resolved if this proposal is to be pursued further. Additional complications of administration also must be addressed. If the resolution is that the proposal should go ahead for adoption as published, it is safe to predict a maelstrom of protest.

The first ground of protest is that it is not safe to rely on common-sense implication in administering the proposal. The simple illustration is a class involving a $10 injury to each of 1,000,000 people that could be litigated through to judgment on the merits at a cost of $1,000,000. The argument is that it is folly to compare an individual benefit of $10 to an aggregate cost of $1,000,000. The comparison either should weigh the $10 individual benefit against the pro rata individual cost of $1, or the aggregate $10,000,000 benefit against the aggregate $1,000,000 cost. The focus on individual benefit never was intended to imply anything as ludicrous as comparing individual benefits against aggregate costs. The median class recoveries indicated in the Federal Judicial Center study, for example, have been accepted throughout the process as benefits that would readily justify at least most class actions, even though such recoveries would scarcely support the costs of adjudication by small-claims procedures. It may prove difficult, however, to articulate the ways in which the blends of individual and aggregate costs and benefits are to be counted.

The second ground of protest is that public values must be counted as well. Witness after witness bewailed the inadequacy of public enforcement resources, tactfully questioned the cogency of some public enforcement decisions, and extolled the benefits of class-action enforcement. On this view, wrongdoers must be made to internalize the costs of their wrongs; only then will policies of social regulation be properly enforced, and only then will adequate deterrence be realized. This argument involves very important questions on the merits of the proposal. It also suggests grave drafting problems if the Committee concludes that deterrence and disgorgement deserve to be weighed in the determination whether to certify a (b)(3) class.

Both of these first two grounds of objection could be met, at least in part, by reverting to an earlier draft formulation. The version that emerged from the November, 1995, meeting looked to "whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation." The private benefits could easily include consideration of the aggregate private relief. The public interest

is explicitly included in the calculation, in terms that would allow consideration of any relevant factor. The Committee was wary of this formulation, however, because it seemed to justify discriminations based on case-specific appraisals of the substantive value of substantive principles. A court hostile to the policies embodied in constitutional, legislative, administrative, or common-law rules could simply determine that there is no public interest in enforcement, much less an interest sufficient to justify class litigation.

The third protest went to an issue that was deliberately held open by the Committee. Reference to probable relief seems to many observers to require consideration of the probable merits of the class claim. The objections to preliminary consideration of the merits raised all of the difficulties that led the Committee to recede from earlier proposals to require some measure of predicted success on the merits as a prerequisite to certification of any (b)(3) class. Whatever else is done, it is imperative that the Committee decide whether the reference to probable relief requires or justifies consideration of the merits.

Beyond these three core issues lie a number of additional comments. The many challenges to proposed factor (F) are summarized first, both because they demand attention and because they set the framework for the comments that support it or urge extension of the underlying principle. In all, there is much to discuss.

Factor (F) Opposed

No Need. In a variety of ways, it is urged that there is no need for factor (F). Many say that Rule 23 works now. No need to trim it back has been shown; there are no empiric studies that document any of the alleged abuses. To the extent that (F) reflects legitimate concerns, these concerns are taken into account now as courts administer the general superiority, predominance, and manageability criteria. Superiority assumes that there are other available means for adjudicating wrongs; for small-claims classes, there are no other means. At the very least, the Note should give illustrations of "bad" class actions that should not have been certified.

A specific variation on these themes was provided by the observation that class actions typically are undertaken on contingent-fee arrangements. Contingent-fee lawyers will undertake only "good" litigation that promises success on the merits.

A more general variation was that (F) is not an effective means of addressing such problems as may arise from actions undertaken solely to gain attorney fees. Direct regulation of fee awards is a better approach.

Statutes. Various statutes specifically regulate small-claims classes and recoveries in them. It is urged that the proposal is

antithetical to the Fair Debt Collection Practices, Magnuson-Moss Warranty, Social Security, and Truth-in-Lending Acts.

A more general argument is that Congress has relied on the existence of Rule 23(b)(3) class enforcement in many (unspecified) statutes adopted since 1966. There has been no need to legislate overlapping and repetitious small-claims class procedures. The Committee should not defeat this reliance by adopting (F).

Vagueness, Discretion, and Evasion. The general open-ended character of factor (F) has fueled many arguments. Some go directly to problems of vagueness, unguided discretion, and evasion of Rule 23. Others, noted separately below, go to more specific difficulties of administration.

The central argument is that (F) is vague and standardless. This vague concept must be applied at the beginning of the litigation, when there is little satisfactory information for guidance.

The vagueness argument is elaborated into the argument that balancing tests, cost-benefit calculations, are not appropriate for judicial administration of Rule 23. This is social engineering, not procedure. What is "worth it" to one judge will not be to another judge. Courts hostile to class actions or to specific substantive policies will be given free rein to engage in social engineering and legislative policymaking.

Administration. Many of the arguments go to anticipated difficulties of administration. With such vague guidance, courts and would-be class representatives will be buried with preliminary certification litigation. This litigation will be more costly, more protracted, and less effective than the tools now available to dispatch improper class actions through wise administration of present Rule 23(b)(3) and Rules 11, 12(b)(6), 16, and 56.

The focus on probable relief requires the court to guess at what relief will be available after trial on the merits. This will lead to wrangling over probable damages. Damages often cannot be estimated without considering the merits of the claims — different theories of violation will support different measures of recovery. Experts will be called by all parties to give mutually contradictory theories and estimates. Defendants will demand discovery of individual injuries. Plaintiffs will need discovery to obtain information about probable class injuries that is available only to defendants — securities and antitrust cases are common examples.

The proposal does not state whether it addresses mean recoveries by individual class members, median recoveries by them, or only the recoveries of the representatives. Individual damages ordinarily will be spread over a wide range. At the least, the Note should state that the lowest of the FJC median recovery figures — $315 — is enough. And if the rule is retained, it should

explicitly draw the line at "trivial" relief, approving small relief.

There is no indication of the party costs that are to be counted. Discovery costs may be staggering in some actions, undermining very sizable aggregate claims. Counsel fees, if they count, will have to be explored. Defense estimates of counsel fees will be high; plaintiffs will insist on responding that the proposed fee arrangements and costs are unreasonable, and should not be counted in the balance. It is urged that class actions are expensive to litigate because defendants make them expensive, behavior that should not be encouraged and rewarded by denying certification.

Projecting costs is particularly difficult because costs depend on whether, and when, the case settles.

The Note references to complexity are inappropriate. Most class actions involve complex issues and are necessary to support litigation of complex issues. The implicit sliding scale that requires greater individual class member benefits as complexity increases will generate much motion practice.

The only legitimate focus, if there is one, should be on the costs of notice and distributing class relief. Only if these administrative costs will surpass total class relief should certification be denied.

Court burdens. How are the burdens on the judicial system to be figured? What is judicial time worth? Why should only class plaintiffs be turned away because of the public costs of providing justice?

Specific relief. The proposal does not seem to take account of injunctive or other in-kind relief. Even if such relief is included in the probable individual relief, there is no guide to evaluating the relief and weighing it in the balance.

Moral values. It is not moral to treat people with small claims as null quantities. (F) "is pernicious. To say to people, 'you just ain't worth it'" is a terrible message. "Junk (F). Junk it. It's bad philosophy. It's bad social engineering."

One comment seems to advance the apparently substantive suggestion that it would be better to establish a minimum pay-out to all class members — perhaps $10 — regardless of actual injury.

Relation to settlement classes. One comment argues that proposed (b)(4) would allow certification for settlement of a $2 class that (F) would not allow to be certified for trial.

Deterrence. Most of the many deterrence arguments are captured in the core concern noted above. One comment focuses on current legislative patterns: As legislatures "deregulate," courts must "provide legal redress ex post in order to compensate for the

consequences of oversight ex ante."

Substantive impact. Many comments assert that (F) is an attempt to move in an outcome-determinative direction, implementing substantive policies. They make it clear that, in the words of one witness, any revision of Rule 23 is "a very delicate matter." Typical statements include: "It is not the role of the courts or the rulemakers to decide that some of the rights established by federal and state substantive law are unworthy of enforcement." "The Advisory Committee approach addresses the public interest by denying its relevance * * *. [T]he problem is far more complex * * *, and is freighted with major considerations of substantive policy." (F) "embodies a value judgment about the worth of small claims class actions," in violation of the Enabling Act. The point of adjudication is to enforce the substantive law; it is not realistic to impose on Congress the burden of specifically authorizing small-claims classes in each piece of substantive legislation.

Factor (F) Supported or Extended

Make Threshold Requirement. Some supporters were so enthusiastic that they urged that (F) should be elevated from a mere matter pertinent to a requirement. It should be made a condition of certification along with superiority and predominance.

Public perceptions. Many testified that small-claims class action practice is giving lawyers, courts, and the law a bad public image. The public is right — many of these actions exist only to enrich lawyers.

Small claims beneficiaries. Some urge that the image of providing relief to impecunious victims to whom even a few dollars are significant is romantic delusion. It is not the genuinely poor who participate in the small-claims judgments. The beneficiaries are the middle-class and more affluent who buy insurance, use credit cards, and take auto-purchase loans.

No real representatives. Discovery invariably reveals that representative plaintiffs have relatively little knowledge of, or interest in, the claims advanced. Usually they come into the case at the invitation of the lawyers, not the other way around. The idea of providing meaningful relief to vast numbers of caring victims shatters on the reality that not even the representatives know or care.

"Market-value" cases. Representatives of the automobile industry urged that classes claiming that product defects have diminished the market value of automobiles involve imaginary defects, or follow on campaigns to cure the defects. The only purpose is to generate publicity that will cause a decline in market values, justifying a recovery that rewards counsel for an injury counsel caused.

Deterrence-Private Attorney General. The theory that small-claims class actions are necessary to enforce substantive law was assailed in many forms.

The role of public enforcement through executive and regulatory agencies was frequently stressed. "[C]ourts are not the only agency of government with the capacity to govern."

The need for deterrence was challenged from a different perspective. Lawyers overestimate the impact of litigation on business behavior. Litigation is far too uncertain to count for much in business planning decisions.

A somewhat conflicting argument was made that small-claims classes deter, or at least punish, conduct that in the best of the cases involves technical violations of vague law. This is not a matter of catching those who cheat. Indeed, the costs inflicted by class litigation work in the long run to inflict greater injury on consumers than class litigation returns in the way of benefits. And of course there is no class-action remedy to return to business the costs incurred in the mistaken belief that regulatory legislation requires expensive forms of compliance.

It also is argued that vast numbers of legal wrongs that inflict small injury, and indeed that inflict quite substantial injury, go unchallenged and unredressed. Justice and public policy have never led to insistence that all violations of the law be litigated, nor even to provision of free public lawyers for everyone who cannot afford to pursue a desired private remedy. Small-claims class actions have no special justification that makes them different.

Finally, it is argued in many ways that the Enabling Act does not permit adoption of a rule designed to increase deterrence by supplementing public enforcement. "It is outside the scope of the Rules Enabling Act for the Advisory Committee to confer upon class counsel the role of a private attorney general."

Dollar Threshold. Several suggestions were made that a bright-line threshold of minimum injury should be adopted. The figures suggested ranged from $10 to $300. The bright line apparently would exclude from the class anyone whose individual injury fell below the stated amount.

Criticisms rebutted. The proponents believe that (F) is not unworkably vague. To the contrary, it is in the nature of the Federal Rules to provide general guidelines that are filled in by trial-court discretion.

Note changes. Supporters urged several changes in the Note to bolster the effect of the proposal. The Note is seen as taking back some of the good that the text should accomplish.

The Note should not refer at all to the value of enforcing

small claims. It should not imply that the median potential recoveries reported by the FJC study are sufficient to justify class certification.

The Note should urge that account be taken of such factors as the number of complaints that have been made to the defendant or public officials about the challenged conduct; whether the defendant has undertaken voluntary corrective measures; whether there are preexisting relationships between representative class members and counsel. The references to "trivial" claims might be changed to "small claims," allowing refusal to certify even though individual recoveries will rise above the trivial.

A suggestion that reflected the frequent arguments for adopting opt-in classes was that (F) should be administered by considering whether a substantial number of individuals seek actively to pursue claims on behalf of the proposed class. The worthiness of the class enterprise would be supported by showing that class members, without solicitation or influence by class counsel, spontaneously believe that enforcement is important.

(F) In Balance

These summaries do not reflect the deepest themes opened by the comments and testimony. There are forceful arguments that small-claims classes have become an essential means of enforcing important legal rules and the public policies embodied in those rules. There also are forceful arguments that small-claims classes are misused in ways that not only inflict unjustified costs on defendants but also exact great public costs. The proposal was designed to address these competing problems by drawing from the belief that private adversary civil litigation justifies the risks of judicial lawmaking and law enforcement only when it yields significant individual recoveries. It has been assailed directly on the ground that Rule 23 also is an important means of public enforcement. It has been assailed also on the ground that it is vague, engendering all the problems of discriminatory, costly, and arbitrary enforcement that underlie one part of "void-for-vagueness" doctrine. It has been defended as a modest beginning in a more important enterprise that must lead to more profound controls on Rule 23 excesses. The perceived administrative problems are met with the confident response that the Federal Rules witness the repeated triumph of open-ended discretionary procedure administered by strong district judges.

The core arguments have been considered repeatedly. Resolution has not been made easier by the volumes of cogent comments and testimony. The more specific predictions of administrative problems to be engendered by adversary litigating responses are, in some part, new. If it is accepted that there is something about small-claims class practice that needs to be cured, it remains to decide whether (F), as proposed or as it may be modified, remains the best prescription.

(b)(4) and (e): Waiting on the Supreme Court

Until the April, 1996 meeting, successive drafts referred to settlement classes only through a new factor in the (b)(3) list of matters pertinent to the determination of predominance and superiority: "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." This approach was not much discussed, in part because brief discussion sufficed to demonstrate the complexity of the issues presented by settlement classes. The published (b)(4) proposal was substituted at the April meeting for the earlier draft in response to the clear Third Circuit ruling that a class can be certified for settlement only if the same class would be certified for trial. The gradual growth of settlement classes to become a regular feature of Rule 23 practice was shown by the FJC study, and the central purpose of the (b)(4) proposal was to restore that practice. No attempt was made to address the many questions that continue to surround settlement classes.

The hearing requirement added to subdivision (e) was proposed on the basis of a few minutes of discussion in conjunction with the Committee-floor drafting of (b)(4). It was meant simply to confirm the Committee understanding of common practice.

Public comments and testimony have underscored the complexity of the settlement class phenomenon. Many witnesses urged that settlement classes have become a central and important aspect of practice in areas where Rule 23 practice has matured. Securities and antitrust litigation provided the most frequent examples. Other witnesses stressed the grave theoretical problems that surround binding disposition of class members' claims by private agreement, not official adjudication. Most of the problems were illustrated by reference to dispersed mass tort litigation, and particularly pending attempts to resolve large classes of asbestos claims by settlement. Solutions to the problems were offered in many forms. Rule 23 could specify detailed procedures for the settlement process; judges or judicial adjuncts could become directly involved in structuring the negotiations or in the negotiation process itself; the procedures and criteria for reviewing the substance of any settlement could be developed in greater detail.

At one level, these reactions suggest a simple question that is easily stated. The (b)(4) proposal rested on the belief that it is better to authorize settlement classes, but to leave answers to the many surrounding problems to be found in the continuing common-law process of judicial improvisation. Not enough is yet known to provide clear answers in the text of Rule 23. The question is whether this is wise, or whether the time has come to regularize settlement class practice in some measure. The most obvious alternative, adoption of the Third Circuit approach, would simply

remove one preliminary step from this question. Even if the same class would warrant certification for purposes of trial — a premise that at best must survive the uncertain pressures of application in face of an actual or prospective settlement — the quality of a settlement must eventually be faced in any case that does not in fact go to trial. The other obvious alternative is so unthinkable that it does not seem obvious. Settlement of class actions could be prohibited, completely avoiding the problems that arise from authorizing self-selected (or, worse, adversary-selected) representatives and counsel to barter away the rights of others. If Rule 23 could survive at all without the possibility of settlement, it must be limited to an exquisitely small number of cases.

The question whether to attempt greater regulation of settlement classes is not yet ripe. As much information as has been gathered, Supreme Court guidance is likely to emerge from the decision in the *Georgine* litigation. The Committee published (b)(4) as a reaction to the Third Circuit opinion. Certiorari was then granted, the case has been argued, and decision is imminent. As illustrations of approaches that might be taken, however, two detailed proposals are appended. One, the Resnik-Coffee proposal, involves regulation of the settlement process. The second, Judge Schwarzer's proposal, would expand the subdivision (e) process for reviewing proposed settlements.

The fate of subdivision (e) is inextricably tied to the (b)(4) proposal, both in Committee history and in concept. Further consideration of the published proposal making explicit the hearing requirement should await action on the broader questions. Even if the (e) proposal should come to stand alone in the end, concerns have been expressed that warrant further consideration. Pro se prisoner complaints often include class allegations; requiring a hearing incident to dismissal of all such actions could impose substantial costs for little purpose. Purported class actions may be dismissed without certification in other circumstances that do not threaten the interests of any putative class member and that do not involve collusion at class expense. Dismissal may itself rest on judicial action, as under Rules 12(b)(6) or 56, or upon complete administration of the class remedy, that satisfies any hearing need. It may be desirable to address some of these concerns in the text of (e) or in the Note.

IV Other Proposals

The hearings and comments advanced a variety of other proposals for Rule 23 revision. Some were offered to improve the proposals actually made. Others reflected a deeper concern that the published proposals offered no more than modest initial steps toward more important changes. Some of the proposals involve matters that were worked out in Committee drafts but never fully discussed. Others are substantially new to this study. The more prominent of the proposals may be summarized briefly.

Mass Torts

The Committee has considered and put aside the prospect of creating a new "Rule 23.X" for mass torts. Several comments have suggested that Rule 23 is not an appropriate means of addressing mass tort litigation problems.

Common Evidence

Many comments have urged that the purpose of Rule 23(b)(3) be restored by adding an explicit requirement that trial evidence be substantially the same as to all elements of the claims asserted by class members. Several appellate decisions have emphasized this need, but district court practice is said to be variable. The comments often tie to specific substantive areas. The need to show individual reliance in fraud-based claims is a common example. Proof of reliance by representative plaintiffs may allow recovery on behalf of many other class members who did not rely. Substantive rights are altered by dispensing with individual evidence on matters required for individual recovery. A variation suggests a new factor (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."

(b)(3)(F) - Opt-in Draft

Built into (b)(3)

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that an opt-out class action under this paragraph is superior to other available methods, including an opt-in class action under paragraph (4), for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: * * *

(This alternative sweeps well beyond rejection on factor (F) grounds, but it focuses the issue. And it has the advantage of bringing the opt-out language into the text of (b)(3) for the first time.)

Tied to (F), but not built into (b)(3)

(4) certification of a (b)(3) class is denied {by application of factor (F),} [because the public interest and private benefits do not justify the burdens of class litigation,] but the court determines that permissive joinder should be accomplished by allowing putative members to elect to be included in a class.

(c) * * *

(2) (A) When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe * * * the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. * * *

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

(3) Whether or not favorable to the class, * * *

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

((And (b)(3)(F) could be amended to include reference to (b)(4), e.g.: "(F) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of litigation as an opt-out (b)(3) class, taking account of the possibility of certifying an opt-in (b)(4) class."))

Agenda Item V-D

FLSA/ADEA Opt-In "Classes"

This is a preliminary observation on the reasons why there does not seem much to be learned for Rule 23 purposes from practices under the opt-in "class" proceedings under the Fair Labor Standards Act, adopted into the Age Discrimination in Employment Act.

The Fair Labor Standards Act, 29 U.S.C. § 216(b), provides for an action to recover:

> by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party-plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Although the statute does not use the term, it is common to refer to these proceedings as opt-in class actions. The same procedure is incorporated into the Age Discrimination in Employment Act, 29 U.S.C. § 626(b).

Representative plaintiffs are never formally designated as class representatives by the court. The court can approve notice to potential plaintiffs, and establish a deadline for filing consent to become a party. Discovery can be had to identify potential plaintiffs. The statute of limitations runs against each potential plaintiff until the written consent is filed. There is no statutory definition of the requirement that plaintiffs be "similarly situated"; apparently the requirement is found satisfied in some cases that nonetheless proceed much as if so many plaintiffs had intervened in a nonclass proceeding.

There is little indication that this device creates a "class" that has the consequences of a Rule 23 class. It is accepted that Rule 23 does not apply to these proceedings, and apparently Rule 23 is not independently available for FLSA or ADEA claims. The practice indeed seems to be a voluntary, large-scale joinder device. It took on this form in 1947. From adoption of the FLSA in 1938 until the 1947 Portal-to-Portal Act, there was no requirement of written consent, and apparently the "representatives"-plaintiffs did not even have to be employees. There is little indication that either in 1938 or in 1947 Congress was thinking in terms at all analogous to contemporary class actions, much less to Rule 23 as it has become in 1997.

Advisory Committee consideration of opt-in classes has proceeded on the assumption that all of the incidents of Rule 23 would be adopted, beginning with the Rule 23(a) prerequisites and going through whatever variation on Rule 23(b) requirements might seem appropriate. Apart from changes in notice procedures, subdivisions (c), (d), and (e) would continue to apply.

Conceptually, FLSA and ADEA plaintiff-joinder procedures are not class actions at all. In implementation, at times they must share procedures that parallel Rule 23 procedures, just as happens with other non-class methods of aggregating multiple parties. At least on preliminary inquiry, there seems little reason to suppose that these practices can much illuminate the consequences of adding an opt-in class procedure to Rule 23, whatever form the new opt-in procedure might take.

Further study might show minor but interesting details that could illuminate Rule 23 opt-in practice. The only illustration that has occurred so far arises from an opt-in form that, in addition to effecting the plaintiff's joinder, requested basic information about age, employment history, salary, and the like. The opt-in form, that is, accomplished a modest but important first wave of discovery in nearly painless form. It seems likely that general use of this sort of opt-in form in many Rule 23 settings also would have the effect of forcing potential class members to think carefully about the criteria governing membership in the class and about the value of joining the action.

Agenda Item VD

Appendix A

Resnik-Coffee Proposed Rule 23(b)(4)

The Proposed Language

Proposed 23(b)(4)

(4) the court finds that provisional certification under subdivision (b)(3) for the purposes of litigation or settlement would constitute a fair and efficient method by which to advance the resolution of the dispute, and such certification is requested either:

A) by the plaintiffs, who seek certification but are not able to establish that they can meet all the requirements of 23(b)(3). When making such a provisional certification, the court shall:

i. indicate that the proposed certification is conditional and for litigating purposes only ("litigating certification");

ii. make specific findings as to which requirements of subdivision (b)(3) it finds satisfied, unsatisfied, or to which it reserves judgment;

iii. require that members be notified of the limitations placed on the certification. Should defendants or class members object, the court shall provide a hearing, after notice, on the issue of the propriety of certification. After such a hearing, the court may alter the certification and/or appoint additional representatives, a guardian ad litem, or employ other procedures to ensure that all interests within the class are adequately represented during the litigation process.

iv. either upon motion of the parties or sua sponte, revisit the certification and alter it, either by decertifying the class, recertifying it under subdivision (b)(3) or (b)(4)(B), or by creating subclasses for certification as it deems appropriate; or,

B) jointly by one or more of the defendants to the action and by a plaintiffs' steering committee, appointed by the court, even though all of the requirements of subdivision (b)(3) might not be satisfied for the purpose of trial. Before certifying such a provisional class, the court shall:

i. make specific findings as to whether each of the requirements of subdivision (B)(3) are satisfied;

ii. if one or more of the requirements of subdivision (b)(3) are found not to be satisfied, determine whether any discrete subcategory of class members would be likely to obtain a superior result (via settlement, trial or other form of disposition) in another available forum or proceeding (including actions pending or to be commenced in the foreseeable future). In so determining, the court shall consider whether similarly situated individuals have obtained superior results in the past in other proceedings; whether individual or representative litigation in the future in other proceedings constitutes a viable alternative for most of the class or an identifiable subcategory thereof, whether delay is likely to affect materially the effectiveness or enforceability of any judgment or remedy, and other factors (including the availability of counsel) bearing on the ability of class members to receive just and fair treatment. If the court determines, either before or after certification, that one or more discrete subcategories of class members would likely obtain or has obtained a superior result in another forum or by means of another procedure, the court shall exclude such subcategory from the certified class; and

iii. determine and make specific findings as to whether a need exists for subclasses, special counsel, guardian ad litem, or other additional procedures are needed, because of the potential differential in impact of any proposed settlement upon class members or because of the need for negotiation among subcategories as to the allocation of any proposed settlements.

C) When considering the request to approve a class action settlement, and whether the class is certified pursuant to 23(b)(3) or 23(b)(4), the court has fiduciary obligations to protect the interests of absentees. Prior to approval of any proposed settlement, the court shall require that the parties

requesting the settlement provide the court with detailed information about:

i. the means by which the lawyers seeking to represent the plaintiffs came to engage in negotiations with lawyers seeking to represent defendants;

ii. the degree to which the proposed settlement treats all members of the class equally or, if distinctions are made, the bases on which such distinctions are claimed to be proper;

iii. the means by which the remedial provisions shall be accomplished;

iv. why it is in the interest of the members of the proposed class action to accept the proposed settlement in lieu of either individual litigation or other forms of aggregate litigation, in either state or federal court or in an administrative proceeding;

v. information, if available, about the amount of compensation, including costs and fees, provided to the attorneys representing the class and the relationship between that compensation and that received by class members;

vi. information about payment of fees or costs associated with special counsel, guardians ad litem, court experts, objectors, or others;

vii. information about the methods by which other lawyers, if any represent individual class members, shall be compensated (including fees and costs) and the amounts of such compensation; and

viii. such other information as the court deems necessary and appropriate.[2]

A Proposed Advisory Committee Note

Under this subdivision, a court may consider two kinds of certification not provided for in 23(b)(3) -- certification of classes in which, at the time of certification, it is not yet known whether the case can proceed through all phases, and particularly through trial as a class action ("litigation

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[2] The provisions we have proposed for 23(b)(4)(C) could alternatively be placed in an expanded 23(e).

classes") and certification of classes jointly requested by lawyers for plaintiffs and defendants (and often, but not exclusively, including proposed settlements as well).

The purpose of litigation classes is to enable an initial exploration, on notice to affected parties, of the possibility of a group-wide disposition, either through the pretrial process or via settlement. Building on the model of the multi-litigation statute, 28 U.S.C. §1407, a litigation class permits discovery and exploration of settlement on a class wide basis, but only upon notice to affected members and opponents. This rule revision is proposed to complement the spirit of other rules involving parties, specifically Rules 19 and 24, which endeavor to enable participation of litigants with somewhat divergent interests within a single lawsuit. The rule revision is also designed to make the practice in class actions accord with that in other aspects of civil litigation, namely that few cases are in fact disposed of by trial but many proceed through pretrial litigation under the aegis of amended Rule 16. The proposed amendment to Rule 23 places burdens on judges to ensure that those affected by such litigation are adequately represented throughout the pretrial process, and further requires judges to revisit the question of certification when appropriate.

The other kind of certification contemplated by the rule is that requested jointly by plaintiff counsel, seeking to represent a class, and one or more of defendant counsel, joining in that application. A common form of such requests is that of the settlement class, in which a certification of a class is a means to implement a settlement but the findings in 23(b)(4)(B) should be made whenever the court has reason to believe that the requests for class certification and for approval of a settlement are linked. Given contemporary concerns about such cases (*see* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995)), the rule imposes higher burdens on such joint certification requests, including that courts determine whether subclasses should also be certified to ensure that all of the interests of class members are adequately represented within the litigation structure and that those affected either legally or practically by a judgment are either appropriately represented or beyond the scope of any proposed judgment.

As used in subdivision 23(b)(4)(B), the term "superior result," achieved "via settlement, trial or other form of disposition," requires the court to consider more than a comparison of the likely monetary results of the pending action as compared with likely results in another forum (e.g. an individual action in state or federal court, an administrative remedy, other forms of aggregate litigation, formal or informal,

in state or federal court). In class actions involving monetary recoveries, the court should also evaluate how proposed recoveries will be funded (including the adequacy of insurance coverage) and whether relegating class members to individual actions, to multi-district litigation, or to other processes will give such class members viable remedies, if liability is established, against defendants who are likely to remain solvent in the foreseeable future. When evaluating non-pecuniary aspects of proposed settlements, the court should evaluate carefully the actual utility of those proposals and the means by which they will be provided to class members. If the court finds that identifiable groups of class members have a viable and established remedy by means of processes other than a settling on certification class, the court shall consider the effect of divesting class members of such remedies by approving of the proposed certification. In short, this comparative analysis requires the court not only to consider the class and settlement proposed simultaneously but the other options practically available to class members, the incentives of the litigants and their attorneys to proceed by means of a class as compared to those other ways, and the availability of counsel and of access to such other fora. The question before the court is whether there are better ways to respond to the alleged injuries of the plaintiffs than by means of a settlement class action or whether, under the particular circumstances of a specific case, such a certification is appropriate.

When certified under any provision of 23(b), the provisions of 23(f) that permit discretionary appeals apply. Judges considering certifying litigating classes may take into account the concerns either that class certification inappropriately creates undue pressures to settle or, alternatively, inappropriately undermines the authority of the class representatives.

Classes certified for litigation and those certified at the behest of both plaintiffs and defendants should be accompanied by notice to class members, thereby enabling the development of information relevant to the settlement negotiations and relevant to the propriety of maintaining the class certification.

The proposed revision also provides for the appointment, by the court, of more than one kind of representative or lead counsel and the utilization of an array of lawyers and others to ensure a process of litigation and negotiation that will, in turn, facilitate the district judge's task in considering the adequacy of proposed settlements, if any result, and will assist the judge in the discharge of his/her fiduciary task of monitoring the class representatives. "Judging" consent -- evaluating the reasonableness, adequacy,

and fairness of an agreement -- is a very difficult task. *See* Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL FORUM 43. The proposed language provides the framework by which judges are to discharge their fiduciary obligations to the absent members of the class. Because this proposal anticipates that more lawyers may participate in the pretrial proceeding and in the negotiations, judges should -- in cases involving court-awarded attorneys' fees and costs or when approving settlements that provide for fees and costs -- consider awarding or requiring that attorneys' fees be paid to a wider array of lawyers than those designated as attorneys for a class, those on a Plaintiffs' Steering Committee, in other "lead counsel" positions. *See* Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996). The new language expressly calls for information to be provided to the court about the proposed compensation, including costs and fees, for all lawyers, be they class representatives, individually-retained attorneys, objectors, or others.

While the standards for considering of settlements filed concurrent with requests for certification do not preclude so-called "futures" classes per se, the standards require close scrutiny by the court of the treatment of all segments of a class when settlements are proposed.

The court should ensure an inclusive array of representatives during the course of class action litigation but should also guard against the risk that small segments of class members or their attorneys might attempt to exert control over the shape of a settlement in a fashion that proves detrimental to other, and possibly, most, members of the class. The requirement of disclosure of all fee and cost arrangements, including those among plaintiffs' lawyers as well as between plaintiffs and defendants, is aimed at enabling the court to assess the interests of all participants and the degree to which specially-identified participants (lead counsel, PSC members, special counsel, objecting counsel, defense counsel, etc.) represent the interests of the disputants.

Conclusion

We have erred on the side of being comprehensive in terms of our explanation, our draft, and our notes. We would be happy to meet with you to discuss means by which we could shorten these proposals or otherwise redraft them. We remain willing to help the Advisory Committee in any way that is useful to you.

Appendix B

Rule 23(e) Factors

William W. Schwarzer

Settlement of Mass Tort Class Actions: Order Out of Chaos
1995, 80 Cornell L. Rev. 837, 843-844

be transsubstantive, suitable for any action subject to Rule 23; they should be neutral, avoiding substantive ethical rules and principles: they should not dictate the terms of settlements or stifle creativity and adaptation to unique circumstances; they should be practical and flexible; and they should be reasonably comprehensive but not so detailed that they lead to a failure to see the forest for the trees. Finally, guidelines should not be prescriptive but should give direction that would lead the court to give the settlement the consideration necessary to bring to light any serious defect and ensure that it is truly fair and equitable. Precedent for such an approach is found in Rules 16(c), 19(b), 26(b), and 26(c) of the Federal Rules of Civil Procedure, all of which enumerate factors or items to be considered by the court in particular contexts.

Relying merely on appellate decisions for such guidelines has drawbacks: the law may vary across circuits, decisions are ad hoc, and their precedential effect will be circumscribed by the unique facts of the case. Amendment of Rule 23(e) is therefore worthy of consideration. The thrust of such an amendment would be to require the court to make findings, and hence to ensure its consideration of a number of factors relevant to the fairness and reasonableness of a settlement. The statement of such factors should be sufficiently specific to provide guidance but not so elaborate as to defeat the utility and flexibility of the rule.

The following formulation is suggested as an addition to the current text of Rule 23(e):

> When ruling on an application for approval of a dismissal or compromise of a class action, the court shall consider and make findings with respect to the following matters, so far as applicable to the action:
>
> (1) Whether the prerequisites set forth in subdivisions (a) and (b) have been met;
>
> (2) Whether the class definition is appropriate and fair, taking into account among other things whether it is consistent with the purpose for which the class is certified, whether it may be overinclusive or underinclusive, and whether division into subclasses may be necessary or advisable;
>
> (3) Whether persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;
>
> (4) Whether notice to members of the class is adequate, taking into account the ability of persons to understand the notice and its significance to them;
>
> (5) Whether the representation of members of the class is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;

(6) Whether opt-out rights are adequate to fairly protect interests of class members;
(7) Whether provisions for attorneys' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;
(8) Whether the settlement will have significant effects on parties in other actions pending in state or federal courts;
(9) Whether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from the settlement;
(10) Whether the compensation for loss and damage provided by the settlement is within the range of reason, taking into account the balance of costs to defendant and benefits to class members; and
(11) Whether the claims process under the settlement is likely to be fair and equitable in its operation.

In identifying these factors relevant to most class action settlements, the rule would establish neither substantive requirements nor minimum standards for approval. Rather, it would set out guidelines—a kind of checklist—for the consideration and evaluation of settlements. Each factor relates to matters that could bear on the fairness and equity of the settlement and present a possible obstacle to approval, but none of them ipso facto defines the terms for approval or disapproval. Rule 23 would continue to leave the decision whether to approve or disapprove a settlement to the discretion of the trial judge, but the exercise of that discretion would no longer be unguided. However, so long as the trial court record reflects consideration by the trial judge of each of these factors (to the extent relevant under the circumstances of the litigation), and any others related thereto, and findings with respect to each, the court's ruling should be entitled to a presumption of reasonableness on appeal. By lending structure to the process of approval of class action settlements, this proposed rule would also provide guidance to parties in negotiating settlement agreements. While this rule would not set limits on what is permissible, it would inform them of the issues they must address.

Amending Rule 23(e) along the lines suggested would help bring order out of the present chaos, enhance predictability and stability, increase the utility of class actions, and serve the interests of justice.

Rule 23 Comments: (b)(4) Settlement Class

John Leubsdorf, 96CV026: The (b)(4) settlement proposal should be withdrawn for further work. Settlement classes pose many dangers. Defendants may select plaintiff counsel and representatives; class counsel may have individual clients that are excluded from the class and receive better terms; large numbers of class members may receive nothing; the right to opt out may be denied; class members may be enjoined from suing in other courts, restricting opportunities for collateral attack; the law of a single state may be forced on all class members; "a new set of procedures and remedies" may be substituted for legal remedies. Consequences will include diminished ability to choose among competing lawyers to seek the most effective class representative; stronger pressure to accept inadequate settlements, lest the suit must be dismissed because the case cannot be tried as a class action; and greater difficulty in controlling lawyer fees by advance restrictions. The effects of these problems cannot be forecast — they will sweep across more and more areas of the law. And as settlement classes proliferate, litigators will tend more and more to seek out certain states that seem favorably inclined. The drafting should be changed to make it clear that the parties not only must "request" certification, but also must show that they meet the requirements of (b)(3). There is a special problem of adjusting this proposal with the securities law procedures that require notice and opportunity for rival representatives to appear and claim the right of representation. The securities law procedures, indeed, should be considered for all classes.

Improvements in the settlement class provision would include: (1) Bar consideration of settlement until the certification decision has been made. (2) Require that class lawyers, as well as representative members, fairly and adequately represent the class. (3) Appoint a lawyer to challenge any proposed settlement, providing reasonable discovery "concerning the settlement" and payment out of the class recovery. (This is not a guardian for the class but an objector.) (4) Require notice of any settlement to include comprehensible information about the essential terms. (5) Amend Rule 23(c)(2) to provide a right to opt out of any class, no matter whether certified as a (b)(1), (2), or (3) class if "significant money damages are claimed or awarded."

John McBryde, 96CV027: This proposal "will tend to defeat safeguards built into Rule 23 against improper class action activity."

Susan P. Koniak, 96CV031: The (b)(4) proposal makes worse the already nefarious use of settlement classes. It should be withdrawn. Adopts the suggestion of Professor Coffee about (b)(3)(F).

The suggestions for reform are set out in the conclusion: (1) The Rule should forbid settlement of a class that cannot be tried. (2) It is legitimate to certify a class for settlement without an initial litigated dispute over the ability to try the class claim, but if certification is uncontested the court must provide special scrutiny of the settlement, the representation of the class, and the process of negotiating the settlement. (3) The Rule should

ensure that class notices are understandable to ordinary people, and are printed in normal type. (4) The Committee should consider ways of making more meaningful the requirement of adequate representation. Class counsel should be forbidden to represent individual clients simultaneously with the class. (5) An explicit duty should be imposed on all counsel seeking approval of a class settlement to brief, fully and fairly, the potential objections to the settlement, weaknesses in the terms proposed, and potential conflicts of interest of class counsel. (6) Professor Leubsdorf's suggestion should be adopted by requiring appointment of an advocate for the class who is responsible for challenging the settlement and class representation.

These suggestions are supported by an exposition of the dangers of present practice and the risks created by the proposals. Present law is not, at least in the books, as contrary to the Third Circuit view as the Committee Minutes and draft Committee Note suggest. Settlement classes are subjected to special scrutiny. The proposal authorizes the "malignant form of settlement class" that cannot possibly be tried. It is particularly dangerous to require that settlement be reached before certification is sought. Defendants can select compliant plaintiff's counsel, who has no bargaining power arising from the prospect of trying the class claims. Even if counsel has no conflicting interests arising from representation of individual clients, and can rise above the prospect of fees from a successful settlement, there is a fear that rejection of the best negotiable deal may lead defendants to find other class counsel who will accept an even less attractive deal. If counsel has present clients, there is a conflict over advising them on opting out, and a risk that an alternative settlement will take them anyway. Objectors, moreover, cannot be counted on. Counsel should not advise counsel to stay in a bad settlement class so she can object. Objections are costly, and not likely to succeed. It is better to raise the shadow of objection, accept a role as cooperating counsel, and surrender; this is not a theoretical risk, but an actual event. Courts, moreover, accept virtually every proffered class settlement; they are not motivated to look for abuse, and "find class settlements all but irresistible and spend precious little energy ferreting out abuse."

"Large-scale problems that defy ready disposition by traditional adversary litigation," offered in the Committee Note as a justification for settlement classes, instead raise questions whether such matters are properly in court at all. Choice-of-law problems are problems because we are a federation of states, and because large-scale problems are properly governed in various parts by the laws of different states. If subclassing is required to reflect the different positions and interests of "class" members, that is no reason for ignoring the differences by fostering a spurious settlement class.

Although the Committee Note professes to take no position on

futures classes, the proposal will support and encourage settlements that include claimants who do not yet even know that they have been injured. Of course settlement is easier, but it is irresponsible or even reckless to reopen this prospect without careful safeguards.

John P. Frank, 96CV032: "Settlement classes should not be allowed at all; if we are to have them, they should be subject to the same criteria as litigation classes." Effective judicial review requires great amounts of time that often are not available. There is a great risk of collusion. The collusion hazard was greatly increased *Jeff D. v. Evans*, 1986, 475 U.S. 717, overruling the rule of *Pandrini v. National Tea Co.*, 3d Cir.1977, 557 F.2d 1015, 1021, that required determination of legal fees separately and after settlement. The Pandrini rule "reduced the bribery potential." One effect of the current practice that negotiates a settlement first, then seeks certification, is the emergence of dueling classes: the statute of limitations is suspended by filing the first action, so rival counsel can emerge to file parallel actions and solicit opt-outs by promising more favorable settlements.

Stephen Gardner, 96CV034: The coupon settlement in the General Motors pickup truck litigation is a clear example of the problem. "[N]othing in the settlement addressed the animating principle of the lawsuit: that these General Motors pickup trucks pose a serious – but remediable – safety hazard." It was a settlement class. Compensation for counsel was not in any way based on money paid to the class. And "the trial bench is in many instances absolutely failing its independent duty to scrutinize any settlement * * *." Trial judges are under pressure to administer their dockets effectively; this approach "fails miserably with respect to class actions * * * trial courts fall back on the hoary precept that settlements are to be viewed with favor and bend over backwards to find ways to approve them." Appellate courts often exacerbate the problem. The abuse of discretion standard of review should be replaced by plenary appellate review of any decision approving a settlement. Uncertifiable settlement classes should be outlawed, not encouraged. The best rule would require certification before any discussion of settlement. If a settlement is reached before certification, at least there should be a two-step process. The first notice and hearing should say nothing of the terms of the settlement. If certification is approved, there should be a second notice and hearing to review the fairness of the settlement. At least if there is a combined hearing, the court should conduct a plenary hearing into certification and reach fairness issues only after determining the nature of the class to be certified. And approval of a settlement class could be made conditional on approval of the settlement, "providing no res judicata effect if the settlement itself is rejected." Coupon settlements should be rejected; they reward, not punish, the wrongdoer.

Leslie A. Brueckner, 96CV035 & Supp.: Appears on behalf of Trial

Lawyers for Public Justice. Opposes both (b)(4) and (b)(3)(F) proposals.

Under (b)(4), "precisely because the participants in the settlement negotiations would know the case could not be litigated as a class action, the settlement negotiations would be truly perverse." The defendant in a mass-tort action hopes to pay significantly less than through individual litigation; it does not fear class counsel, because there is no realistic threat of trial. Class counsel gets no fees unless there is a settlement. The courts will be flooded with "legally questionable class actions." The prospect of settlement even before a complaint is filed is particularly disturbing — defense counsel can pick their own adversary. The right to opt out is not a meaningful protection, and is useless for "future" victims. Nothing should be done until Georgine is decided. But the (b)(4) proposal should be abandoned no matter what the Supreme Court does. It would vastly increase the potential for abusive settlements. A mass-tort defendant wants to settle on terms that cost less than alternative modes of proceeding; class counsel wants to settle to win a fee. "But the class members would get far less than they deserved." Attorneys interested in a fee would simply file classes unlikely to be certified for trial. Settlements reached before filing will enable defendants to shop for the best bargain, and pressure "even the most ethical attorney" to accept a poor offer lest someone else accept an even worse offer. There are no adequate safeguards. The right to opt out is essential to due process, but "in reality few class members are in a position to exercise their opt-out rights in a meaningful fashion. Future victims have no means of opting out. Notice is often ineffective. It may be difficult to determine whether the class is too broad, particularly in the settlement context. Conflicts of interest will be equally difficult to evaluate. And district judges are provided no guidance.

Patricia Sturdevant, 96CV039: Personally and as General Counsel, National Association of Consumer Advocates. As pointed out by 150 law professors, this proposal "(1) contains no limiting guidelines or principles, (2) it fails to address serious constitutional and statutory problems, and (3) it formalizes what until now has been an extremely controversial practice and invites collusion." "It is unnecessary to amend Rule 23 at all to obtain the positive benefits of appropriate settlement classes." And nothing should be considered until the Supreme Court has decided Amchem Prods. v. Windsor.

Judith Resnik, Margaret A. Berger, Dennis E. Curtis, & Nancy Morawetz, 96CV037: This statement accepts the desirability of settlement classes, and suggests the need to improve proposed (b)(4) in many ways. It is tightly written; this attempt to summarize the many observations is inadequate, and serves only as an introduction to a statement that should be read in full.

There is special danger in encouraging settlement before certification when there has been no determination that the representatives are adequate, without notice to many class members, and in some instances without the development of information by discovery. This setting invites the criticisms that are so cogently advanced by many. A judicial hearing after settlement is no substitute for presettlement supervision. Although it would be unwise to preclude any opportunity to settle before seeking certification, the practice should not be encourage.

The first principle to be recognized should be that settlement is appropriate in class actions, as it is in other actions. It is appropriate even if the class claim could not be tried. There is much value in aggregation for pretrial purposes – recognizing that pretrial work commonly will lead to settlement – even when it is understood that if pretrial disposition is not possible, the class must be decertified.

The second principle is that judges have special duties to ensure adequate representation of absent class members. The problem is difficult because there are many plaintiffs, many of whom have individual lawyers; many differing relationships between clients and lawyers, and many different views by lawyers of their responsibilities to their clients; many different roles played by lawyers in the class action, and complex relationships among the lawyers; and great difficulties in supervision of counsel by clients.

The third principle is that judges should seek to ensure that as many distinctive class-member interests as possible are actually represented during the settlement negotiation process, not later. This may make it harder to achieve settlement, but it is an important guaranty of any settlement that is achieved.

Robert N. Kaplan, 96CV038: As to (b)(4), there may be problems in mass tort litigation, but "[s]ettlement classes have been routinely utilized in antitrust and securities litigation for many years, without any adverse effect. * * * This proposed rule would recognize what has been a routine practice in those litigations."

Roger C. Cramton, 96CV040: This too is tightly written, and summary is perilous. The essence is a plea to abandon (b)(4) settlement classes, and in any event to adopt into subdivision (e) the settlement-review criteria advanced by Judge Schwarzer. The proposals "are not a 'cautious increment' but an unwise initiative."

It is unwise to attempt rule changes while the settlement class issue is pending in the Supreme Court.

The (b)(4) proposal violates the Rules Enabling Act. Settlement classes will "promulgate new substantive law," displacing existing state or federal law. Rules devised by the parties, not any legislature, will govern. Wholesale schemes of

reparation will be substituted for judicial procedure; systems comparable to bankruptcy, without its safeguards and procedures, are created. Such vast administrative schemes require legislation, not rulemaking. Managerial judges will be so involved in crafting settlements that impartial review is impossible. Defendants will choose plaintiffs' representatives. The right to opt-out will not be protected in meaningful ways. The parties will shop for a court willing to approve their deal. Side settlements for the benefit of current clients will be made in some cases. "A class action settlement with these features would have been unthinkable to lawyers and judges of a decade or so ago."

The proposal, moreover, has no limiting principles. Subdivision (a) is not alone enough. Although the proposal formally requires that the predominance and superiority requirements of (b)(3) be met, in fact "[c]ase load management and judicial convenience displace the certification standards listed in 23(b)." In practice, whatever the theory, settlement classes will be unhooked from the tests of (b)(3).

The proposal "does not support the kind of rigorous and careful scrutiny of attorney incentives that certification of a settlement class demands." A prepackaged settlement leaves no incentive for the defendant to challenge the class definition or adequacy of representation; to the contrary, there is every incentive to sell the deal already cut. Opt-out rights are scant protection — notices often are incomprehensible, and may not be taken seriously; future claimants cannot protect themselves. The important issues suggested as justifications for settlement classes — choice of law, manageability, broad-based resolution of large controversies — are too important to be left to the open-ended discretion proposed.

Constitutional concerns are raised. There may not be a true case or controversy when the first judicial event is a proposal by all parties for approval of a settlement. An action that cannot be tried may not be a case or controversy. The constitutionality of resolving future claims is a matter now in litigation, and should not be resolved so quickly. Due process standards of adequate representation may not be satisfied when the only lawyers who can represent the class are those who have already struck a deal with the defendants.

Many have written at length on the ways in which packaged settlement classes invite collusion. Even with the best of intentions, would-be class lawyers who know they have nothing unless there is a settlement agreeable to the defendants are hard-pressed to provide adequate representation. They know that if their deal fails, another lawyer may strike an even less favorable deal.

Whatever comes of the (b)(4) proposal, Judge Schwarzer's proposed check-list of settlement-approval factors should be added

to subdivision (e).

The several suggestions made by John Leubsdorf (96CV026) all are sound.

Roger C. Cramton, 96CV040 (November 23, 1996 letter): Taking issue with testimony by Melvin Weiss at the Philadelphia hearing, and with comments by Francis Fox, urges that class counsel has a fiduciary duty to absent class members that requires disclosure to the court of possible weaknesses in a settlement. A duty of candor is owed to the court in ex parte proceedings, and also in cases involving persons under the court's protection. "In a class action involving absent and passive class members, the court is a guardian for the class, and the lawyers for the class are trustees of the interests of all members of the class. The lawyer for a class owes fiduciary duties to its absent members and therefore has a duty to inform the court about aspects of the settlement that may not be in their interest." "The settling parties should be required to disclose to the court all relevant facts concerning the negotiation of the settlement and its terms so that the court may make an informed determination that the settlement is in the best interests of the class." "For example, the court should be told * * * whether class representatives are getting special treatment, whether side settlements have carved some similarly situated persons out of the class on terms different than those applied to class members, whether the resulting negotiation sacrifices the claims of a group of class members to provide larger awards to another group, etc."

In addition, Rule 23(e) should require specific findings in every case in which a settlement is approved, and "in appropriate cases" should require appointment of an advocate to oppose settlement.

Alliance for Justice, 96CV041: Many problems are reduced by requiring that all classes meet the standards of certification for trial. A single wrong may affect many people in different ways, so that they have divergent interests and cannot be included in a single class; a toxic spill, for example, may cause property damage to some, small present physical injury to others, great physical injury on some, and unknowable future physical injuries on many. A class that would not be certified for trial includes people of such different positions that they are not similarly situated. The opt-out alternative is not real. For "future" claimants it is not even possible. There is a danger of collusive settlements, and judges cannot be effective guardians. Settlement classes will be certified in contexts that exert a hydraulic pressure to settled. Unusual cases such as the asbestos cases "require their own solution, perhaps a legislative solution. They should not justify a change of rules that would affect the vast majority of other cases."

Public Citizen Litigation Group, 96CV044: (b)(4) on settlement classes "offers no guidance, standards, or criteria." The emphasis

on precertification settlement "creates a breeding ground for settlement classes in which the defendants have chosen the class counsel." Rule 23 should be restructured to encourage participation of class counsel who champion class interests; this proposal has the opposite effect. It will mean either that settlement is reached even before a complaint is filed, or that the original complaint will be replaced by an amended complaint after settlement is reached. Defendants will have enormous leverage because the case cannot be litigated as a (b)(3) class — and this is particular problem in the current litigation climate, where defendants often face multiple class actions filed by different class counsel in different forums. They will engage in a reverse auction, selecting class counsel who provide the most favorable settlement. The requirement that settlement predate certification does not protect the class. It is in any event irresponsible to propose a rule that will encourage settlement of futures claims without at least making it clear that the Committee is not endorsing futures class actions, "which raise fundamental due process concerns regarding notice and opt out, * * * and serious justiciability problems."

H. Laddie Montague, Jr., 96CV046: The (b)(4) settlement proposal "is the most significant and constructive." Settlement classes are valuable. Often class certification is resisted because the parties cannot agree on such matters as individual causation or damage formulas. Settlements that resolve these disagreements are good for all concerned, including the courts. Many safeguards are possible. The distribution plan should be presented with the settlement. Class members must be allowed to opt out. And defendants who agree to settle cannot claim coercion.

Stuart H. Savett, 96CV048: (b)(4) should be adopted. Settlement classes are an important means of speedy and efficient resolution. There are adequate protections. "I strongly recommend approval."

John C. Coffee, Jr., 96CV049: If (b)(4) is retained at all, it should be limited by adding the requirement that "the court finds that there is no realistic possibility that the same or similar claims could be successfully asserted (on either an individual or class basis) in any other court or forum." It is not proper to authorize settlement classes that would cut off claims that might be asserted in other ways; the reason defendants are willing to settle is that it costs less to settle on a class basis. This is particularly true as to future claimants. The court is in a poor position to evaluate fairness.

Judith Resnik & Jack Coffee, 96CV049: The detailed proposal should be appended to these (b)(4) notes. It is a draft settlement-class rule and Note, reflecting an attempt to preserve the values of settlement classes while reducing the risks. At the outset, they repeat their view that by requiring a consummated settlement agreement, the present proposal focuses on the most dangerous setting of all. It invites "small collectives of plaintiff and

defendant lawyers" to negotiate before filing, without any judicial determination that the representatives are adequate, without notice to anyone, and often without development of information sufficient to support an informed settlement. Often is it impractical to opt out. Such settlements are seldom reshaped in any meaningful way during the process of court review and approval. Turning to their proposal, they distinguish between two settings: the first is a "litigating" class, tentatively certified with the recognition that it is likely to be useful for discovery and settlement; this class may be sought by plaintiffs alone, and the standards for certification are less searching than the standards for the second type of settlement class. The second type is sought jointly by a plaintiffs' steering committee and one or more defendants. For both types, the proposal emphasizes the need to include more participants, the importance of developing a comprehensive information base, and more exacting judicial scrutiny. It expressly stated that the court has a fiduciary duty to class members. There is heavy emphasis on considering divergent interests within the class and the possible need to create subclasses. The need to consider alternative modes of aggregation is stated explicitly. Use of special counsel, guardians ad litem, "or other additional procedures," is encouraged. Detailed information is required in conjunction with requests for approval of a settlement, including the means by which plaintiffs's lawyers came to engage in negotiations; the reasons for any differences in treatment of class members; "the means by which the remedial provisions shall be accomplished"; and detailed information about compensation for all attorneys involved, including special counsel, and about compensation for guardians ad litem, court experts, objectors, or others. The Note observes that "close scrutiny" is required when "futures" classes are involved.

Melvin I. Weiss, 96CV050: The (b)(4) settlement proposal "does have merit." The parties have far greater control of their destiny when they negotiate a settlement than when — at great expense — they risk the hazards of jury trial. But there is also great risk that settlement will be auctioned off to the lowest bidder, as was attempted in Georgine. The court should be required to examine the "ethical underpinnings" of the settlement, and should "allow limited discovery to test the strength and weakness of asserted claims. Judicial oversight of the negotiation process can eliminate any concerns of collusion." And notices to the class should be comprehensive and comprehensible.

Edwin C. Schallert, for Comm. on Fed. Cts., ABCNY, 96CV053: The (b)(4) settlement-class proposal advances the core purposes of Rule 23. Settlement classes can ameliorate problems with choice of law, proof problems, and "the very scope of certain kinds of cases." The proposal codifies the practices of many courts. There are substantial concerns with collusive or inadequate settlements, but the Note points to the various devices that can be used to protect against these risks.

Fed.Cts.Comm., Assn. of Bar of City of NY, 96CV053(Supp): Supports the proposal as confirming present practice that "has emerged as an important method for achieving many of the core purposes" of class actions. The risk of "unexamined and even collusive settlements" "is considerably overdramatized." The risk exists for litigation classes as well as settlement classes. There are a number of protections. The requirements of Rule 23(a) must be satisfied, as well as the superiority and manageability requirements of (b)(3) (although these matters should be made more explicit in the text of the rule). Notice and the right opt out provide the central means of protection. Courts have inherent power to monitor settlement negotiations, including the powers to establish protocols for negotiation, to utilize special masters, and to appoint different counsel to represent conflicting interests. The benefits outweigh the risks. (n. 5 states that the Consumer Affairs Committee of ABCNY opposes (b)(4). It will encourage plaintiffs' counsel to compromise class claims. It contains insufficient guidelines for trial judges. The right to opt out is not sufficient protection in consumer class actions; future claimants must have a right to opt out at a meaningful time. Full, fair, and comprehensive representation of the essential terms of the settlement must be set out in the class notice. Courts should be required to ensure that persons with similar claims receive similar treatment, and that class representation is adequate against the risk of conflicting interests.)

National Assn. of Securities & Commercial Attorneys, 96CV059: (b)(4) settlement classes are desirable. If defendants risk a binding certification for trial at the settlement stage, regardless of the outcome of the settlement process, they will be unwilling to settle until there has been a contested ruling on a trial-class certification. Concerns with collusion and disabling conflicts of interest relate primarily to futures classes; the proposed rule "does not diminish the ability of courts to respond in an effective and flexible manner when faced with these or other concerns." Steering committees, guardians ad litem for the class, limited discovery by objectors, extended opt-out periods, administrative determinations of settlement payouts in the future, and like means can address these concerns.

Beverly C. Moore, Jr. (Editor, Class Action Reports), 96CV060: (b)(4) is desirable "though not for the reasons that most commentators will state." The Third Circuit properly disapproved the inadequate settlements in Georgine and General Motors Corp. Pick-up Truck. But it is wrong to allow a class settlement only if the same class could have been certified for litigation. Settlement discussions will precede certification in any event, and will be shaped by the risk that certification will be denied. As important, to insist that a settlement class meet the tests for a litigation class will lead to two unfortunate results. One result will be that judges make findings favorable to a litigation class, creating undesirable precedent for real litigation classes. The

other result will be denial of certification in such settings as large personal injury mass tort actions, where settlement classes may be desirable. The proposal "should be accepted, so as to require federal judges to do their duty of *disapproving* proposed inadequate settlements under Rule 23(e), which judges have heretofore usually declined to do."

It remains an issue "to devise some amendment to Rule 23(e) to make judges disapprove inadequate settlements under that provision."

John D. Aldock, 96CV061: As national counsel for the Center for Claims Resolution, is petitioner in Georgine. A summary of the facts found by Judge Reed in Georgine is provided; the Supreme Court Brief for Petitioners in Georgine is attached as an appendix. Supports the (b)(4) proposal. **A.** Settlement classes promote settlement. Settlement of "many cases" at once multiplies the benefits of settlement; uniform treatment of class members is ensured; and the particular expense of litigating on a class basis is spared. Settlement classes have been used for at least 25 years. They embrace not only mass torts but also securities, civil rights, and antitrust disputes. Many kinds of cases cannot meet the standards for certification for litigation; requiring that they be resolved individually, or in small groups, will create enormous burdens. And in cases involving individual claims too small to support individual litigation, the alternative to a settlement class is no remedy at all. If a defendant cannot agree to a settlement class, there is a strong incentive not to stipulate to a litigation class. **B.** The supposed risks of settlement classes are overstated. All the elements of 23(a) and (b) must be met, and the court must approve under (e). In Georgine, the objectors were afforded extensive discovery and there was a five-week fairness hearing. The hearing reviewed the course of negotiations, the allegations of collusion, and the adequacy of representation. Class counsel has negotiating leverage arising from the costs of single litigations as an alternative to class settlement. Looking at the terms of a proposed settlement provides better evidence of adequate representation than the speculation made before a result has been reached. Class members can protect themselves far better because they know the outcome before deciding whether to opt out. Courts need not be concerned about drawing state cases to federal courts — the cases are there now. Settlement is proper judicial business, as emphasized by Civil Rule 16. **C.** Other available means of resolving multiclaimant disputes are far worse. In asbestos litigation, individual tort actions face great delay, high transaction costs, capricious verdicts, and settlements that force surrender of any opportunity to recover for future aggravated injury. In reality, moreover, the vast majority of asbestos cases are resolved by group settlements of hundreds or thousands of cases; the plaintiffs' lawyer unilaterally allocates the proceeds. There is no judicial supervision of the amount of the group settlement, nor of the allocation, nor of the reasonableness of

attorney fees.

Alfred W. Cortese, Jr., & Kathleen L. Blaner, 96CV063(Supp): "Under the Third Circuit standard, most, if not all, of the mass tort settlements over the last twenty years would not have passed muster. * * * The same holds true for other types of damages claims for which Rule 23(b)(3) class status often is sought, such as consumer fraud actions. Since there is no realistic possibility of a fair trial, class certification serves as a vise pressuring the parties to settle. Although using the class action rule as a device to coerce settlement is unfair and should be discouraged, the ability to settle claims as a class at times may be the only viable alternative for resolving massive numbers of widely dispersed, disparate individual claims. In rare instances, the availability of class settlements can be an essential safety valve even though the same claims could not be certified for class adjudication." It may be wise, however, to await the Georgine decision.

Alan R. Dial, 96CV067: Hearings should be postponed until the Supreme Court has decided the "Georgine" case.

Eric D. Green, 96CV072: Supports the proposal so enthusiastically as to recommend consideration of extension to (b)(1) and (b)(2) classes as well. (1) The proposal "will clarify uncertainty about the legitimacy of settlement classes, increase fairness and efficiency in mass tort litigation, reduce transaction costs, increase compensation to deserving plaintiffs, decrease ruinous exposures and bankruptcy to defendants, and provide a reasonable and fair tool * * *." It is made necessary by the Third Circuit decision in Georgine. (2) The objection that there are no limiting principles in the proposal is unpersuasive. All the present class-action protections remain unchanged. Shifting the focus to state courts, "where problem cases may be more numerous," does not provide helpful guidance for federal court practice. The prospect of settlement bears on all the factors that must be considered under (b)(3), and the newly proposed factors make further improvements in this process. Appellate review under (f) adds still further protection. Any attempt to spell out detailed limitations and criteria would be premature — it is better to clearly authorize settlement classes and gather experience as it develops. (3) The "case or controversy" objection cannot be made in the abstract; it may be real in specific cases, but must be evaluated on a case-by-case basis. "Article III does not require that a case or controversy be triable in any particular format." Justiciability as to futures claimants turns on the extent to which state law requires present injury, allows recovery for fear of injury, and the like. Adequate representation must be assured. (3) The fear of collusion, and a "race to the bottom" as would-be class counsel vie for representation and fees, is not unique to settlement. Defendants may shop for class counsel who will be less threatening as trial counsel. The threat of collusion is not necessarily increased by the prospect that the same class cannot be certified

for trial. Experience in many mass tort classes shows that the threat of multiple individual actions, or small groups of aggregated actions, with perhaps multiple punitive awards, is a greater threat to defendants. Denying the possibility of class settlement may seriously harm class members. Class lawyers are likely to be the most experienced, knowledgeable, and passionate lawyers, the ones who initially developed the evidence and law and made the claims into viable class claims. And a properly conducted fairness hearing is adequate protection. (4) A guardian ad litem can be used as an effective tool to gather information, communicate with class members, engage in discovery as to the substance of the settlement and the negotiations that led up to it, review attorney fee arrangements, and the rest. A guardian could be an even more effective tool if appointed before final negotiation of the settlement, but negotiation dynamics may preclude this. (5) Settlement classes must be judged in relation to the real-world alternatives. "In many cases, the alternative will mean no effective recovery at all to the absent class members * * *. Experience in mass torts teaches that bankruptcy is not an effective approach to these problems."

Michael Caddell, 96CV076: Was lead or co-lead counsel in two state-court polybutylene class actions that settled. (b)(4) is "a positive step toward assuring the continued use of settlement classes." (a), (b)(3), and (e) provide adequate protection. By requiring that there be a settlement agreement the rule protects against pressure to settle an otherwise uncertifiable case. The result is efficient and fair. And if a litigation class cannot be certified, the alternative to a settlement class often is individual litigation that cannot be brought, leaving no remedy.

Stanley M. Chesley, 96CV078: "As a practical matter, the proposed amendment addresses a need and facilitates settlement. * * * [I]t must be remembered that every proposed settlement must be approved by a court. * * * [A] court can easily conduct a 'collusion' inquiry should allegations arise."

Linda Silberman & Marcel Kahan, 96CV079: The comments are based on their article on the Matsushita decision in the Supreme Court Review. They urge five specific suggestions, in addition to endorsing the proposals made by Judge Schwarzer in 80 Corn.L.Rev. 837: (1) A preliminary fairness hearing on the settlement before notice is sent to class members. (2) Require disclosure of any parallel litigation, and invite participation by plaintiffs in any other action; if counsel for a parallel class has contributed to the value of the claims, the fees from the settled case should be shared. (3) The benefits of global settlement must be explicitly weighted against the risks of "plaintiff-shopping" and "forum-shopping" for collusive settlements. (4) There be a substantial nexus between the court approving the settlement and the claims or parties, so as to reduce forum shopping. (5) That the settlement include only claims that are "transactionally related."

Samuel Issacharoff, Douglas Laycock, & Charles Silver, 96CV082: Settlement should be encouraged, but the FJC study shows there is no pressing need to further encourage settlement of class actions. They settle now at about the same rate as other litigation. The chore is to find an acceptable half-way house; the (b)(4) proposal does not satisfy. There are special problems when there are parallel class actions. Fee arrangements exacerbate the problems because the lodestar method "discourages plaintiffs' attorneys from maximizing the value of class members' claims." There is little overt collusion, but inadequate representation does occur. Coupon settlements are the most notorious examples; even counsel for the plaintiff class in the airlines pricefixing case now recognizes the inadequacy of the settlement. But cash settlements also can raise questions -- as shown by the inadequate funding for the proposed breast implant settlement, and the exhaustion of the Johns-Manville settlement. Questions also can be raised about "limited fund" settlements that allow shareholders to keep a considerable portion of a defendant's value. Plaintiffs' attorneys often undervalue class claims "because they are operating under inappropriate incentives." "The most significant current concerns arise where the claims of absent class members are sold off to benefit an inventory of claims by individuals with prior relations to class counsel, or, more commonly, to benefit plaintiffs' counsel incommensurately to the benefit realized by the class." Rule 23 must protect against these threats. A settlement-only class deprives counsel of the threat of litigation, greatly weakening the class bargaining position. Defendants will settle "only to avoid greater losses to plaintiffs who have viable individual lawsuits." [This may mean to suggest the argument that the positions of strong-claim plaintiffs are sacrificed for the benefit of weak-claim plaintiffs and counsel.] It can be appropriate to allow a conditional stipulation to class certification for settlement purposes that does not bind the defendant if the settlement falls through; this would encourage settlement negotiations, without committing the defendant to litigation on a class basis. The dangers persist, however, and any version of (b)(4) should address the problems explicitly.

Frederick M. Baron, 96CV085: "For corporate defendants long hungry for a way to cap their liabilities, backroom settlement class negotiations have rendered legislative tort reform efforts an obsolete means to that end." (b)(4) grossly exaggerates the agency problem because it tends to collapse the adequacy of representation inquiry into an evaluation of the settlement: if the settlement seems fair, it is concluded that representation was adequate. "But * * * post hoc review of a settlement's terms by a court can *never* substitute for zealous, unconflicted representation by the actual negotiators." As the court said in In re General Motors Corp. Engine Interchange Litig., 7th Cir. 1979, 594 F.2d 1106, 1125 n. 24, the integrity of the bargaining process is important because the court's only control is rejection of an inadequate settlement; the court cannot undertake the task of bargaining for better terms.

The fairness hearing, moreover, provides grossly inadequate information. "Finally, * * * a court's interest in clearing its dockets can and does cloud the judgment of otherwise fair-minded judges." And there is a further difficulty with future tort claims. Apart from the single event mass tort, any comprehensive solution must encompass future claimants. (b)(4) will permit settlement of future claims cases unless it is altered to expressly forbid them. Future claims settlements violate the Constitution, but it is not clear that the Court will even resolve that question in the Georgine case.

Clinton A. Krislov, 96CV088: "The issue of whether mass-tort/large-damage personal injury suits should be tried or settled as class actions binding on smitten future claimants (with or without permitted opt-outs) is a substantive due process issue." The choice will be made by the Supreme Court; it is not for this Committee.

G. Luke Ashley, 96CV091: "The addition of subdivision (b)(4) properly makes clear that, in proper circumstances a party can waive objections to the structure of a proposed (b)(3) proceeding in the settlement context."

Bartlett H. McGuire, 96CV092: The proposal is good. "In complex cases, the parties can sometimes develop creative settlement structures to resolve issues that would be horrific to try." These settlements need not be rejected merely because individual issues would predominate at trial, and perhaps make the class unmanageable.

John L. Hill, Jr., 96CV094: Classes have been certified for settlement for years without inquiring whether Rule 23 requirements are met. The proposal is sound. It will help defendants who wish to "achieve peace regarding somewhat varied individual claims." Without this rule, parties will be tempted to stipulate to class certification, but face the risk that the certification will carry forward if the proposed settlement is not approved. Without this rule, parties will feel coerced to offer more in settlement to ensure approval. Without this rule, futures settlements will be prohibited. And without this rule, certifications made for the purpose of settlement will set bad precedent for litigated class certifications.

FRCP Committee, American College of Trial Lawyers, 96CV095: Despite possible advantages of efficiency and economy, there is a substantial potential for abuse of settlement classes. There is a risk of collusion between class counsel and defendants. Prepackaged settlements can be arranged by defendants with sympathetic class attorneys pre-selected by defendants, and then presented to a court chosen by all these lawyers as one likely to approve. "Futures" claims remain a problem that is not addressed. "There are frequently issues of the adequacy of notice on opt-out provisions." The proposal raises Enabling Act concerns.

Lewis H. Goldfarb (Chrysler Corp.), 96CV099: Settlement classes should meet all the requirements of (b)(3), but further comment is inappropriate while the Georgine case remains in the Supreme Court. It is tempting for a defendant to buy res judicata by settling unfounded claims, but "the more you feed this monster, the greater its appetite grows. Succumbing to this temptation also infuriates our customers when they learn that they've been used by the class action lawyers."

Hon. James G. Carr, 96CV104: This comment arises from Judge Carr's experience with a class action in which he had granted summary judgment in favor of the putative plaintiff class representative on the merits as a prelude to considering certification. He then learned that a Texas state court had granted preliminary approval to a settlement of the same class claims, and directed notice and planned a hearing on the question whether to grant final approval to the settlement. Judge Carr concluded in his case that the due process rights of his would-be class representative were denied by the failure to provide notice before the preliminary approval, because of the realistic consequences of even preliminary approval. His answer under current law was that if he should certify the class in his court he would deny res judicata effect to any final judgment in the Texas action, and would impose on the defendant the costs of notice to the class. His suggestion is that if settlement classes are to be approved, the defendant should be required to certify whether any other class actions have been filed. Notice would be given to the representatives for any overlapping class, and an opportunity to be heard, before even preliminary approval of the proposed settlement. The competing class representatives can provide information about the merits and weaknesses of the proposed settlement. (In his case, counsel for the representative plaintiff asserted that he had rejected the same settlement that was accepted — along with a $2,000,000 fee award — by counsel for the class in Texas.)

Lawrence W. Schonbrun, 96CV105: (Based on experience as an objector in a number of class-action settlements.) "An overworked judiciary * * * too often finds it easier to follow the maxim, 'better a bad settlement than a good trial.'" Coupon settlements have produced "a long string of settlements whose terms look favorable to plaintiffs on the surface — but only on the surface." "[T]he parties often provide the judge with purported expert projections, forecasts and guesses as to how many class members will avail themselves of the coupons being offered, the idea * * * being to legitimate the size of the fee they have negotiated with the defendant. * * * And in many cases, very little money is actually paid out." The problem is greatly exacerbated by the practice of separately negotiating for fees to be paid by the defendant, not out of the class recovery; even though they follow the form of negotiating the settlement before the fee, there is an irremediable conflict of interests. (This problem is described further with the notes on attorney fees.)

Sheila Birnbaum, 96CA107: The proposal merely confirms common practices, dispelling the contrary Third Circuit developments. Although further action should await the Supreme Court decision, comment seems appropriate now. "Settlement classes are different creatures from trial classes." Defendants voluntarily waive a number of due process rights, such as the right to demand state-by-state application of the law. This waiver is the reason why certification of a settlement class cannot support conversion into a litigation class; the Note should make that point clear. Rule 23(a) still must be satisfied. The fear that the parties and court will approve inadequate settlements from the desire to avoid litigation has been unfounded; courts do review settlements carefully. The fear of "collusion" includes the argument that defendants will shop for quiescent "low bidders" to reach a settlement. This is a hypothetical danger, not reality. If there is any merit to the class claim, dueling class actions are often filed; any class attorney willing to sell out would face strong opposition from other firms who would object to the settlement or pursue parallel opt-out litigation. Some counsel file class actions on a "settlement speculative" basis, merely to test whether a cheap settlement can be won without much work. This concern can be addressed in the Note by "an admonition that courts should not entertain proposed settlements unless the litigation of the matter has generated a sufficient factual record to allow a meaningful review of the adequacy of whatever settlement is proposed. * * * [B]efore approving a proposed settlement class, a court should have 'lived with' the case (or related litigation) long enough and have before it sufficient record evidence to determine whether the settlement is fair. Further, * * * the Note should urge courts to restrict attorneys' fee awards in purported class actions that settle at an early stage, particularly those that yield only minimal awards for the individual class members."

John W. Stamper, 96CV108: The settlement class proposal is consistent with widespread practice. One special use may be to facilitate classes in which the common issues are settled and ADR mechanisms are adopted to resolve individual issues, an emerging practice that deserves more development. In my experience — mostly confined to defense of securities class actions — there has not been a problem of collusion. The problem is that it is easy to obtain certification of marginal claims; "[t]he problem is not that the settlements are not genuine but rather that the claims are not." Finally, the right to opt out protects any class member "who would be sufficiently motivated to file and litigate an individual claim * * *."

Arthur R. Miller, 96CV111: This modest proposal "merely recognizes an existing fact of life — settlement classes serve important purposes in today's complex litigation." Of course they raise claims of abuse. But defendants' may not have as much bargaining power as the critics fear, since the alternative is dozens of smaller class actions or hundreds of individual actions. "Indeed,

the seemingly pervasive monitoring of cases by other interested lawyers serves as an effective deterrent to the success of such tactics." And the perceived problems can be minimized through diligent examination of proposed settlements. "Indeed, most circuits have longstanding, well-established criteria to make that determination." The requirement that the terms of settlement be defined before certification increases the court's objectivity in reviewing the settlement. Objecting class members "almost always appear." The court can permit "limited confirmatory discovery to test the strengths and weaknesses of asserted claims, and class members can opt out * * *." Courts also can appoint representatives for absent class members, limit the right of class counsel to represent clients in related individual litigation, and appoint masters to review settlements when the court has played a role in settlement negotiations. Adequacy of representation should be reviewed as well.

Miles N. Ruthberg, 96CV112: Strongly supports (b)(4) as codification of the law that prevails outside the Third Circuit. Settlement classes are indispensable for voluntary resolution of mass litigation. The solution to any perceived abuses is careful supervision. Defendants are protected because they must consent. Plaintiffs are protected by judicial insistence on the 23(a) requirements, review of the settlement, and the right to opt out. The amendment is useful no matter what the Supreme Court does in the Georgine case. But the Notes to (b)(3) revisions should be amended to reflect the (b)(4) proposal. The notes to (b)(3)(A) and (B) speak of individual litigants' interests, but these go to control of litigation and can be protected by notice and opt-out rights. The suggestion that certification can be deferred pending the maturity of a new tort case, lest settlements be ill-informed, can be misconstrued as standing in the way of voluntary settlement of less than mature torts; that would needlessly postpone recovery for plaintiffs. And the Note should state expressly that a certification for settlement is not precedent for certifying a litigation class.

Roger Dale Klein, 96CV113: "The availability of the consensual settlement-only class device has been and continues to be essential to the ability of defendants to limit and manage their product liability risk." It is not a cure for the ills of unrestricted claim agglomeration, but it is a balm. The amendment "would restabilize the real world practice of consensual settlement classes." Under the Third Circuit approach, defendants have powerful reasons to refuse proposed class certification and settlement, for fear that the settlement will not survive but the certification will survive. A settlement class is better than other means of agglomeration such as consolidated mass trials, sample or test cases that are extrapolated to other cases, common issues trials, or separate trials with the prospect of nonmutual preclusion. "None of these more common aggregative techniques is in any way subject to the scrutiny and restraints on class action

litigation * * *." At least the settlement class gives the defendant an opportunity to win "global peace."

John P. Zaimes, 96CV115(Supp): Settlement classes could be an important tool, but also could be a powerful tool for abuse by class lawyers. "Additional safeguards are necessary to avoid settlements of questionable or meritless claims and to avoid classwide settlements which may advance the interests of defendants and class lawyers, but eliminate the legitimate claims of individual class members."

John L. McGoldrick (Bristol-Myers Squibb), 96CV116: The Committee has heard much evidence and should speak out without waiting for the Georgine decision. The proposal "simply makes good practical sense. There are numerous multiple-claim disputes — mass torts come to mind — that lend themselves neither to class action litigation under Rule 23, nor to individual litigation with its heightened transaction costs and collective action problems. Without the possibility of class settlement, however, there is no way short of class certification and a trial on the merits for the judicial system to satisfy the numerous individual claims" and achieve res judicata. Trial courts — with the help of objectors — can protect against collusion. The self-interest of defendants in achieving the durable protection of res judicata, and in not encouraging future suits, will work against collusion. And defendants should be free to waive the protections of commonality, typicality, and other related Rule requirements that exist to protect defendants.

Jeffrey J. Greenbaum, 96CV119: This is a good compromise. The potential for collusive settlements can be minimized by court review of the settlement; the explicit hearing requirement in proposed (e) is a help. It would be wise to redraft to make it even more clear that there is a right to opt out. And the Note should "be clarified to elaborate on how the court is expected to apply the (b)(3) factors of predominance and superiority in the settlement context and to highlight that particular care should be given to defining the scope of class membership."

William A. Montgomery (State Farm Ins. Cos.), 96CV122: "For the same reasons advanced by other supporters of this change, we believe that it is important affirmatively to recognize the propriety of certifying classes for purposes of settlement."

Gerson H. Smoger, for ATLA, 96CV126: (1) A trial class cannot bind individual class members with respect to individual damages issues; a settlement class should not be permitted to do this. (2) Claimants who have not yet suffered injury, or who do not have reason to recognize present injury or to connect it to the defendant, must be allowed a reasonable opportunity to opt out after they have suffered injury and have reason to know of its existence and causation. (3) Representative plaintiffs often are ignored by class counsel, and were chosen because they were the first to appear, or are believed pliable, or were simple random

choices. (4) Mandatory settlements on a limited fund theory have been misused, and are particularly strange when a single defendant seeks a limited-fund class for punitive damages while accepting an opt-out class for compensatory damages. The combination seems to imply that funds are limited for one purpose, but not another. (5) The supposed need for finality for corporate wrongdoers cannot justify the expansion of class actions to mass torts. The right to individual choice of jury trial, and individual control of litigation, should be preserved. As the Court observed in Fuentes v. Shevin, 1972, 407 U.S. 67, 90 n. 22, "[p]rocedural due process is not intended to promote efficiency ... it is intended to protect the particular interests of the person whose possessions are about to be taken."

John F. Klebba, 96CV131: Opposes. There is no problem with weak settlements now. But the settlement-only class means counsel has no leverage. There is a risk of settlements engineered to ensure recovery of attorney fees. All a defendant need do is convince class counsel and the court that the settlement is a good one.

Ronald Jay Smolow, 96CV132: A settlement class that does not at least arguably meet the requirements of 23(a) and (b) makes no sense. Georgine is wrong because the parties should have the right to stipulate to class certification as part of a settlement. "It is, I would suggest, improper for the court to involve itself in the settlement negotiations and second guess whether the defendant is correct or incorrect in its decisionmaking as to whether the case meets Rule 23 criteria." And when certification and settlement are proposed, courts should be concerned with fairness and with protection of the rights of absent class members.

Richard A. Koffman, 96CV133: The fear of abuse expressed by Professors Koniak and Resnik "is not supported by actual experience." They provide no examples of abusive settlements. The overwhelming majority of class counsel take their ethical responsibilities seriously. Without a settlement class, many class members would achieve no recovery because a litigation class could not be certified.

James N. Roethe (Bank of America), 96CV134: If settlement classes different from trial classes are to be permitted, the Rule should clearly set out the differences so there is no risk that a settlement class certification will transmute into a trial certification when a settlement fails.

Ron M. Feder, 96CV136: Opposes all of the proposals, and particularly (b)(4). "I particularly object to any provision that denies the individual the right to consult and employ counsel and any provision which would deny relief to potential class members who have not yet developed an injury. The proposed Georgine was an abomination." National class actions should not be allowed to destroy state-by-state resolution of personal injury and commercial claims."

David C. Vladeck, 96CV139: Writes to Judge Levi to follow an exchange at the Philadelphia hearing. The choice-of-law problem cannot be resolved by treating a decision not to opt out as consent to application of the law chosen by the court. Class notices have not explained choice-of-law problems, and it is difficult to imagine a notice that explains such complex problems. Settlement under one law, moreover, may sacrifice the interests of claimants from states whose law gives a more valuable claim for the benefit of claimants from states whose law gives a less valuable claim or no claim at all. The problem is better solved by subclasses that correspond to the strength of different state-law claims. "[W]e [the Public Citizen Litigation Group] simply do not have enough faith in the notice and opt out process to say that they cure all ills."

Paul D. Rheingold, 96CV145: The proposal does not address the impracticalities of opting out. Often notice is given too quickly. And there are penalties for opting out, such as mandatory arbitration or delay for trial. "The pernicious practice has developed of defendants exposed to mass tort liability approaching willing plaintiffs' counsel to set up a settlement class to get rid of claims cheaply and yet to give fees to counsel." "[T]he great abuse today is in settlement classes. One of the best means of control is to ensure that the facts of the action would have qualified the matter otherwise as a (b)(3) class."

Commercial & Fed. Litig. §, New York State Bar Assn., 96CV147: This proposal "is necessary to confirm the legitimacy of an already common and useful practice." It is proper to limit certification to cases in which settlement has already been reached, so as to avoid the risk of undue settlement pressure. There are problems with "futures" claimants, but "there is nothing inherent in the proposed rule that would permit courts to provide anything less than vigorous protection for the rights of those and all other class members." But the Note should state that the court must take particular care to consider the ability of counsel to represent all members of the settlement class, including consideration of the need for subclasses. The court should consider also the desirability of appointing a guardian ad litem for different subclasses, or formation of "a broad and representative committee to either approve or re-negotiate a proposed settlement on behalf of a class." But "[of] course it should be emphasized that the need for multiple counsel is in most cases unnecessary and should be balanced with the desire to ensure an adequate settlement fund * * * which fund might otherwise be decimated by attorneys' fees." And (c)(2) and (c)(3) should be revised to refer to (b)(4) to make clear the right to opt out.

Fed Cts. Comm., Chicago Council of Lawyers, 96CV148: "It is notable that the only proposal likely to expand the availability of class certification is one that the defense bar currently endorses * * *." This will encourage the quick "sell-out" variety of class. The Steering Committee has well stated the corrupting influence

that this will have on class-action practice. "The new (b)(4) class removes the brakes and guardrails of subsection (b)(3). It provides no standards to guide district court discretion * * *. It also tips the balance in favor of quick, cheap settlements * * *." And it omits the opt-out procedure; although the Note states that there is a right to opt out, the text of the rule does not state the right. "Any rule that fosters class settlements ought to provide a lot of protection for unnamed class members," yet this proposal lessens protections "by encouraging negotiation by persons whose adequacy has not yet been established. Objectors, historically, have had a tough row to hoe once a settlement is tentatively approved. The drafters of this proposal have not addressed the objectors' needs at all." And there is no apparent need for this proposal "courts have long allowed settlement classes under current Rule 23, subject to the normal conditions of certification."

Howard M. Downs, 96CV149: The comment is supported by an appended article: Downs, Federal Class Actions: Diminished Protection for the Class and the Case For Reform, 1994, 73 Nebr.L.Rev. 646; see also Downs, Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon, 1993, 54 Ohio St.L.J. No. 3. Adoption of (b)(4) would have several bad effects. (1) The basic protections of typicality, adequacy of representation, and conflict-of-interest are diminished even though formally the requirements of Rule 23(a) continue to apply. (2) If different class members could invoke different state laws to govern their claims, there is a conflict of interest between those whose state law is more favorable and those whose state law is less favorable; a settlement is likely to compromise the conflict by way of a "generalized composite," "esperanto" law. Protection requires representatives from each state, or at least each group of states with similar law. (3) Court approval will not protect the class. The settlement presentation is not adversarial. There is little discovery, a scant record on the merits, and not much inquiry by the court. Conflicts of interest are not explored; dissents are not reported; named representatives often do not participate in shaping the settlement. Even if named representatives voice preferences, their views may be ignored. (4) The protection afforded by notice and opting out is inadequate because the notices are inadequate. "Adequacy of representation and absence of conflicts is not described in any detail in the notice." Objections to the settlement are not disclosed. Often the plan of distribution is not described. The deficiencies in the present rule cannot be met by Note suggestions that particular care should be taken by the court. Use of proposed (b)(4) in mass torts will be inappropriate.

David L. Shapiro, 96CV153: (1) Although there may be standing and ripeness problems with respect to such matters as future claimants, Article III permits some settlement classes. Even when settlement is reached before suit is filed, Article III permits a federal

court "to play a role that only a court can fulfill in such a case." Court approval is necessary to bind the class. We accept negotiated guilty pleas, and consent decrees. The judicial role in a settlement class "consists primarily of evaluating and, if appropriate, approving the settlement after full opportunity for hearing." (2) The benefits of a settlement class may outweigh the costs. The settlement class that now is proposed for the blood solids litigation is a good illustration. There are real fears of such dangers as the "reverse auction," sacrifice of class interests for the benefit of individual actions simultaneously pursued by class counsel, and the strong bargaining position of a defendant who knows that class trial will not happen. "But these fears may well be overstated." There is little empirical evidence of the reverse auction. The defendant's bargaining position is weakened by the risk of such alternatives as multiple state-wide class actions, or "the defendant's nightmare of one-way nonmutual offensive issue preclusion." Settlements reached before filing, moreover, reduce the probability that the judge will be involved in negotiating the terms and thus enhance the prospect of objective judicial review. The very prospect that the settlement can be rejected without forcing a class trial may increase the objectivity of judicial review. (3) The text of the proposal is far too brief; the Note is "disturbingly vague or confusing" on some points. The Note, moreover, is not law in the way that the Rule is. The text is not clear "whether certification is contemplated under (b)(3)," or whether the (b)(3) limitations apply. It would be far more clear to incorporate settlement classes into (b)(3); the suggestion in the April, 1996 Minutes is a start. (4) The Rule should address "the special difficulties that arise when a settlement class is certified at the outset of litigation." These include the risks that there have been no adversary proceedings, no discovery, no submission of material from objectors; that lawyers will be torn between the interests of the class and the interests of individual clients; that dramatic differences in applicable state laws will be overlooked, overvaluing some claims and undervaluing others; and that lawyers will be awarded disproportionately large fees. Perhaps these risks should be addressed in subdivision (e); the suggestions of Leubsdorf and Schwarzer are good. Thought should be given to provisions for appointing an advocate for absent class members; limiting or even prohibiting representation by class counsel of clients who are maintaining individual actions; and limiting the ability of a judge who has taken any part in settlement negotiations in the review and approval process.

Jeffrey Petrucelly, 96CV157: The proposals "would foster collusive settlements."

Reporters Comm. for Freedom of Press, by Jane E. Kirtley, 96CV160: (b)(4) will encourage "the already increasing use of confidential settlement proceedings and agreements to which the First Amendment and common law right of access do not attach." Courts generally hold that the right of access does not extend to settlement

negotiations or agreements. And increasingly, courts "are approving confidentiality orders that restrict the release of information about the terms of settlement agreements." "Secret settlements are particularly troublesome in cases of heightened public scrutiny," including class actions. This amendment would permit denial of access to settlement proceedings or documents. "Our concern is that a dispositive tool not be overused for the purpose of clearing the court's docket, particularly at the expense of public access." Confidentiality orders have a great potential for abuse," but often are signed on a routine basis.

Litigation Comm., American Corporate Counsel Assn., by Theodore J. Fischkin, 96CV161: The proposal "would further the highly important policy of promoting voluntary settlement of disputes." "It would be anomalous if this strong substantive policy could be frustrated by a procedural rule. Since the Georgine decision threatens to do just that, it is properly overruled by the proposed amendment."

American Bar Assn., 96CV162: Supports, "provided that adequate due process protections are provided for the parties."

ABA Section on Litigation, 96CV162: (This report is not ABA policy.) This "is a good compromise that allows the continued use of this [settlement class] device, despite recent adverse decisions, while reducing the potential for abuse." Courts and practitioners have found settlement classes useful, and have use them with increasing frequency. The potential for collusive settlements can be reduced through the court's examination of the fairness of the settlement, and by opting out. Rule 23(c)(2) and (c)(3) should be amended, however, to confirm the right to opt-out for (b)(4) classes by referring to (b)(4) wherever (b)(3) is mentioned. And the Note should state more elaborately "how the court is expected to apply the (b)(3) factors of predominance and superiority in the settlement context and to highlight that particular care should be given to defining the scope of class membership."

Tort & Ins. Practice §, ABA, 96CV162(Supp.): Although a task force majority support the change, there are sufficient reservations by others that TIPS cannot support (b)(4) as written. Many members believe the proposal embodies existing practice; some doubt this, finding little authority to permit class settlement "where there may be a substantial, even unrebutted, challenge to certification." Others fear collusion, and the lack of bargaining power when all parties know the settlement class would not be certified for litigation. Some think there should be (b)(4) language requiring heightened scrutiny of the settlement agreement. But there is concern that the inherent tendency to approve settlements will defeat heightened scrutiny. There also is concern that settlement classes will supersede state tort and contract law. Some believe that settlement classes are inappropriate for mass-tort litigation, and particularly for "classes of future claimants with exposure-only latent injuries." Settlements accomplished prior to filing

suit are particularly dangerous. The supporters respond that adequate protection lies in judicial review of the settlement, the opportunity to opt out, the ability of objectors to present challenges, and the court's power to appoint a special master. Finally, some believe "that settlement as to a class so diverse as to be unlitigable on a class basis differs fundamentally from a settlement as to a litigable class." The more diverse the class membership, and the more complex the settlement, the more difficult it is to represent all class members -- especially intense judicial review of the settlement, going well beyond present usual practice, is necessary.

A. Mark Weisburd, 96CV164: The proposal cannot be justified. (1) There are due process difficulties with adequate representation. If the class includes members whose individual claims would be governed by different laws, the settlement is bound to trade off the stronger claims for the benefit of class members with weaker claims; the conflict of interest defeats adequate representation. (2) Although the Note says that all the subdivision (a) prerequisites must be met, it is clearly intended to apply a "weaker standard" to (b)(4) settlement classes than to (b)(3) litigation classes -- "surely there is a serious risk that (b)(4) will be read as giving a green light to less searching examinations of all the factors relevant to the certification decision." (3) (b)(4) "seems extraordinarily vague, and difficult to reconcile with (b)(3). How does it mesh, for example, with the purpose of proposed factor (F) to discourage classes framed more for the benefit of counsel than the benefit of class members? (4) "The most fundamental problem * * * is that it is difficult to imagine [(b)(4)] being used in good faith. After all, it is intended for use in circumstances in which a defendant presumably would have an excellent chance of preventing class certification entirely." The defendant's motive for settling, then, must be "concern[] about suits by class members despite the weakness of the class claim * * *."

James A. O'Neal & Bridget M. Ahmann, 96CV165: The (b)(4) proposal provides necessary guidance. The recent Third Circuit decisions have thrown the often-utilized settlement class device into a state of uncertainty. The Third Circuit view is directly contrary to the overwhelming weight of current case law. It also discourages settlement. The concerns of abuse and collusive settlements are met by insisting on the prerequisites of subdivision (a), the notice requirement and the opportunity to opt out, and the requirements for hearing and court approval.

Dennis C. Vacco, 96CV166: (This statement is submitted by Dennis C. Vacco, Attorney General of New York, but may be amended to add other states.) The controversial settlement-class practice, recently rejected by the Third Circuit, has a high price. The proposal will exacerbate existing abuses by changing the leverage in negotiations -- since there is no fear of trial, class counsel may well be those most willing to join with defendant in a deal

that provides attractive fees but few class benefits. The rule 23(a) requirements are not enough. The mandatory hearing on the settlement is not enough either; the Georgine case shows that even extensive hearings cannot ensure due process. The right to opt out is not meaningful for future class members, unless there is a right to opt out when a claimant becomes ill. If there are to be settlement classes, several requirements must be provided. (1) Notice must be in plain language. It must include the essential terms of the settlement, information about distribution, a description of opt-out rights, the procedures for filing a claim, the procedures for objecting, the amount of attorney fees, the source of class counsel fees, and any other disclosures needed to support informed decisions. (2) The opt-out right should be made explicit, including the right of future claimants to opt out after their injuries develop. (3) Heightened scrutiny of the settlement should be required. The court should inquire into such matters as parallel representation by class counsel of non-class clients; settlement agreements for non-class clients negotiated "in conjunction with" the class settlement; more favorable settlements for non-class claimants than for class members; and class definitions limited to members who have not filed individual actions by a specified date.

Howard M. Metzenbaum, for Consumer Fedn. of America, 96CV167: The proposal authorizes a settlement class "without having to meet the standards for class certification in Rule 23(b)(3)." It invites collusion between class counsel and defendant against the class interests. Class members are not likely to be adequately represented, and few will have the resources to hire an attorney to file objections. Even those who are not aware of the litigation or whose injuries are not yet manifest may be barred. The proposal should be withdrawn.

Federal Bar Assn., 96CV170: "The proposed amendment reflects a practice adopted in several recent cases." Because some courts have rejected the practice, "codification of the practice is warranted."

Washington Legal Found., 96CV171: Comments now, but believes it prudent to defer action until the Supreme Court has decided the Georgine case. This proposal simply recognizes the current state of the law "in all but the Third Circuit." It is powerfully supported by the policy favoring settlement. The theoretical objections are mostly theoretical, not practical. Superiority, predominance, and manageability are all different in the settlement context than in the litigation context. The core fairness notions of Rule 23(a) still apply.

Bradford P. Simpson & B. Randall Dong, 96CV173: "[S]pecial emphasis should be added to the proposed Rule to ensure that no collusion occurs. It is imperative that this rule retains an opt out provision."

Robert G. Bone, 96CV176: Settlement classes may at times be

appropriate. They can reduce transactions costs, speed recovery, achieve more equitable distribution of a limited fund, and achieve an administrative-type solution to large-scale compensation problems that the parties would (had they known of the coming injuries) have agreed to ex ante. But there are well-known risks in agency problems, trading off strong class-member claims to benefit the weak claims, and adverse selection that dilutes individual recovery in claims resolution facilities. An ideal rule would provide guidance on how to balance these costs and benefits in particular cases. It would also suggest procedures to reduce the costs, such as appointment of guardians, attention to subclassing, and careful review of attorney compensation. The modest approach taken in (b)(4) does not provide the needed guidance. And the text of the rule should make "much clearer" the application of the Rule 23(a) prerequisites and the (b)(3) constraints. It also should make clear how much effect the prospect of settlement has on the (b)(3) requirements of predominance and superiority – it does not seem likely that the Committee intends great departures. The requirement that the parties reach settlement before requesting certification "only exacerbates the agency problems." The Resnik-Coffee proposal is a good start. Specific findings should be required on the (b)(3) requirements, and also on "such matters as subclassing, guardians ad litem, special masters, and the like." It is good to require findings whether any subclasses might do significantly better outside the class action; the suggested appointment of a steering committee will at least help address the informational difficulties, but participation by others also might be invited. It is critical to require disclosure of information important to assessing the fairness of the settlement. All of these things should be supplemented, however, by adding to the rule an explicit reference to the potential benefits of class settlements. And the Note should provide examples at least of good settlements, in some detail; although it is delicate, examples of real-world bad settlements also would be helpful. The examples should be more complex, and the discussion more extensive, than the "Illustrations" commonly provided in the ALI Restatements.

Committee on U.S. Courts, State Bar of Michigan, 96CV178: "[S]trongly opposes the proposal on both theoretical and practical grounds." Analytically, the proposal eliminates the need to satisfy any of the (b) class categories; by definition, common questions will not predominate and a class will not be superior to other available methods of adjudication. "An action that does not meet any of the subsection (b) requirements simply does not present a group of claimants sharing a community of interest * * *." On a practical level, the proposal "will create undesirable, and even perverse, incentives. Especially in mass tort cases * * *, the rule would provide an open invitation to collusive settlements." And the rule provides no guidelines to distinguish a "good" settlement class from a bad one. This is not a proper occasion for attempting to affect the rights of absent parties.

California State Bar, Comm. on Fed. Cts., 96CV179: The proposal would assist settlement "in order to promote efficiency, consistency, fairness, and ease of administration and distribution of award burdens." The requirement that there be an agreement will protect against early coerced settlements. It will help treat similarly situated persons alike in ways that cannot be achieved by litigation of separate actions in different courts with different choices of law. It is endorsed, with the recommendation that the Note say explicitly that it is intended to overrule the Georgine approach.

California State Bar, Comm. on Admin. of Justice, 96CV180: A majority of the Committee voted to support the amendment, recognizing that a majority of courts take the approach it proposes, but the Committee took no position pending the decision of the Supreme Court in the Georgine litigation.

Kenneth W. Behrend, 96CV181: The Committee should endorse the Third Circuit Georgine holding, and should provide that a class-action settlement binds only members who opt in to the class. Present practice creates a juggernaut for settlement. Notice often fails even to reach class members, and is confusing even when it does arrive. The lists of class members may include "thousands of persons who are indifferent or even frivolous or who have not been advised of their alternative rights by their own counsel." Judicial scrutiny of settlements should be more exacting. Ordinarily the certification decision should be made before there are any settlement negotiations. Injunctions that purport to preclude settlement class members from pursuing their own litigation, in their own courts and under their own state law, deny due process. Class representatives should not be able to bargain away the rights of class members under their own states' laws.

TESTIMONY

Philadelphia

Professor Susan Koniak, Tr. 8 - 24: The Rule should be amended to make it clear that a class can be certified only if it could be certified for trial. And it should be further amended to make sure that there is adequate representation and the settlement is fair. The proposed rule invites collusion. A class that cannot possibly be certified for trial is "malignant." Indeed it is not a class at all; if it cannot be tried, there is no justification for lumping these people together as if a class. The pressure to settle is too great when, absent settlement, the class lawyer surrenders the class. A class that might be certifiable for trial but is created for settlement is "benign" in the sense of a benign tumor - it needs attention, but we may have to live with it. Often it will be not entirely clear whether the class would be certified for trial – the parties are not contesting certification, and there is no other source of sufficient information to support an informed determination. But the plaintiffs do have leverage in negotiation. And this test may be met if certification is possible for issues, although not for resolution of liability to class members – if reliance must be proved on an individual basis, still the underlying misrepresentation issues might justify class trial and thus certification that leads to settlement. And there should be procedural protections – Professor Leubsdorf's proposal to appoint an advocate for the class is wise. To be sure, it cannot be said that all settlements of class claims that could not be tried are corrupt, but that is not the standard for rulemaking. The kind of information that is not revealed to the court includes such matters as the terms of parallel settlements of individual cases that are much more favorable than the terms of the class settlements. The integrity of the judicial system is compromised by allowing these deals. The choice-of-law justification for settlement classes does not work; "those laws are important. They are state laws." Subclassing is important to protect different rights – the difficulty of subclassing does not justify a nontriable settlement class. And the vague notion of "large-scale comprehensive solutions" to widespread problems seems to refer to the futures class, which presents special problems. A victim "wake[s] up on day, you know, 10 years later, and they find out that some lawyer settled their claim and they are dying and they can't go to court and they don't even know what happened."

Melvin I. Weiss, Tr. 35 - 44: Lawyers in this field practice diligently, ethically, at arm's length. Judges have become comfortable with the oversight role. "[S]ettlement classes should be something that you consider very seriously because that's what we do. That's the way these cases are resolved, overwhelmingly." Defendants care about more than just the amount paid. Class-based

settlement provides certainty, or at least better predictability. It provides uniformity of treatment; the importance of uniformity is illustrated by a number of life insurance policyholder classes, in which the insurers are anxious to deal uniformly and fairly with their entire customer base, and in which state regulators are breathing down their necks. Class settlement also accelerates resolution of the problems. Class members are well protected by the information provided and the right to opt out. If it is argued that there is no meaningful right to opt out because individual relief is not available, it is argued that there should be no remedy at all. The appointment of an advocate for the class "is a disaster waiting to happen." Experience with advocates shows that it adds another costly level of procedures; "I mean, once you hire an advocate, the advocate has to advocate." Does the advocate have to make every argument? Can the advocate use a business judgment approach, be sensible? Advocates have said that they cannot deal with counsel for the class, because their obligation is to raise all arguments on behalf of the class. As advocate for the class, the class lawyer cannot be totally candid about the problems with the case; the judge is there to provide overall supervision. As to hearings, there should be and are hearings whenever a class action is dropped, unless it is dropped without prejudice and no money is being paid to anyone. Yes, at times class lawyers will be influenced by the prospect that settlement class would not be certified for trial -- defense lawyers also will be influenced. "That is why we have Rule 23. That's why lawyers can't just drop cases, settle cases, take payoffs. They have to go through a process." The rule works effectively and fairly; it should not be trashed because there are occasional problems that cannot be addressed effectively by any rule.

Steven Glickstein, Tr 62 - 65: A settlement class involves a purely consensual arrangement -- the settlement cannot be crammed down an unwilling party's throat. Class members have an opportunity to opt out on the basis of full information about the settlement. And the settlements are not uncontested; to the contrary, there are active contests, often mounted by members of the plaintiffs' bar who fear loss of future cases in the area. And the district judge "cares about the absent class members." District judges are holding hearings, and making excruciatingly detailed findings. And the result is not always approval of the settlement. In the Shiley heart valve litigation, the district judge listened to the objectors and made us adjust the settlement to meet their objections.

David Vladick, Tr. 78-83: For Public Citizen Litigation Group: The settlement class identified by (b)(4) involves cases with the highest potential for abuse. Often the case could be certified for trial on liability issues, even if other matters such as reliance of damages must be litigated individually. "[T]he problem with (b)(4) is that it transfers a litigation device into a settlement device." There is no effective way to protect the rights of absent

class members in class settlements of cases that could not be tried as class cases. "[T]here is nothing adversarial about that settlement." What is wrong is the cases that are brought only for the purpose of settlement — those that Professor Koniak describes as "malignant." No one ever argued that the Georgine case could be tried as a class.

Beverly C. Moore, Jr., Tr. 83-89: Favors (b)(4). Georgine, Castano, and Rhone-Poulenc all could be tried as class actions. What is needed is proper structuring, including an exclusion of certain states from certain claims and having a few subclasses. Statistical proof can be used to set individual damages, as in Cimino and the Ferdinand Marcos action. The problem with some settlements, as Georgine, is discrimination against some class members, or against all class members in favor of individual clients. The solution is not to prohibit settlement classes but to exercise Rule 23(e) authority. Traditionally judges did not want to review settlements closely because they wanted to clear these cases from their dockets. But that is changing. Objections are being made, and settlements are being changed in response. If we deny settlement classes, judges will make spurious findings that support certification as if for litigation, distorting the class action jurisprudence.

Roger C. Cramton, Tr. 94-109: This proposal exceeds the power of the Committee and violates the Enabling Act. Reliance on waiver is misplaced. Waiver implies consent, and even as to present claimants the notice process is inadequate; consent is fictional. The Manual for Complex Litigation recognizes this. The reasons given for (b)(4) are all wrong. The choice-of-law suggestion seems to abandon Erie, Klaxon, and VanDusen. It would allow self-appointed lawyers to agree to substitute "a new national law" for authentic state law. Manageability concerns are equally spurious. Management in these cases involves the judge becoming involved in the settlement process, and then reviewing the settlement for fairness and reasonableness. "It looks unjudicial." The desire to establish wholesale schemes for reparation involves Article III judges in legislation. The present language, moreover, "is meaningless. It provides no standards, no possibility for the development of a coherent appellate law." Because of notice problems, "consent" cannot justify any of the supposed advantages. The objectors who show up, moreover, are "bottom feeders. That is, they were not named as class counsel and what they really want is a share of the action, a special deal on their clients' cases and so on * * *." They may abandon their objections once the sweetener is provided. Settlement classes, if allowed at all, should be limited to those in which the judge concludes that the class probably would be certified for trial, and makes a conditional certification for settlement. And Rule 23(e) should be strengthened along the lines suggested by Judge Schwarzer, requiring specific findings on the matters of general concern. There must be adequate discovery on the merits of the settlement,

and it must come early enough to support informed objections. The negotiation process must be open for inquiry; the theory of many judges that privilege and work-product protection can be invoked against the class members who are clients of class counsel is outrageous. Everything must be made available to the objectors. "Otherwise, it is a cover-up." When plaintiff and defendant join in urging approval of the settlement, it is like an ex parte proceeding, in which Model Rule 3.3(d) imposes a professional obligation to bring forth all relevant facts. Counsel appears not as an advocate but as trustee for a class. The written documents sent to class members should provide intelligible information; simply providing a telephone bank is not enough. Although there is case law on Rule 23(e) procedures and requirements, it is not terribly well developed, is no uniform among the circuits, and often is not paid much attention by trial judges.

John C. Coffee, Tr. 113-121: There is a basic conflict of interest when the class attorney has no stake in, and does not care about, related class actions or individual cases; there is every economic motive to settle them in the class action if that can be done. And the fact that the case cannot be tried in this class form weakens bargaining leverage. The "reverse auction" is a further problem, arising from the fear that if the settlement is not made sufficiently attractive the defendant will shop for another class attorney who will strike a more favorable deal. Future claims also present problems, with the risk of divesting claims of much greater value than they receive in the settlement class. There is a legitimate place for settlement classes. Originally it comes from the fear of a defendant who wants to settle that agreeing to certification will carry forward to trial if the settlement falls through; the purpose of a settlement class was to achieve a kind of contingent certification. And there may be cases now in which there is no present possibility of an effective remedy in any other form. Global settlement may be necessary to get complete relief. What we should look for is the case in which no one is injured, no one is made worse off, by the settlement. One factor may be the risk that when a future claim matures there will be no defendant, and no insurance, to satisfy it. It would be best to put all of these things in a long commentary on (b)(3), not as express text. The cigarette class action, for example, could be evaluated to determine whether there are better remedies in individual actions, or awaiting further development of state law. Rhone-Poulenc may have been a good case for a settlement class — plaintiffs had lost almost all of the individual actions that had been tried, suggesting that individual actions are not viable.

Judith Resnik, Tr. 121-138: The focus is that there should be "litigating" classes in addition to settlement and trial classes. The starting point is that the civil rules are organized to dispose of cases by settlement or by adjudication without trial. Class actions should fall into the same approach. A group can constitute a class for pretrial purposes, even if not for trial. This is

accomplished now by other means, such as multidistrict transfer or other consolidation with plaintiff steering committees. Class actions have a virtue that is not present in many other modes of aggregation, such as multidistrict litigation transfer: Rule 23 provides a structure and roles for judges and litigants, "pushing them to the visible arena." Ethical obligations are created by certification in ways that do not arise from steering committees or like devices. The rule should not be limited to settings in which a settlement agreement has been reached before the request for certification; to the contrary, it is better to have the court consider adequacy of representation at the outset, and to open up the process by making it visible. The certification should state clearly that it is for pretrial proceedings or settlement, and may not extend through to trial. The concern that leverage is lost because the class cannot be tried overlooks other sources of leverage — the prospect of trying other classes or individual actions, and the costs of discovery in this action or in other actions. To the extent that defendants today would resist certification for any purpose without having an agreement in hand, for fear that the certification will carry forward for other purposes, a well-crafted rule can encourage certification before there is an agreement. Rule 23(e) should be tightened up to insist on careful exercise of the power and obligation to review settlements. There are other problems not addressed by the rule, arising from the layers of lawyers and the other costs that should be spread across related litigation. Document depositories and the exchange of information across districts are only beginning to be addressed. Clients who have individual lawyers as well as class lawyers may face multiple attorney fees.

Stephen Burbank, Tr. 139-142: (b)(4) does not seem to raise Enabling Act problems under current interpretations of the Act, because they set very loose standards. We should take seriously the prospect that there may be limits beyond those stated in Sibbach and Hanna. Rulemaking should not extend to rules that predictably and unavoidably affect rights under the substantive law. The (b)(4) proposal does not seem to do that. More generally, however, there is a special problem. Rule 23 may not have been intended to affect substantive rights, but it has. Does that mean that the Supreme Court cannot undo or temper what it has done, because that is to modify the substantive effects it has wrought? That would put the Court in an impossible position.

Eugene A. Spector, Tr. 143-144: Plaintiff-class attorneys take seriously their responsibilities to members of the class.

Robert N. Kaplan, Tr. 150-151: Settlement classes are used in securities and antitrust litigation. They are arm's-length negotiations; I had one that negotiated for a year and a half before a settlement master. Discovery is used to probe the merits while settlement is being considered. Problems that may exist in mass tort classes should not wash over to other kinds of classes.

H. Laddie Montague, Tr. 154-162: In antitrust class actions, there are certain parts of the plaintiff's class definition that always are attacked by defendants claiming that impact and injury are not common to class members, and so on. This can become a battle of experts at the certification stage. And, before any determination whether the case can be tried as a class, the parties agree to settle. This resolves every issue that would be litigated. Although defendants will want the class defined as broadly as possible, for maximum protection, plaintiffs can resist — and I have. The practical problem is that a defendant fears that a class defined for possible settlement will carry over for trial if the settlement fails. Perhaps there should be some safeguards, but the courts have been able to develop them without rule provisions. Concern with the distribution among plaintiff class members should be addressed by the terms of the settlement and approved as part of the 23(e) process. Settlement is very constructive.

Edward Labaton, Tr. 189, 192-193: Settlement classes work well in securities litigation. There may be problems in other contexts. To insist that the case be one that could be tried for the same class does little, because "lawyers are imaginative enough to find a way to say that we could have tried this case. * * * [P]eople would work around that relatively quickly."

William T. Coleman, Jr., Tr. 211-212: Settlement classes are now in the Supreme Court. It is understandable why defendants should want them.

Michael Donovan, Tr. 227-228: The Supreme Court decision in the Georgine case will provide guidance. It is not necessary for the Committee to jump the gun.

John Leubsdorf, Tr. 256-264: The proposal addresses a problem that does not exist. The problem is not that courts are refusing to approve desirable class-action settlements. The problem is that they are approving settlements that should not be approved. The settlements recently rejected by the Third Circuit "were awful settlements," to be rejected for many reasons. The problem arises from a failure in the adversary system. A small group of people, plaintiffs, plaintiffs's lawyers, and defendants get together and agree on a settlement. (b)(4) will make that easier. It encourages people to package a settlement before certification is requested, and presents the certification for the first time with a defendant whose interest is in supporting certification. And it dilutes the protection arising from the requirement that the case be capable of trial as a class action. If there is to be any change, it should be to increase the safeguards against bad settlements. First, only in the most unusual circumstances should settlement negotiations be permitted before certification, before it has been determined that the plaintiffs and their lawyers can adequately represent class interests. Second, the rule should require that the lawyers be adequate to protect class interests — it is the lawyers, not the representative class members who ensure

adequacy. Third, whenever there is a significant amount of money at stake the court should appoint an official objector; several lawyers have testified that they would consider it improper to present information that might destroy the settlement — it is because "lots of lawyers do think that way" that we need official objectors. Fourth, there should be a more adequate notice requirement. Fifth, the right to opt out should exist whenever significant monetary relief is involved; it should not be defeated by a (b)(2) certification. Finally, if a "futures" class is certified, notice of the opportunity to opt out should be in a form "reasonably likely to permit an informed decision by a person to whom it's addressed."

Leslie Brueckner, for Trial Lawyers for Public Justice, Tr. 272-280: (b)(4) focuses on the precertification settlement, which creates the greatest risk of abuse. This requirement of settlement before negotiation is not in any way a protection for the class. The right to opt out is not much protection "given the complexities of notice, class actions that are certified where the actual identities of class members are not known." Approval hearings "tend to be * * * dog and pony shows * * *. There is no real adversary process except in the very rare instance when a plaintiff's lawyer or public interest group manage to muster the resources to mount massive objections." More often, a few individual objectors appear and are bought off. As a public interest group, we commonly are denied standing to object unless we have a class-member client; and the defendants then offer an individual settlement so attractive that our duty to our client requires that we accept. The policies in favor of settlement do permit settlement of a class that could not be certified for trial. But the court needs to look at it "very, very carefully. * * * [Y]ou need special protections for the class members, and you cannot rely on objectors * * *." The proposal does not provide the necessary special protections.

Deborah Lewis (Alliance for Justice), Tr. 281: Opposes, for basically the same reasons as Leslie Brueckner. "[T]he opt out provision has to carry the heavy load of protecting against the potential dangers of this proposal of collusiveness, of the conflicts within the class, and * * * the opt out provision just can't provide that kind of service * * * for really just for the opt out provision to serve this function, we would have to have advice of counsel to understand both the notice and the proposed settlement, and whether or not the settlement will make them whole. And that would be just prohibitively expensive for the poor absentee class members."

Dallas

Stephen Gardner, Tr. 4-22: (This testimony interlaces observations about (b)(4) and factor (F); most of it is summarized here.) Consumer class action experience provides the framework for this testimony. Settlement classes foster abuse; this proposal, and

factor (F), "will exacerbate rather than address the problems." The very concept of trying a class action is so foreign to the weltanschauung [Tr: bel tan shong] of many plaintiff class lawyers that settlement becomes the sine qua non. Counsel who begin with high praise for their cases "become suddenly and extraordinarily pessimistic about the legal and factual merits of their very lawsuit once the case has been settled and their fees have been sewn up." These are triable classes. The claims are very, very good. The problem is quick and dirty settlements. "The problem is they've never intended to seek relief for the class. * * * [T]he relief to be obtained in too many cases focuses on fees and not on relief for the class." Coupon settlements are a good illustration. "If a case is bad, it ought to be lost, it ought not be settled, and particularly so with class actions. * * * [Y]ou do not discourage abusive filing of class actions by making them easier to settle when they do not have a basis for settlement." If there are choice-of-law problems, perhaps there should not be nationwide class; California lawyers resist nationwide classes that risk trading down the strong California consumer law claims for the advantage of weaker claims under the less favorable law of other states. There is no need for (b)(4); settlement classes can work even under the Third Circuit formula. The problem that defendants may not stipulate to certification when they fear a settlement will fail and that they may be forced to try the class action can be met in part by getting certification rulings before settlement discussions begin, and in part by liberal use of the power to "recertify, decertify, uncertify." Most consumer classes could be brought just as well in the form of (b)(2) classes; injunctive relief can be as effective as minor damages awards. (b)(4) offers "an unstructured, unregulated approach to settlement classes." The Committee should wait.

Richard A. Lockridge, Tr.25-27: (Testifying from experience as plaintiff class lawyer in antitrust and securities actions.) The (b)(4) proposal is beneficial. There have been problems with settlements that seem to result from less than arm's-length bargaining, but "a slightly heightened level of judicial scrutiny would help resolve that." Courts could look to whether there has been an agreement on attorney fees; it would be better to have no agreement at all, but if there is an agreement courts should look at it carefully, and recognize that the fee agreement makes the settlement more suspect. It also supports the settlement to show that documents have been reviewed, and at least some depositions have been taken.

Samuel Issacharoff, Tr. 28-40: Rulemaking is premature. It is better to let these problems work out through the process of adjudication. Judicial experience with settlement classes is "hesitant and unknowing." The Georgine decision will begin the process of further judicial development. (b)(4) represents an impulse to facilitate settlement classes that is quite problematic. "For example, there are problems when you have groups of plaintiffs

who have preexisting relations to plaintiffs' counsel that other groups of plaintiffs don't have. We've seen this in some of the cases. * * * There are issues for concern where you have future claimants * * *." Perhaps there should be a distinction between tort cases and "the more economic harm contract type of cases and how we assess the question of manageability under (b)(3)." The courts should be looking for middle ground; the Third Circuit Georgine decision may be too harsh. Defendants who recognize that they have done wrong should be able to settle and avoid the cost of further litigation. But "the evidence of collusion is real." Courts can examine the processes by which settlement was reached: how arm's-length were the negotiations? What were the relations between various types of class members and class counsel? What kind of notice was there — particularly notice to rival groups? "[F]ederal judges are extremely able people with extremely limited resources and * * * have no capacity to enter into an independent examination of the facts presented to them because they do not know the record, they do not know the evidence." There is a very limited capacity to intervene, particularly with (b)(1) settlements. There is an incentive for judges to clear their roles. "And what this panel's proposal does is to say to the federal judges the fact that they come before you with something called a settlement should pretty much take care of the issue." This is particularly problematic as Rule 23 is extended into areas "very far removed from what was originally contemplated when Rule 23 was put into effect." "I am a disbeliever in rule making in this area. I think that the committee should be leery of presuming its competence simply by the way of very smart people thinking about problems in the abstract and instead should trust to the federal courts to develop these responses on a case-by-case basis."

Charles Silver, Tr. 41-43: Follows Professor Issacharoff's testimony, stating that one of the problems is that the standard of comparison in evaluating a class settlement is other class settlements. Even if courts await until there has been enough individual case litigation to make the class claim mature, the comparison will largely be to individual case settlements rather than individual case trials. And the database of settlements is tainted because the incentives are inadequate across the board. n The real focus for the Committee should be attorney fees. (Noted separately.)

John Martin, Tr. 56-57: Approves the whole package, but has some reservations about (b)(4). There should be very careful analysis of proposed settlements; the added hearing requirement in (e) is good.

John Henderson, Tr. 67-73: As defender in class actions, welcomes the (b)(4) proposal. Settlement classes are needed. They are the best way to resolve mass personal injury torts, that otherwise would take many years to decide. Concern that plaintiffs will lack leverage because the case cannot be tried is misplaced. There is a real prospect that absent settlement, some form of class action

— or actions — will be certified for trial. Plaintiffs' lawyers are interested in settlements, and there are formal and informal ways to participate and protect against sweetheart deals. And federal judges look carefully at the settlements; there is no need to add particular scrutiny requirements.

Fred Baron, Tr. 80-95: Opposes all uses of class actions in mass torts. They are not needed. Rule 42 consolidation and § 1407 transfer are sufficient. And settlement classes are particularly bad. Whenever we try to settle large numbers of individual cases, the first demand is that we create a nationwide class and deliver peace for ever and ever and ever. These cases involve very individualized injuries that would be resolved differently under different laws; they could never be certified for class litigation. Allowing settlement certification invites the friendly deal. Rigorous scrutiny by the court should solve these problems, but it does not. A settlement class would be proper if there were a genuine right to opt out that could be explained to each class member and made good by each class member. The opportunity to object does not give much leverage; it is very expensive. Our firm spent more than a million and a half dollars objecting to the Georgine settlement. That is not the way these situations should be handled. We presented reams of evidence that there were dual track negotiations, settling present cases on condition that the future cases be settled on a class basis. The only way to defeat this kind of competition among attorneys is to deny the opportunity for class certification. If a future claimants' class is to exist — and it should not — there must be an effective right to opt out as a matter of due process. The HIV settlement is good, because it carries an effective opt-out right. For future claims, as in asbestos, it would have to be a "back end opt-out." Bankruptcy is a better alternative when there is a real risk that there will not be sufficient assets in the future to compensate the future injuries. If changes are to be made, there should be clear opt-out rights in any mass torts case; no futures classes; compensation for successful objectors; more scrutiny of settlement classes. And all of this should await the Supreme Court decision in Georgine.

Alan Dyal, Tr. 111-113: The Committee should provide another opportunity for public comment after the Supreme Court decides the Georgine case.

John L. Hill, Jr., Tr. 116-117: Settlement classes should be allowed. "[W]e're wise enough to know how to solve problems of unfairness, problems of fraud, problems of collusion, that sort of thing. That's what lawyers with fiduciary duties are for, that's what our ethics are for, that's what our trial courts are for, that's what discretion is for." In mass tort cases, settlements provide relief that is quicker and easier, and do not "just bury our courts with case after case on an individual basis."

Clinton A. Krislov, Tr. 117-126: The rule should provide a roadmap of procedures for the trial judge to follow in reviewing a

settlement. Counsel for any competing class should be informed and invited to appear. The objector's role is very difficult. "You never get paid if you don't change the settlement in some way. You will probably never get listened to, and it's very difficult. You're the least wanted person there. You are the one who is messing up this train which is headed in a direction and you're trying to derail it, and so nobody really loves having you there." The concept of a guardian ad litem for the class is "rarely effective. * * * I'm not sure * * * whether it's the incentive or the logistics. There is a real benefit to having counsel in there, whether it's with * * * the best of intentions, the most aggressive of intentions or the incentive of actually getting paid as well." When there are competing objectors, it is better to form a group and select lead counsel to pursue the objections. It is less effective to allow several objectors to proceed independently. To be successful, an objector has "to find something that is fundamentally wrong with the settlement. And typically the 'it ain't enough,' 'it out to have been more' and 'somebody else added in a case that we're in' and 'we could have done it better,' those typically get rebuffed pretty quickly. You really have to come up with something that is tight, to the point and a really fundamental problem. Usually you don't have much of an opportunity to do anything as an objector because if you get the notice, there's very little — there's no discovery on file usually. You have to go through something that is sort of conceptually on the face of the deal." In addition, the Committee should do something the change the rule in several circuits that denies appeal standing to a class-member objector who has failed to intervene. There is no risk in the real world that hundreds of dissatisfied class members will hold up the settlement by appealing; one or two is the highest real number. Heightened scrutiny should be required; some courts have approved settlements that the class was against.

Stanley M. Chesley, Tr. 140: Settlement is good, and the proposed amendment "addresses a need and facilitates settlement." The fear of collusion can be met by court inquiry — the allegations have been made, inquiries have been had, and collusion is very rarely found.

Bartlett H. McGuire, Tr. 159-161: (b)(4) "makes sense * * * for all of the reasons discussed in your advisory committee notes. And it would overturn the Third Circuit's decision in Georgine, which is good." But it would be wise to defer final action pending the Supreme Court decision in Georgine.

San Francisco Hearing

Eric Green, Tr. 28-37: (b)(4) is a desirable clarification of the law. It does not require certification of a (b)(3) settlement class, but only authorizes it. Consideration should be given to authorizing settlement classes also under (b)(1)(B). There are sufficient procedural protections to answer all of the concerns raised by the 120 academics arrayed on the other side of this

issue. As guardian ad litem for the plaintiff class in the Ahearn settlement, I observed an extremely detailed and vigorous settlement hearing that lasted 9 days. There was substantial discovery ahead of time. As guardian, I had full authority to conduct whatever discovery I wanted into the settlement; I had an 800 number; I had contact and correspondence with hundreds of class members; I scrutinized all aspects of the settlement, including the ethical aspects and the alternatives. Special masters also may help in the process. The other requirements of Rule 23 all must be satisfied, and provide adequate protection for class members. Although my experience is in mass torts, I believe that settlement classes also may be important in some consumer class cases. There may be differences between personal injury and economic harm cases. And there may have been some bad settlements; the coupon settlements seem dubious. The proposal authorizes courts to consider any problems of justiciability, jurisdiction, or the like. The future classes problem is a red herring; it is a matter of state-law authorization for fear of cancer, for emotional distress, for medical monitoring, or like relief. This proposal does not address those issues. The academic critics have shifted focus to abuses in state courts; the federal rule should not be defined by state-court problems. It might be a bit better to allow certification before a settlement agreement is reached, but as a practical matter that is not going to happen very often. It might help to appoint a guardian for the class before the settlement agreement is reached. But the practicalities of negotiating make that difficult. In some of these cases, the effective negotiation process has been going on for years; it is only the final stages that involve the concentrated series of meetings all around the country. And a guardian who seeks to participate in the negotiations had "better be a superb negotiator and a very experienced person, so as not to inadvertently, through poor negotiation or unfamiliarity with the issues or whatever, because of some notion that the guardians got to add value somehow to the deal or to justify himself or herself, disrupt the process."

Lewis H. Goldfarb (Chrysler Corp.), Tr. 43-44: It is a very close question, but we oppose (b)(4) — although "settlement classes have been beneficial to us" — "because we're trying to wean ourselves from that temptation. * * * It is, in many cases, in our interest to sign onto a settlement that may not meet Rule 23.

Elizabeth J. Cabraser, Tr. 45-52, 56-58: There are real concerns about the corruption of procedures in settlement, but (b)(4) is desirable. It will confirm the legitimacy of a valuable practice that has grown up to become, before the Third Circuit decisions, an accepted part of federal jurisprudence. The supposed polarization between trial and settlement classes is overdrawn; many of the settlement cases could in fact be tried, at least in part, utilizing the procedures of (c)(4)(A) and (B). Yes, there are concerns that arise when the negotiators have an interest in settling for the largest possible class and the courts have a need

to resolve large numbers of cases. But evaluation for compliance with 23(a), and appropriate notes to (b)(4), will support good resolution of the problems by lawyers and judges. The Manual for Complex Litigation also helps. The factors suggested by Judge Schwarzer's article, and by the cases, should be adopted in the Note. They include similar treatment of people similarly situated, and the adequacy of notice. It is easier to give good notice now than ever before, and less expensive, although it remains quite expensive with large classes. And the media have become interested, giving free — if not always accurate — coverage. Ironically, what happens in the largest classes may be that the court hears from the interests of everyone but the class members "who would simply like to have a fair recovery in their lifetimes." It would be better not to limit (b)(4) to cases that are settled before certification. The greatest concern is with cases that are settled before they are brought. This is a particular problem when we bring a case, knowing that we may have to try it but hoping it can be settled, and litigate it for years, and then someone else who has not gone through this process, who does not know the case and would not know how to try it, packages a settlement in another court, packages a settlement. That should be stopped.

Arthur R. Miller, Tr. 69, 80: We need the settlement class as a practical of late 20th Century litigation phenomena. "It can be a very powerful force for good, when constrained, when guarded." There may be Enabling Act problems. "I certainly would limit the (b)(4) to a situation in which you have an adversary proceeding, anterior to any settlement. But you're on the knife's edge."

Samuel B. Witt, Tr. 96: Obviously (b)(4) will not be resolved until Amchem is decided. "My question for you is whether you reopen public comment after the Supreme Court gives us its thoughts on that, to allow this debate to go forward in the context of what they're saying."

John L. McGoldrick, Tr. 105-106: There are very different purposes for trial certification and settlement certification. "There is no reason why they should have the same standards." Without settlement classes, defendants and plaintiffs and courts will march "through long years of litigation, that nobody wants or needs." Permitting settlement classes will not encourage added filings on nonsubstantial claims; settlement classes are the law now, outside the third circuit.

Sheila L. Birnbaum, Tr. 110-118: Speaking from experience in mass torts, (b)(4) should be limited to cases where a settlement has been reached. This does not mean that people simply begin all litigation by negotiating a settlement and then filing for class certification. Instead, there are cases all over the country, being tried and being settled. The settlement class resolves the mass tort. And mass tort classes do not exist in a vacuum. There are aggregations by consolidation, by MDL transfer, by consolidated discovery. "But if you don't allow for the ability to settle cases

globally with 23(b)(4), then you will have mass chaos on your hands in the courts." This is something that exists everywhere but the Third Circuit. Notice is given, and given broadly — defendants want res judicata, and protect it by broad notice. There will be no need for (b)(4) after the Supreme Court decision only if the Court says expressly that settlement is different from trial for certification purposes; that choice of law and predominance do not apply; that the 23(a) requirements do apply; that the settlement must be proved fair; that there is a case in controversy. Georgine was settled over a 20+ to 30-year history of litigation. The rules give the judge all the power needed to review fairness, including special masters. The settlements that go on now occur on an aggregated basis, but without judicial review. Class settlements, reviewed by a court, may give a more equitable resolution. A bad settlement will be challenged by objectors; more and more lawyers have learned the opportunities in objecting. There is no need to provide more guidance in the Note; the Manual for Complex Litigation does that. And there are appellate courts. It is not fair to suggest that district judges and circuit judges are closing their eyes to fairness because they want to get rid of these cases. They are there to protect the class. "These court cases, even without class actions, * * * need to be settled globally, you cannot take that tool away. It's just a tool. And that's why it should only be used when the parties are prepared to settle the case, because it is only then that the defendant is willing to give up some of the due process rights that they might be asking for to get the global resolution of the problem." There are real cases out there before the settlement.

John Aldock, Tr. 118-126: Is counsel for the Center for Claims Resolution, 20 companies in the asbestos litigation. Negotiated the Georgine settlement. The critical issue about settlement classes is the need to compare class settlement to "individual" litigation, to the realities of the alternatives. The supposed problems with settlement classes are not new; they were identified by Judges Friendly and Wisdom, and resolved. The findings of fact in the district court in the Georgine case have not been challenged. They show that in individual litigation, attorney fees account for more than two-thirds of the amounts expended. Contingent fees are 33% to 40% in cases that are no longer contingent. In most jurisdictions it takes more than three years to resolve a case. Jury verdicts are erratic: "People who aren't sick make millions. People with cancer get nothing." In Cimeno, "the nonmalignants got more than the long cancer." Individual litigation affords no protection to the futures. Those who have present claims settle by giving a full release — if they develop worse diseases in the future, there is no claim left. And bipolar litigation has not occurred for 20 years. The cases are tried in large group consolidations. "Asbestos lawyers don't have clients any more. They have inventories. They talk about them as their inventories. They are retailers and wholesalers. The cases brought in Texas were brought by a North Carolina lawyer, who has

brokered them three times, and they're now being filed in Texas. The fee is being shared so many times, nobody even knows who is getting it. The idea that these people have clients and that the clients are making the litigation decisions is a fix." It is hard to believe that the clients are even consulted in the group settlements, that they even know that their cases are being settled. And there is no judicial superivision of the amount of the group settlement, nor of the allocation among individuals, nor of the fee. In a settlement class, the judge looks at all of these things. And the settlement ensures that people are treated the same. "Call it administrative justice; call it whatever you ant. it is fair; it has more protections; it protects the futures." Extensive notice was given in Georgine; the futures know they have been exposed to asbestos, and worry about, and want peace of mind.

Jeffrey J. Greenbaum, Tr. 153-154: (b)(4) will add honesty to the system. Cases will settle, whether (b)(4) or there or not. The proposal will allow direct focus on the settlement class. And it is right to insist that there first be a settlement agreement; otherwise, some judges will make a "conditional" certification for settlement purposes that intimidates counsel into settling for fear that the certification will persist through trial.

Miles N. Ruthberg, Tr. 160-161, 162-164: We were concerned about settlement classes when writing the Harvard Developments Note in 1970, and people are still concerned. Even then we were talking about subclassing, guardians ad litem, and so on. Settlement classes are a good thing, but they require active supervision — a lot of hard work — by the court. If the Supreme Court affirms the Third Circuit in Georgine, it will be essential to amend the rule. Even if it reverses, it will help to have a clear rule. But it would be a mistake to attempt to write into the rule, in subdivision (e) or elsewhere, more detailed guides for approving settlement. Subclasses may work in one context, but be a bad idea in another. Guardians ad litem or special masters may work in some cases, but not in others. A comment that the judge must be actively involved would be appropriate.

Stephen B. Ringwood (Kaiser Aluminum), Tr. 174-178: Approves the package of proposals, but focuses on (b)(4). Mass tort claims generally are inappropriate for class trial. (b)(4) is a judicially manageable safety valve that confirms a useful, longstanding process. Settlement classes avoid huge, unfair transaction costs. Class members are better protected than they would be in a litigation class. "More is known up front, can be evaluated in the context of a fairness hearing, scrutiny in the certification process." Defendants get predictability.

Gerson Smoger for ATLA, Tr. 189-201: Much of the focus of this plea for individual control of individual actions in mass torts, not class treatment, is focused on (b)(4). For a class, there must be a meaningful opt out, which requires "true notice," "notice where

somebody really knows." Class treatment loses sight of who is actually being represented. It is the individual injured who must determine what a fair settlement is, "and the victim is out of this play. He's no longer a constraint * * *. The representative plaintiffs often are the first people who walk through an attorney's door." This is in part a matter of adequacy of representation, but it is more. "When we get to the level of settlement class, we're putting much more power in the individual attorney to settle that case and the courts to monitor that. * * * The real quality of the representative plaintiffs is not viewed at all, and nobody even gives consideration to that, and then we're asking somebody to make decisions on behalf of an enormous number of victims who are hurt." (b)(4) can never work in a mass tort. The one thing that has to happen in a mass tort is that "at the end of the day, the attorney has to go to those individual clients with serious injuries and say, 'is this a good settlement, and is this what you want?' * * * They are controlling the fate of litigation that is very significant to their lives."

Robert Dale Klein, Tr. 209-215: (b)(4) simply brings Rule 23 into the real world. It "reaffirms economic reality and necessity." Settlement classes are better than the alternative devices also being used. Aggregation is accomplished by many devices outside Rule 23. Rule 42 consolidations "bring all of the downsides of class actions under 23 with none of the protections, if you're a defendant, or, for that matter, if you're a member of the plaintiff group." Massive consolidated trials that extrapolate "a few supposedly illustrative or representative — and I use those terms in quotes — plaintiffs" are masking devices. We also see several trials; you win some, and then lose one, and in the next case the loss is used as collateral estoppel. Rule 23 cannot solve this, but (b)(4) "does help address and provide a way out for corporate defendants who have to deal with this mess day-in and day-out." "The threshold for consolidating cases for mass trials has slipped below the horizon of due process fairness in too many courts." These are pseudo-classes. Even with opt-outs from a (b)(4) settlement class, defendants can identify and count the opt-outs, and gain predictability, calculability.

James N. Roethe (Bank of America), Tr. 232-234: Settlement should be available. The Note suggests that you have to meet all the requirements of (a) and (b)(3), albeit in the context of settlement, but it should be made clear that if a settlement falls through "there is not some admission or presumption raised that a class is appropriate."

William M. Audet, Tr. 258: (b)(4) "is a good idea, to be consistent with what the courts have been doing over the last ten years."

John L. Cooper, for Fed.R.Civ.P. Comm., Amer. Coll. of Trial Lawyers, Tr. 271-274: There are opportunities for collusion. The defendant wants to buy a cheap retroactive insurance policy through a class action settlement. Perhaps an opt-in settlement class

would work; that addresses the problem of a retrospective insurance policy. Examination of a settlement for collusion may work, but it requires close attention by the judge and the issue may not be presented; objectors may not appear. The real protection is advocacy; if the case has been litigated long enough before settling, that is protection.

Lawrence B. Solum, Tr. 274-279: If we already have settlement classes, would we make the system fairer by eliminating them? Settlement can be fair because it provides a party's entitlement, or because it is a fair negotiated compromise, or because it results from a fair process. The alternative to settlement in a (b)(3) class is litigation as a class; the alternative in a (b)(4) class is some form of nonclass, disaggregated proceeding. The standard that a settlement must be fair, adequate, and reasonable provides little guide. The Fifth Circuit factors like fraud or collusion, complexity, expense, stage of the proceedings, also do not provide real criteria. (b)(4) "by its very nature, is adding cases in which there are differences among class members." So it raises the question whether a settlement may systematically provide more fairness to some members than to others by moving some members closer to their entitlements and other members further away. Should such a settlement be approved? Can we ask whether the net benefits to the class as a whole substantially outweigh the harm to some subgroup? Or should such a settlement simply be disapproved? This problem needs to be thought through and addressed.

Agenda Item VI

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 22, 1997

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Congressional Hearing on H.R. 903 and Offer-of-Judgment Proposal*

A hearing is scheduled on the "Alternative Dispute Resolution and Settlement Encouragement Act of 1997" (H.R. 903) before Congressman Howard Coble's Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary on October 9, 1997. Judge Fern M. Smith, chair of the Advisory Committee on Evidence Rules, will testify on the bill's provisions regarding proposed amendments to Evidence Rule 702 codifying *Daubert*.

Section 3 of H.R. 903 adds a new section 1332(e) to title 28, United States Code, that creates an offer-of-judgment procedure, which would affect the procedures in Civil Rule 68. Judge Alicemarie H. Stotler wrote to Congressman Hyde in April advising him of the concerns of the rules committees on that provision. In a separate letter, Judge Stotler also advised Senator Hatch of concerns regarding another offer-of-judgment proposal contained in the "Civil Justice Fairness Act of 1997" (S.79). Copies of both letters and relevant excerpts from the bills are attached for your information.

John K. Rabiej

Attachments

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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ADRIAN G. DUPLANTIER
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PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

April 21, 1997

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
Room 2138, Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Hyde:

I write on behalf of the Judicial Conference's Standing Committee on Rules of Practice and Procedure to express concern over the *Alternative Dispute Resolution and Settlement Encouragement Act* (H.R. 903), which was introduced by Congressman Howard Coble on March 3, 1997. The Act would amend Rule 702 of the Federal Rules of Evidence in an attempt to codify the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). H.R. 903 would also establish a statutory provision governing offer-of-judgment practices now covered under Rule 68 of the Federal Rules of Civil Procedure.

I urge you and your colleagues on the Committee on the Judiciary to reject the proposed amendment of Evidence Rule 702. The evidence standards set out in *Daubert* are not simple. The Advisory Committee on Evidence Rules has placed *Daubert* and its expanding progeny on the agenda of its next meeting in October 1997. The committee has refrained from considering amending Evidence Rule 702 to account for *Daubert* until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. *Daubert* caselaw has rapidly developed and now involves many areas not considered nor in issue in the 1993 case. Codifying *Daubert* now — as proposed by H.R. 903 — would create problems in applying it to fact patterns other than those specifically considered in *Daubert* and would adversely hamper developing law.

The rules committees, however, take no position on the offer-of-judgment proposal contained in section 3 of H. R. 903. Nonetheless, the committees do want to advise you of the problems that were identified when a number of proposed amendments to Civil Rule 68 were considered.

Offer-of-Judgment Proposal

Section 3 of the bill would shift the payment of attorney fees in a federal diversity case when a party rejects a proposed settlement offer that turns out to be more favorable than the final judgment. The Judicial Conference considered similar legislation in 1994 (S. 585, 103d Cong. (1993)) and, on the recommendation of the Standing Rules Committee and the Advisory Committee on Civil Rules, declined to take a position.

In 1992 through 1994, the advisory committee studied various versions of proposed amendments to Rule 68 of the Federal Rules of Civil Procedure that would have provided an incentive for a party to accept a settlement offer, similar to the incentives contained in section 3 of H.R. 903. After careful study, the advisory committee concluded that every proposal under its consideration was seriously flawed and would either be too confusing or subject to manipulation. Several members of the advisory committee also were concerned that the proposed amendments to Rule 68 were substantive and outside the scope of the rulemaking process. In the end, the advisory committee decided to defer indefinitely further action on the proposed amendments to Civil Rule 68.

The advisory committee was especially concerned with the mechanical operation of any modified offer-of-judgment procedure. The same concerns apply to the fee-shifting provision in H.R. 903. For example, it would be very difficult to calculate the differences between separate and successive settlement offers and the final judgment in cases involving multi-parties. The interrelation between any modified Rule 68 and fee-shifting statutes also raises serious problems in light of the Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), which included attorney fees as part of costs in certain statutory-fee based cases. Finally, a modified offer-of-judgment procedure would be subject to substantial gamesmanship and abuse. There are no safeguards to prevent an extremely low offer at the outset solely to intimidate a risk-averse party from pursuing legitimate claims, particularly in a case when an attorney represents a resource-rich client. The above concerns dissuaded the advisory committee from proceeding on the proposed amendments to Rule 68.

Other, more specific, problems could also arise from the proposed offer-of-judgment procedure in H.R. 903. For example, the proposal applies to "any action over which the court has jurisdiction under this section." This implies that a case that arises under federal question jurisdiction, but that also could be based on diversity jurisdiction, would be subject to the new procedures. On another level, a case removed from a state court would be covered, creating an incentive for a defendant to forum shop by removing to federal court in order to intimidate a risk-averse plaintiff. Allowing a party to serve a settlement offer as late as 10 days before trial is very late and may increase the potential for gamesmanship. Class and derivative actions are substantially different from routine cases and should be excepted from any modified offer-of-judgment procedure. Among other things, a class action settlement may not be approved by the

court, or the representative plaintiff may fear personal liability for attorney fees and accept an inadequate settlement, creating a conflict of interests with the class or other shareholders and forces.

A substantial amount of research and data on the proposed amendments to Rule 68, including an extensive survey of attorneys conducted by the Federal Judicial Center, was compiled by the advisory committee. Copious records of the meetings of and papers presented to the advisory committee on the proposed Rule 68 amendments are available. If you believe that the information may be helpful in your deliberations, please contact the Administrative Office of the United States Courts and the materials will be forwarded to you. In addition, Judge Paul V. Niemeyer, United States Court of Appeals for the Fourth Circuit, and chairman of the Advisory Committee on Civil Rules, stands ready to provide you or your colleagues with a briefing on the issues.

Testimony by Experts (Evidence Rule 702)

The Chief Justice established and appointed members to the Judicial Conference Advisory Committee on Evidence Rules in early 1993. As part of a comprehensive review of all the evidence rules, the advisory committee discussed at length the rules governing testimony by experts. The committee unanimously concluded that amendment of Rule 702 would be counterproductive in light of the Supreme Court's *Daubert* decision. The committee also determined that it would be too early to assess fully the implications of that decision.

Many cases applying *Daubert* standards have only now reached the appellate court level for review. Significantly, the Supreme Court has recently granted certiorari in a case applying *Daubert* (*General Electric* v. *Joiner*, No. 96-188 (March 17, 1997)). A memorandum is enclosed, which was prepared by Professor Daniel J. Capra, the committee's reporter, that summarizes the cases applying the *Daubert* standards. In these cases, the fact patterns and types of "expert information" are different from those addressed by the Supreme Court in *Daubert*, and they pose different litigation and practical problems. Codifying *Daubert* as proposed by H.R. 903 would ignore the collected wisdom contained in the cases decided after *Daubert*. And in many cases this freezing of the law would retard appropriate developing caselaw. Under the rulemaking process, as envisioned under the Rules Enabling Act, proposed amendments to Evidence Rule 702 would be subjected to extensive scrutiny by the bar, bench, and public. And during the process the many different situations and circumstances under which expert testimony can become an issue would be ascertained and fully addressed.

Not only do the proposed amendments to Rule 702(b) in H.R. 903 fail to account for post-*Daubert* caselaw, but they also do not accurately codify *Daubert*. And if enacted, they would cause mischief. Proposed Rule 702(b) distinguishes between "validity" and "reliability" of scientific evidence — a distinction that was explicitly rejected in *Daubert*. Under the proposed amendments to Rule 702, a judge must determine the "validity" of scientific evidence as a preliminary matter. This new requirement imposes an ill-defined burden on the courts. The

uncertainties created by the new requirement could cause significant problems, particularly for prosecutors who often must rely on "scientific evidence" in establishing a defendant's guilt.

The proposed amendments to Rule 702(b) only extend to "scientific knowledge." The amendments do not encompass "technical or other specialized knowledge," matters explicitly contained in the present Rule 702. By implication, the proposed amendments would bar extension of the *Daubert* standards to these other important sources of evidence — an issue left open in *Daubert*. In fact, there is a split among the courts who have considered extending the *Daubert* standards to testimony involving "technical or specialized knowledge" in several reported cases. The apparent distinction drawn in H.R. 903 would fail to resolve the issue, create confusion, and spawn satellite litigation.

The proposed amendment to Rule 702(b) also contains a balancing test that would supersede the present Evidence Rule 403 balancing test, which *Daubert* expressly applied to Rule 702 testimony. Proposed Rule 702(b) requires that the proffered opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403"; instead of the existing test which permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

In addition to altering the *Daubert* standard, the superseding balancing test used in the proposed amendments to Rule 702(b) raises serious internal interpretational problems, because the proposed amendments would apply only to "scientific knowledge." There is no apparent reason to apply different balancing tests to expert witness testimony arising from "scientific" versus "technical or other specialized" knowledge. The distinction will generate unnecessary litigation attempting to discern differences in individual cases.

A new Evidence Rule 702(c) would also be added by H.R. 903, which would exclude testimony from an expert who is entitled to receive "compensation contingent on the legal disposition of any claim with respect to which testimony is offered." The need for the provision is unclear. Contingent fee expert testimony is prohibited in most districts under disciplinary rules regulating professional conduct. Unlike disciplinary rules, the proposed amendments to Rule 702(c) would regulate and penalize contingent fee expert testimony by excluding proffered evidence. Neither the provision's advantages nor adverse consequences are fully understood. For example, the relationship between the new rule and the numerous statutory fee-shifting provisions is unclear.

Although less likely, disputes may also arise concerning large corporations' in-house experts whose livelihoods may depend on their past records in testifying before the courts or experts testifying in cases litigated on a contingency attorney-fee basis. The entire question of what "entitled to receive compensation" means in the proposed Rule 702(c) is a matter that needs careful attention and study.

Conclusions

Revision of evidence rules governing the admission of expert testimony in civil and criminal cases involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Such input is now most useful when the courts and the bar have had experience in applying *Daubert* to many different circumstances. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled under the Act's rulemaking process. The Advisory Committee on Evidence Rules has initiated the rulemaking process to amend Evidence Rule 702.

We urge you to defer acting on the proposed amendments to Evidence Rule 702 and allow the rulemaking process to proceed.

Sincerely yours,

Alicemarie H. Stotler
United States District Judge

Enclosures

cc: Subcommittee on Courts and Intellectual Property
House Committee on the Judiciary

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Alternative Dispute Resolution and Settlement Encouragement Act (Introduced in the House)

HR 903 IH

105th CONGRESS

1st Session

H. R. 903

To amend title 28, United States Code, with respect to arbitration in United States district courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

March 3, 1997

Mr. COBLE (for himself and Mr. GOODLATTE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, with respect to arbitration in United States district courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Alternative Dispute Resolution and Settlement Encouragement Act'.

SEC. 2. ARBITRATION IN DISTRICT COURTS.

(a) AUTHORIZATION OF APPROPRIATIONS- Section 905 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 651 note) is amended in the first sentence by striking `for each of the fiscal years 1994 through 1997'.

(b) ARBITRATION TO BE ORDERED IN ALL DISTRICT COURTS-

(1) AUTHORIZATION OF ARBITRATION- Section 651(a) of title 28, United States Code, is amended to read as follows:

`(a) AUTHORITY- Each United States district court shall authorize by local rule the use of arbitration in civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter.'.

(2) ACTIONS REFERRED TO ARBITRATION- Section 652(a) of title 28, United States Code, is amended--

(A) in paragraph (1)--

(i) in the matter preceding subparagraph (A) by striking `and section 901(c)' and all that follows through `651' and inserting `a district court'; and

(ii) in subparagraph (B) by striking `$100,000' and inserting `$150,000'; and

(B) in paragraph (2) by striking `$100,000' and inserting `$150,000'.

(3) CERTIFICATION OF ARBITRATORS- Section 656(a) of title 28, United States Code, is amended by striking `listed in section 658'.

(4) REMOVAL OF LIMITATION- Section 658 of title 28, United States Code, and the item relating to such section in the table of sections at the beginning of chapter 44 of title 28, United States Code, are repealed.

(c) CONFORMING AMENDMENT- Section 901 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 652 note) is amended by striking subsection (c).

SEC. 3. AWARD OF REASONABLE COSTS AND ATTORNEY'S FEES IN FEDERAL CIVIL DIVERSITY LITIGATION AFTER AN OFFER OF SETTLEMENT.

Section 1332 of title 28, United States Code, is amended by adding at the end the following:

`(e)(1) In any action over which the court has jurisdiction under this section, any party may, at any time not less than 10 days before trial, serve upon any adverse party a written offer to settle a claim or claims for money or property or to the effect specified in the offer, including a motion to dismiss all claims, and to enter into a stipulation dismissing the claim or claims or allowing judgment to be entered according to the terms of the offer. Any such offer, together with proof of service thereof, shall be filed with the clerk of the court.

`(2) If the party receiving an offer under paragraph (1) serves written notice on the offeror that the offer is accepted, either party may then file with the clerk of the court the notice of acceptance, together with proof of service thereof.

`(3) The fact that an offer under paragraph (1) is made but not accepted does not preclude a subsequent offer under paragraph (1). Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, or to determine costs and expenses under this subsection.

`(4) At any time before judgment is entered, the court, upon its own motion or upon the motion of any party, may exempt from this subsection any claim that the court finds presents a question of law or fact that is

novel and important and that substantially affects nonparties. If a claim is exempted from this subsection, all offers made by any party under paragraph (1) with respect to that claim shall be void and have no effect.

`(5) If all offers made by a party under paragraph (1) with respect to a claim or claims, including any motion to dismiss all claims, are not accepted and the judgment, verdict, or order finally issued (exclusive of costs, expenses, and attorneys' fees incurred after judgment or trial) in the action under this section is not more favorable to the offeree with respect to the claim or claims than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last such offer was made or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made.

`(6) If the court finds, pursuant to a petition filed under paragraph (5) with respect to a claim or claims, that the judgment, verdict, or order finally obtained is not more favorable to the offeree with respect to the claim or claims than the last offer, the court shall order the offeree to pay the offeror's costs and expenses, including attorneys' fees, incurred with respect to the claim or claims from the date the last offer was made or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made, unless the court finds that requiring the payment of such costs and expenses would be manifestly unjust.

`(7) Attorney's fees under paragraph (6) shall be a reasonable attorney's fee attributable to the claim or claims involved, calculated on the basis of an hourly rate which may not exceed that which the court considers acceptable in the community in which the attorney practices law, taking into account the attorney's qualifications and experience and the complexity of the case, except that the attorney's fees under paragraph (6) may not exceed--

`(A) the actual cost incurred by the offeree for an attorney's fee payable to an attorney for services in connection with the claim or claims; or

`(B) if no such cost was incurred by the offeree due to a contingency fee agreement, a reasonable cost that would have been incurred by the offeree for an attorney's noncontingent fee payable to an attorney for services in connection with the claim or claims.

`(8) This subsection does not apply to any claim seeking an equitable remedy.'.

SEC. 4. RELIABILITY OF EVIDENCE.

Rule 702 of the Federal Rules of Evidence (28 U.S.C. App.) is amended--

(1) by inserting `(a) IN GENERAL- ' before `If', and

(2) by adding at the end the following:

`(b) ADEQUATE BASIS FOR OPINION- Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion--

`(1) is scientifically valid and reliable;

`(2) has a valid scientific connection to the fact it is offered to prove; and

`(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.

`(c) DISQUALIFICATION- Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.

`(d) SCOPE- Subdivision (b) does not apply to criminal proceedings.'.

SEC. 5. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) SECTION 2- The amendments made by section 2 shall take effect on the date of the enactment of this Act.

(b) SECTIONS 3 AND 4-

(1) IN GENERAL- Subject to paragraph (2), the amendments made by sections 3 and 4 shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act.

(2) APPLICATION OF AMENDMENTS- (A) The amendment made by section 3 shall apply only with respect to civil actions commenced after the effective date set forth in paragraph (1).

(B) The amendments made by section 4 shall apply only with respect to cases in which a trial begins after the effective date set forth in paragraph (1).

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

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PETER G. McCABE
SECRETARY

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CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

April 29, 1997

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

I write on behalf of the Judicial Conference's Standing Committee on Rules of Practice and Procedure concerning the *Civil Justice Fairness Act of 1997* (S. 79), which was introduced on January 21, 1997. The Act would amend Rule 702 of the Federal Rules of Evidence in an attempt to codify the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). S. 79 would also amend Rule 68 of the Federal Rules of Civil Procedure governing offer-of-judgment practices.

I urge you and your colleagues on the Committee on the Judiciary to reject the proposed amendment of Evidence Rule 702. The evidence standards set out in *Daubert* are not simple. The Advisory Committee on Evidence Rules has placed *Daubert* and its expanding progeny on the agenda of its next meeting in October 1997. The committee has refrained from considering amending Evidence Rule 702 to account for *Daubert* until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. *Daubert* caselaw has rapidly developed and now involves many areas not considered nor in issue in the 1993 case. Codifying *Daubert* now — as proposed by S. 79 — would create problems in applying it to fact patterns other than those specifically considered in *Daubert* and would adversely hamper developing law.

The rules committees take no position on the substance of the offer-of-judgment proposal in section 303 of S. 79. The committees, however, are concerned about the interrelations between legislation and the rulemaking process created by the Rules Enabling Act. Section 303 would directly amend Rule 68 of the Federal Rules of Civil Procedure. The Advisory Committee on Civil Rules has devoted substantial effort to reconsideration of Rule 68, and the committee would like to share the fruits of that consideration with you. Some of the most important choices to be made may involve substantive rights that are beyond the reach of the Enabling Act process. This may suggest that it would be better to adopt any new provisions by statute, leaving it to the Enabling Act process to adopt any appropriate conforming changes to Rule 68.

Offer-of-Judgment Proposal

Section 303 of the bill would amend Civil Rule 68 and shift the payment of attorney fees in a federal case when a party rejects a proposed settlement offer that turns out to be more favorable than the final judgment. The Judicial Conference considered similar legislation in 1994 (S. 585, 103d Cong. (1993)) and, on the recommendation of the Standing Rules Committee and the Advisory Committee on Civil Rules, declined to take a position.

In 1992 through 1994, the advisory committee studied various versions of proposed amendments to Rule 68 of the Federal Rules of Civil Procedure that would have provided an incentive for a party to accept a settlement offer, similar in some ways to the incentives in section 303 of S. 79. After careful study, the advisory committee concluded that every proposal under its consideration was seriously flawed. Several members of the advisory committee also were concerned that some features of the proposed amendments to Rule 68 were substantive and outside the scope of the rulemaking process. In the end, the advisory committee decided to defer indefinitely further action on the proposed amendments to Civil Rule 68.

The problems created by a partial shift from the American Rule that the parties bear their own attorney fees inevitably led to complex provisions that would be difficult to understand and apply, and that would lead to manipulation. The advisory committee was especially concerned with the mechanical operation of any modified offer-of-judgment procedure. The same concerns apply to the fee-shifting provision in S. 79. For example, it would be very difficult to calculate the differences between separate and successive settlement offers and the final judgment in cases involving multiple parties. A modified offer-of-judgment procedure would also be subject to substantial gamesmanship and abuse. There are no safeguards to prevent an extremely low offer at the outset solely to intimidate a risk-averse party from pursuing legitimate claims, particularly in a case when an attorney represents a resource-rich client. The above concerns, and many similar problems, dissuaded the advisory committee from proceeding on the proposed amendments to Rule 68.

Several other features of section 303 deserve comment. Rule 68 becomes applicable to all civil litigation brought to a federal court. It could be used against all plaintiffs, including risk-averse plaintiffs pursuing important civil rights, regulatory, and other federal question claims. It would provide an added incentive to remove state-court actions, so as to make an early but nominal offer that exposes a plaintiff to the risk of paying the full costs of the defense if the plaintiff loses on the merits.

The offer-of-judgment procedure always carries with it an element of gamesmanship. The opportunity for manipulation is enhanced by the subsequent-offer provisions in proposed Rule 68(f). A defendant, for example, has an incentive to make a nominal offer of settlement at the outset; the benefit of this offer would be preserved even after the defendant later makes a more realistic offer, and will entitle the defendant to full costs if the plaintiff loses on the merits. To avoid this risk, the plaintiff will be pressed to make a more favorable offer to the defendant if

the defendant's initial offer is more than nominal — under the terms of proposed (f), the defendant's rejection of the plaintiff's better offer apparently would vitiate the effects of the defendant's initial offer. The defendant, however, would remain free to make subsequent offers that might be above or below the plaintiff's initial offer. And so it would go. All of this not only runs up legal costs, but also can be especially intimidating to middle-class litigants who cannot really afford litigation and who have some assets to lose should a Rule 68 award be made.

Proposed changes to Rule 68 inevitably present tricky procedural and drafting questions. A few random illustrations are provided by this draft Rule 68. Subdivision (a) allows an offer to be made at any time. Literally, the offer could be made an hour before trial, or even during trial. In related fashion, subdivision (b) could be interpreted to allow acceptance at any time within 21 days after service of the offer — including, for a late offer, acceptance after judgment. Subdivision (c) provides for payment of "the actual costs and reasonable attorney fees incurred after the expiration of the time for accepting the offer, but only to the extent necessary to make the offeror whole for actual costs and reasonable attorney fees incurred as a consequence of the rejection of the offer." The "make the offeror whole" may be read to embrace the "benefit-of-the-judgment" concept: if the defendant offers $50,000, incurs $30,000 in costs and fees after the offer is rejected, and loses a $30,000 judgment, the defendant is only $10,000 worse off than it would have been if the offer had been accepted. It can be "made whole" by an award of $10,000. It is not clear whether this is the intent of (c). Nor is it clear how the "make whole" concept would apply to a plaintiff represented by a contingent-fee attorney.

Finally, revision of one of the Federal Rules of Civil Procedure often raises questions about the relationships to other Civil Rules. Here, for example, draft Rule 68(d)(1) provides for an award hearing "upon the motion of either party." But Civil Rule 54(d)(2)(B) provides explicit provisions for the time and content of attorney-fee motions. Without more, the provision in proposed Rule 68 (d)(1) is likely to be read to depend on the Rule 54 procedure. There is nothing wrong about that, but unless it is addressed it could lead to unforeseen and unintended results.

A substantial amount of research and data on the proposed amendments to Rule 68, including an extensive survey of attorneys conducted by the Federal Judicial Center, was compiled by the advisory committee. Copious records of the meetings of and papers presented to the advisory committee on the proposed Rule 68 amendments are available. If you believe that the information may be helpful in your deliberations, please contact the Administrative Office of the United States Courts and the materials will be forwarded to you. In addition, Judge Paul V. Niemeyer, United States Court of Appeals for the Fourth Circuit, and chairman of the Advisory Committee on Civil Rules, stands ready to provide you or your colleagues with a briefing on the issues.

The relationship between legislative and rulemaking considerations and prerogatives are uncertain and particularly complex regarding offer-of-judgment questions. The rules committees

urge you and your colleagues to consider the proper institutional roles when taking further action on section 303. We hope to continue this dialogue with you on this important matter.

Testimony by Experts (Evidence Rule 702)

The Chief Justice established and appointed members to the Judicial Conference Advisory Committee on Evidence Rules in early 1993. As part of a comprehensive review of all the evidence rules, the advisory committee discussed at length the rules governing testimony by experts. The committee unanimously concluded that amendment of Rule 702 would be counterproductive in light of the Supreme Court's *Daubert* decision. The committee also determined that it would be too early to assess fully the implications of that decision.

Many cases applying *Daubert* standards have only now reached the appellate court level for review. Significantly, the Supreme Court has recently granted certiorari in a case applying *Daubert* (*General Electric* v. *Joiner*, No. 96-188 (March 17, 1997)). A memorandum is enclosed, which was prepared by Professor Daniel J. Capra, the committee's reporter, that summarizes the cases applying the *Daubert* standards. In these cases, the fact patterns and types of "expert information" are different from those addressed by the Supreme Court in *Daubert*, and they pose different litigation and practical problems. Codifying *Daubert* as proposed by S. 79 would ignore the collected wisdom contained in the cases decided after *Daubert*. And in many cases this freezing of the law would retard appropriate developing caselaw. Under the rulemaking process, as envisioned under the Rules Enabling Act, proposed amendments to Evidence Rule 702 would be subjected to extensive scrutiny by the bar, bench, and public. And during the process the many different situations and circumstances under which expert testimony can become an issue would be ascertained and fully addressed.

Not only do the proposed amendments to Rule 702(b) in S. 79 fail to account for post-*Daubert* caselaw, but they also do not accurately codify *Daubert*. And if enacted, they would cause mischief. Under the proposed amendments, an opinion by an expert witness would be admissible only if "the techniques, methods, and theories used to formulate that opinion are generally accepted within the relevant scientific, medical, or technical field." This "general acceptance" requirement is comparable to the test originally set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which was relied on by courts prior to the enactment of the Federal Rules of Evidence. *Daubert* concluded that the *Frye* test — as it was commonly referred to — did not survive the Evidence Rules, and the Court relegated the former requirement to an illustrative list of factors that should be considered with other factors by the judge in a gatekeeper's role. S. 79 would undo much of *Daubert* and make the *Frye* test mandatory in every case.

The proposed amendments to Rule 702(b) extend to "scientific, technical or medical knowledge." The amendments do not encompass "other specialized knowledge," matters explicitly contained in the present Rule 702. By implication, the proposed amendments would bar extension of the *Daubert* standards to this important residual source of evidence — an issue

left open in *Daubert*. In fact, there is a split among the courts who have considered extending the *Daubert* standards to testimony involving "technical or specialized knowledge" in several reported cases. Under the proposed amendments in S. 79, the admissibility of expert witness testimony based on "other specialized knowledge," including testimony on certain forensic matters, police practices, economic methodology, polygraph examinations, real estate valuations, and design engineering would be uncertain. The apparent distinction drawn in S. 79 would create confusion, spawn satellite litigation, and fail to resolve the issue.

The proposed amendment to Rule 702(b) also contains a balancing test that would supersede the present Evidence Rule 403 balancing test, which *Daubert* expressly applied to Rule 702 testimony. Proposed Rule 702(b) requires that the proffered opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403"; instead of the existing test which permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

In addition to altering the *Daubert* standard, the superseding balancing test used in the proposed amendments to Rule 702(b) raises serious internal interpretational problems, because the proposed amendments would not apply to "other specialized knowledge." There is no apparent reason to apply different balancing tests to expert witness testimony arising from "scientific, technical or medical knowledge" versus "other specialized" knowledge. The distinction will generate unnecessary litigation attempting to discern differences in individual cases.

Section 302 of S. 79 would add a new Evidence Rule 702(c) on the qualifications of an expert. The provision addresses matters already covered by the present Rule 702, which leaves the expert's qualifications to the determination of the court based on factors similar to those proposed by S. 79. Similar provisions on the same subject in the same rule will cause unnecessary confusion and lead to satellite litigation.

A new Evidence Rule 702(d) would also be added by S. 79 which would exclude testimony from an expert who is entitled to receive "compensation contingent on the legal disposition of any claim with respect to which such testimony is offered." The need for the provision is unclear. Contingent fee expert testimony is prohibited in most districts under disciplinary rules regulating professional conduct. Unlike disciplinary rules, the proposed amendments to Rule 702(d) would regulate and penalize contingent fee expert testimony by excluding proffered evidence. Neither the provision's advantages nor adverse consequences are fully understood. For example, the relationship between the new rule and the numerous statutory fee-shifting provisions is unclear.

Although less likely, disputes may also arise concerning large corporations' in-house experts whose livelihoods may depend on their past records in testifying before the courts or experts testifying in cases litigated on a contingency attorney-fee basis. The entire question of

what "entitled to receive compensation" means in the proposed Rule 702(d) is a matter that needs careful attention and study.

Conclusions

The Advisory Committee on Civil Rules has studied proposed amendments to Civil Rule 68 for many years. It identified serious problems with every proposal under consideration. Although the rules committees take no position on the substance of the offer-of-judgment proposal in section 303 of S. 79, we would welcome the opportunity to continue an ongoing dialogue with you and your colleagues on this matter.

Revision of evidence rules governing the admission of expert testimony in civil and criminal cases involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Such input is now most useful when the courts and the bar have had experience in applying *Daubert* to many different circumstances. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled under the Act's rulemaking process. The Advisory Committee on Evidence Rules has initiated the rulemaking process to amend Evidence Rule 702.

We urge you to defer acting on the proposed amendments to Evidence Rule 702 and allow the rulemaking process to proceed.

Sincerely yours,

Alicemarie H. Stotler
United States District Judge

Enclosures

cc: Senate Committee on the Judiciary

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Civil Justice Fairness Act of 1997 (Introduced in the Senate)

SEC. 302. HONESTY IN EVIDENCE.

Rule 702 of the Federal Rules of Evidence is amended--

(1) by inserting `(a) IN GENERAL- ' before `If', and

(2) by adding at the end the following:

`(b) ADEQUATE BASIS FOR OPINION-

`(1) Testimony in the form of an opinion by a witness that is based on scientific, technical or medical knowledge shall be inadmissible in evidence unless the court determines that such opinion--

`(A) is based on scientifically valid reasoning;

`(B) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403; and

`(C) the techniques, methods, and theories used to formulate that opinion are generally accepted within the relevant scientific, medical, or technical field.

`(2) In determining whether an opinion satisfies conditions in paragraph (1), the court shall consider--

`(A) whether the opinion and any theory on which it is based have been experimentally tested;

`(B) whether the opinion has been published in peer-review literature; and

`(C) whether the theory or techniques supporting the opinion are sufficiently reliable and valid to warrant their use as support for the proffered opinion.

`(c) EXPERTISE IN THE FIELD- Testimony in the form of an opinion by a witness that is based on scientific, technical, or medical knowledge shall be inadmissible in evidence unless the witness's knowledge, skill, experience, training, education, or other expertise lies in the particular field about which such witness is testifying.

`(d) DISQUALIFICATION- Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which such testimony is offered.'.

SEC. 303. FAIR SHIFTING OF COSTS AND REASONABLE ATTORNEY FEES.

(a) IN GENERAL- Rule 68 of the Federal Rules of Civil Procedure is amended to read as follows:

`Rule 68. Offer of judgment or settlement

`(a) OFFER OF JUDGMENT OR SETTLEMENT- At any time, any party may serve upon an adverse party a written offer to allow judgment to be entered against the offering party or to settle a case for the money, property, or to such effect as the offer may specify, with costs then accrued.

`(b) ACCEPTANCE OR REJECTION OF OFFERS- If within 21 days after service of the offer, or such additional time as the court may allow, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk, or the court if so required, shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs and reasonable attorney fees.

`(c) DETERMINATION OF FINAL JUDGMENTS- If the judgment finally obtained is not more favorable to the offeree than the offer, then the offeree shall pay the actual costs and reasonable attorney fees incurred after the expiration of the time for accepting the offer, but only to the extent necessary to make the offeror whole for actual costs and reasonable attorney fees incurred as a consequence of the rejection of the offer. When comparing the amount of any offer of settlement to the amount of a final judgment actually awarded, any amount of the final judgment representing interest subsequent to the date of the offer in settlement shall not be considered.

`(d) DETERMINATION OF COSTS- (1) Upon the motion of either party, the court shall hold a hearing at which the parties may prove costs and reasonable attorney fees, and, upon hearing the evidence, the court shall enter an appropriate order or judgment under this section.

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`(d) DETERMINATION OF COSTS- (1) Upon the motion of either party, the court shall hold a hearing at which the parties may prove costs and reasonable attorney fees, and, upon hearing the evidence, the court shall enter an appropriate order or judgment under this section.

`(2) Allowable costs under this rule shall include--

`(A) filing, motion, and jury fees;

`(B) juror food and lodging while the jury is kept together during trial and after the jury retires for deliberation;

`(C) taking, videotaping, and transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions;

`(D) service of process by a public officer, registered process server, or other means;

`(E) expenses of attachment;

`(F) premiums on necessary surety bonds;

`(G) ordinary witness fees;

`(H) fees of expert witnesses who are not regular employees of any party;

`(I) transcripts of court proceedings;

`(J) attorney fees, when authorized by contract or law;

`(K) court reporters' fees;

`(L) models and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact; and

`(M) any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

`(3) Unless expressly authorized by law, allowable costs under this rule shall not include--

`(A) investigation expenses in preparing the case for trial;

`(B) postage, telephone, facsimile, and photocopying charges, except for exhibits;

`(C) costs in investigation of jurors or in preparation for voir dire; and

`(D) transcripts of court proceedings not ordered by the court.

`(e) DETERMINATION OF LIABILITY- When the liability of one party to another has been determined by verdict of order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial, except that a court may shorten the period of time an offeree may have to accept an offer, but in no case to less than 10 days.

`(f) SUBSEQUENT OFFERS- The fact that an offer is made but not accepted does not preclude a subsequent offer. An offeror shall not be deprived of the benefits of an offer by a subsequent offer, unless and until the offeror fails to accept an offer more favorable than the judgment obtained.

`(g) NONMONETARY AWARDS- If the judgment obtained includes nonmonetary relief, a determination that it is more favorable to the offeree than was the offer shall be made only when the terms of the offer included such nonmonetary relief.

`(h) REDUCTION OF AWARD TO AVOID UNDUE HARDSHIP- A court may reduce an award of costs and reasonable attorney fees by up to 50 percent of the award if the court finds special circumstances that make a full award of attorney fees and costs unjust.

`(i) REASONABLE ATTORNEY'S FEES- For purposes of this rule, a reasonable attorney's fee shall be calculated on the basis of an hourly rate which shall not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and experience and the complexity of the case.

`(j) APPLICABILITY- This rule shall not apply to class and derivative actions under rules 23, 23.1, and 23.2.'.

(b) APPLICATION- The provisions of rule 68 of the Federal Rules of Civil Procedure (as amended by subsection (a) of this section) shall supersede any statute that--

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(1) provides for the shifting of costs by which a specified party makes payment; and

(2) does not provide for the shifting of costs by which such party may receive payment.

TITLE IV--HEALTH CARE LIABILITY REFORM

SEC. 401. DEFINITIONS.

In this title:

(1) CLAIMANT- The term `claimant' means any person who asserts a health care liability claim or who files a health care liability action, including a person who asserts or claims a right to legal or equitable contribution, indemnity or subrogation, arising out of a health care liability claim or action, and any person on whose behalf such a claim is asserted or such an action is brought, whether deceased, incompetent, or a minor.

(2) ECONOMIC DAMAGES- The term `economic damages' has the same meaning as defined under section 101(4).

(3) HEALTH CARE LIABILITY ACTION- The term `health care liability action' means a civil action brought in a Federal or State court, against a health care provider, an entity which is obligated to provide or pay for health benefits under any health plan (including any person or entity acting under a contract or arrangement to provide or administer any health benefit), or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product, in which the claimant alleges a claim (including third party claims, cross claims, counter claims, or distribution claims) based upon the provision of (or the failure to provide or pay for) health care services or the use of a medical product, regardless of the theory of liability on which the claim is based, or the number of plaintiffs, or defendants or causes of action.

SEC. 402. LIMITATION ON NONECONOMIC DAMAGES IN HEALTH CARE LIABILITY ACTIONS.

(a) MAXIMUM AWARD OF NONECONOMIC DAMAGES-

(1) IN GENERAL- In any health care liability action, in addition to actual damages or

Reporter's Note: Rule 68

A draft Rule 68, inspired by an article by Judge Schwarzer, has been on the Committee Agenda for some time. The draft and the portion of the April, 1994 Minutes summarizing the most recent discussion is attached. The topic was held for further discussion in the expectation that the Federal Judicial Center would be able to complete its analysis of the survey results that were presented in tentative form. It also was thought that further study might be given to the possibility of alternative means of increasing the sanctions for rejecting a judgment-beating offer.

The first decision to be made is whether to pursue Rule 68 any further. There are substantial objections to the approach taken in the draft, not least of them the complexity required to implement a "capped-benefit-of-the-judgment" rule. It would be simple to leave Rule 68 as it is, a tool seldom used in ordinary litigation but rather frequently used by defendants in cases where it may defeat a statutory attorney-fee recovery. Although offer-of-judgment legislation is occasionally introduced, there does not appear to be any current risk that failure to act now will encourage prompt legislative response. If it be the Committee's judgment that the present rule is as good as we can get, that judgment of itself may carry some weight in legislative deliberations.

If Rule 68 is to be pursued, there is at least one easily drafted and rather easily defended approach. Rule 68 could be abrogated. There is a strong argument that it has become perverse. It has little effect in ordinary litigation because it is limited to offers by defendants, it provides no sanction if the plaintiff takes nothing, and it provides only a modest sanction if the plaintiff fails to win a judgment more favorable than the offer. In litigation under fee-shifting statutes, on the other hand, it does have an effect — and the effect is to defeat the statutory policy to encourage plaintiffs to vindicate not only their own private rights but also broader social interests. This approach could be bolstered by pointing to the concerns that underlie the approach inspired by Judge Schwarzer. The deterrent effect of a rule that, without a cap, might leave a plaintiff out-of-pocket could be severe. The opportunity to capture both the full benefits of the judgment and the full expenditure of the post-offer fees that produced the judgment, without accounting for the difference between the offer and the judgment, could overcompensate in comparison to the result of accepting the offer. Yet implementing a rule that accounts for these concerns will be difficult at best.

An almost equally simple approach would be to amend Rule 68 to overrule Marek v. Chesny, 1985, 473 U.S. 1. Statutory attorney fees would not be affected by Rule 68, except to the extent that a Rule 68 offer might be considered under the fee-shifting statute itself in determining whether, and how far, any party is a "prevailing party." Many people find the dissent in Marek v. Chesny more persuasive than the Court's opinion. At least one distinguished observer, however, has concluded that the Marek

decision has a beneficial effect. Some litigation may be prolonged more by the hope of increasing the statutory fee award than by the expectation of doing better than a settlement offer of all the relief the plaintiff needs or can realistically expect. Perhaps it is not enough to rely on interpretation of the fee-shifting statute itself to avoid this risk.

More complicated alternatives tend to cluster around a single theme: Rule 68 should be made bilateral, it should provide a sanction that encourages both plaintiffs and defendants to make and consider offers of judgment, and the sanction should not be as powerful as an open-ended shift of attorney fees. Suggestions include an award of 50% of post-offer attorney fees or an award of expert witness fees. A variety of approaches have been taken in several states. The Connecticut Rules of Court, § 344, provide for payment of post-offer costs, including "reasonable attorney's fees in an amount not to exceed $350." Michigan GCR 2.405 is the most inventive approach found: the sanction is "actual costs," including attorney fees unless that is not in the interest of justice. If a mediation award and an offer of judgment both have been rejected, costs run from the time of the earlier event if costs are available under both, but if different results follow then the later-in-time prevails. An offeree who has not made a counteroffer may not recover actual costs — a device calculated to encourage offers from both parties. If offers are made by both parties, the judgment is compared to the "average offer" [the rule formula provides only for the case of one offer by each side]. I have made only casual inquiry among Michigan sources — one plaintiff's attorney who regards the rule as an abomination, and one circuit court judge who thinks it works pretty well. The 1970 Staff Notes to Ohio Civil Rule 68 state that Rule 68 offers of judgment "may no longer be used in a proceeding to determine costs. The use of offers of judgment as the basis of cost proceedings has in the past often had a one-sided, coercive effect. Therefore, Federal Rule 68 * * * has not been adopted."

The current draft can be readily adapted to different sanctions. Most possible alternatives would make it simpler. It would be very helpful, however, to have a theory as well as a sanction as the basis for further drafting.

Rule 68. Offer of Settlement

(a) Offers. A party may make an offer of settlement to another party.

(1) The offer must:

(A) be in writing and state that it is a Rule 68 offer;

(B) be served at least 30 days after the summons and complaint if the offer is made to a defendant;

(C) [not be filed with the court] {be filed with the court only as provided in (b)(2) or (c)(2)};

(D) remain open for [a stated period of] at least 21 days unless the court orders a different period; and

(E) specify the relief offered.

(2) The offer may be withdrawn by writing served on the offeree before the offer is accepted. [Withdrawal nullifies the offer for all purposes.]

(b) Acceptance; Disposition.

(1) An offer made under (a) may be accepted by a written notice served [on the offeror] while the offer remains open.

(2) A party may file {the} [an accepted] offer, notice of acceptance, and proof of service. The clerk or court must then enter the judgment specified in the offer. [But the court may refuse to enter judgment if it finds that the judgment is unfair to another party or contrary to the public interest.]

(c) Expiration.

(1) An offer expires if it is not withdrawn or accepted before the end of the period set under (a)(1)(D).

(2) Evidence of an expired offer is admissible only in a proceeding to determine costs and attorney fees under Rule 54(d).

(d) Successive Offers. A party may make an offer of settlement after making [, rejecting,] or failing to accept an earlier offer. A successive offer that expires does not deprive a party of {remedies} [sanctions] based on an earlier offer.

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy} [sanction] to the offeror.

(1) If the offeree is not entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

(A) costs incurred by the offeror after the offer expired; and

(B) reasonable attorney fees incurred by the offeror after the offer expired, limited as follows:

(i) the monetary difference between the offer and judgment must be subtracted from the fees; and

(ii) the fee award must not exceed the money amount of the judgment.

(2) If the offeree is entitled to a statutory award of attorney fees, the {remedy} [sanction] must include:

(A) costs incurred by the offeror after the offer expired; and

(B) denial of attorney fees incurred by the offeree after the offer expired.

(3) (A) The court may reduce the {remedy}[sanction] to avoid undue hardship [or because the judgment could not reasonably have been expected at the time the offer expired].

(B) No {remedy may be given} [sanction may be imposed] on disposition of an action by acceptance of an offer under this rule or other settlement.

(4) (A) A judgment for a party demanding relief is more favorable than an offer to it:

(i) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] — exceeds the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment includes all the nonmonetary relief offered, or substantially all the nonmonetary relief offered and additional relief.

(B) A judgment is more favorable to a party opposing relief than an offer to it:

(i) if the amount awarded — including the costs, attorney fees, and other amounts awarded for the period before the offer {was served} [expired] — is less than the monetary award that would have resulted from the offer; and

(ii) if nonmonetary relief is demanded and the judgment does not include [substantially] all the nonmonetary relief offered.

(f) Nonapplicability. This rule does not apply to an offer made in an action certified as a class or derivative action under Rule

23, 23.1, or 23.2.

Fee statute alternative

(e) {Remedies}[Sanctions]. Unless the final judgment is more favorable to the offeree than an expired offer the offeree must pay a {remedy}[sanction] to the offeror.

(1) The {remedy}[sanction] must include:

(A) costs incurred by the offeror after the offer expired; and

(B) reasonable attorney fees incurred by the offeror after the offer expired, limited as follows:

(i) the monetary difference between the offer and judgment must be subtracted from the fees; and

(ii) the fee award must not exceed the money amount of the judgment.

(2) (A) The court may reduce the {remedy}[sanction] to avoid undue hardship [or because the judgment could not reasonably have been expected at the time the offer expired].

(B) No {remedy may be given}[sanction may be imposed]:

(i) against a party that otherwise is entitled to a statutory award of attorney fees;

(ii) on disposition of an action by acceptance of an offer under this rule or other settlement.

(e)(2)(B)(i) might take less protective forms: No remedy may be given:

Costs but not fee shifting

(i) that requires payment of attorney fees by a party that is entitled to a statutory award of attorney fees; or

Statutory fees not affected

(i) that affects the statutory right of a party to an award of attorney fees;

COMMITTEE NOTE

Former Rule 68 has been properly criticized as one-sided and largely ineffectual. It was available only to parties defending against a claim, not to parties making a claim. It provided little inducement to make or accept an offer since in most cases the only penalty suffered by declining an offer was the imposition of the typically insubstantial taxable costs subsequently incurred by the offering party. Greater incentives existed after the decision in *Marek v. Chesny*, 473 U.S. 1 (1985), which ruled that a plaintiff who obtains a positive judgment less than a defendant's Rule 68 offer loses the right to collect post-offer attorney fees provided by a statute as "costs" to a prevailing plaintiff. The decision in the Marek case, however, was limited to cases affected by such fee-shifting statutes. It also provoked criticism on the ground that it was inconsistent with the statutory policies that favor special categories of claims with the right to recover fees.

Earlier proposals were made to make Rule 68 available to all parties and to increase its effects by authorizing attorney fee sanctions. These proposals met with vigorous criticism. Opponents stressed the policy considerations involved in the "American Rule" on attorney fees. They emphasized that the opportunity of all parties to attempt to shift fees through Rule 68 offers could produce inappropriate windfalls and would create unequal pressures and coerce unfair settlements because parties often have different levels of knowledge, risk-averseness, and resources.

The basis for many of the changes made in the amended Rule 68 is provided in an article by Judge William W. Schwarzer, Fee-Shifting Offers of Judgment — an Approach to Reducing the Cost of Litigation, 76 Judicature 147 (1992).

The amended rule allows any party to make a Rule 68 offer. The incentives for early settlement are increased by increasing the consequences of failure to win a judgment more favorable than an expired offer. A plaintiff is liable for post-offer costs even if the plaintiff takes nothing, a result accomplished by removing the language that supported the contrary ruling in Delta Air Lines, Inc. v. August, 1981, 450 U.S. 346. Post-offer attorney fees are shifted, subject to two limits. The amount of post-offer attorney fees is reduced by the difference between the offer and the judgment. In addition, the attorney fee award cannot exceed the amount of the judgment. A plaintiff who wins nothing pays no attorney fees. A defendant pays no more in fees than the amount of the judgment.

A plaintiff's incentive to accept a defendant's Rule 68 offer

includes the incentive that applies to all offers – the risk that trial will produce no more, and perhaps less. It also includes the fear of Rule 68 consequences; the defendant's post-offer attorney fees may reduce or obliterate whatever judgment is won, leaving the plaintiff with all of its own expenses and the defendant's post-offer costs. A defendant's incentive to accept a plaintiff's Rule 68 offer is similar: not only must it pay a larger judgment, but it can be held to pay post-offer costs and the plaintiff's post-offer attorney fees up to the amount of the judgment.

Attorney fee shifting is limited to reflect the difference between the offer and the judgment. The difference is treated as a benefit accruing to the fee expenditure. If fees of $40,000 are incurred after the offer and the judgment is $15,000 more favorable than the offer, for example, the maximum fee award is reduced to $25,000.

Subdivision (a). Several formal requirements are imposed on the Rule 68 offer process. Offers may be made outside of Rule 68 at any time before or after an action is commenced. The requirement that the Rule 68 offer be in writing and state that it is made under Rule 68 is designed to avoid claims for awards based on less formal offers that may not have been recognized as paving the way for an award.

A Rule 68 offer is not to be filed with the court until it is accepted. The offeror should not be influenced by concern that an unaccepted offer may work to its disadvantage in later proceedings.

The requirement that an offer remain open for at least 21 days is intended to allow a reasonable period for evaluation by the recipient. Consquences cannot fairly be imposed if inadequate time is allowed for evaluation. Fees and costs are shifted only from the time the offer expires; see subdivision (e)(1) and (2). A party who wishes to increase the prospect of acceptance may set a longer period. The court may order a different period. As one example, it may not be fair to require a defendant to act on an offer early in the proceedings, under threat of Rule 68 consequences, without more time to gather information. If the court orders that the period for accepting be extended, the offer can be withdrawn under paragraph (2). The opportunity to withdraw is important for the same reasons as the power to extend – developing information may make the offer seem less attractive to the plaintiff just as it may make the offer seem more attractive to the defendant. As another example, the 21-day period may foreclose offers close to trial; the court can grant permission to shorten the period to make an offer possible.

Paragraph (2) establishes power to withdraw the offer before acceptance. This power reflects the fact that the apparent worth of a case can change as further information is developed. It also enables a party to retain control of its own offer in face of an order extending the time for acceptance. Withdrawal nullifies the

offer — consequences cannot be based upon a withdrawn offer.

Subdivision (b). An offer can be accepted only during the period it remains open and is not withdrawn. Acceptance requires service on the offeror. An acceptance is effective notwithstanding an attempt to withdraw the offer if the acceptance is served on the offeror before the withdrawal is served on the offeree. If it is uncertain whether acceptance or withdrawal was served first, the doubt should be resolved by giving effect to the withdrawal, since the parties remain free to make successive Rule 68 offers or to settle outside the Rule 68 process.

Once an offer is accepted, judgment may be entered by the clerk or court according to the nature of the offer. Ordinarily the clerk should enter judgment for money or recovery of clearly identified property. Action by the court is more likely to be required for entry of an injunction or declaratory relief.

The court has the same power to refuse to enter judgment under Rule 68 as it has to refuse judgment on agreement of the parties in other settings. An injunction may be found contrary to the public interest, for example, if it requires the court to enforce terms that the court feels unable to supervise. A settled decree may affect public interests in broader terms, particularly in actions such as those to control the conduct of public institutions, protect the environment, or regulate employment practices. The parties cannot force the court to adopt and enforce a decree that defeats important interests of nonparties. A Rule 68 judgment also might be unfair to other parties in a multiparty action. An extreme illustration of unfairness would be an agreement to allocate all of a limited fund to one party, excluding others. Less extreme settings also might justify refusal to enter judgment.

Subdivision (c). An offer expires if it is not withdrawn or accepted.

An expired offer may be used only for the purpose of providing remedies under subdivision (e). The procedures of Rule 54(d) govern requests for costs or attorney fees.

Subdivision (d). Successive offers may be made by any party without losing the opportunity to win remedies based on an earlier expired offer, and without defeating exposure to remedies based on failure to accept an offer from another party. This system encourages the parties to make early Rule 68 offers, which may promote early settlement, without losing the opportunity to make later Rule 68 offers as developing familiarity with the case helps bring together estimates of probable value. It also encourages later Rule 68 offers following expiration of earlier offers by preserving the possibility of winning remedies based on an earlier offer.

The operation of the successive offers provision is illustrated by Example 4 in the discussion of subdivision (e).

Subdivision (e). Remedies are mandatory, unless reduced or excused under paragraph (3).

Final judgment. The time for determining remedies is controlled by entry of final judgment. In most settings finality for this purpose will be determined by the tests that determine finality for purposes of appeal. Complications may emerge, however, in actions that involve several parties and claims. A final judgment may be entered under Rule 54(b) that disposes of one or more claims between the offeror and offeree but leaves open other claims between them. Such a judgment can be the occasion for invoking Rule 68 remedies if it finally disposes of all matters involved in the Rule 68 offer. It also is possible that a Rule 54(b) judgment may support Rule 68 remedies even though it does not dispose of all matters involved in the offer. A plaintiff's $50,000 offer to settle all claims, for example, might be followed by a $75,000 judgment for the plaintiff on two claims, leaving two other claims to be resolved. Usually it will be better to defer the determination of remedies to a single proceeding upon completion of the entire action. If there is a special need to determine remedies promptly, however, an interim award may be made as soon as it is inescapably clear that the final judgment will be more favorable than the offer.

Costs and fees. Remedies are limited to costs and attorney fees. Other expenses are excluded for a variety of reasons. In part, the limitation reflects the policies that underlie the limits of attorney fee awards discussed below. In addition, the limitation reflects the great variability of other expenses and the difficulty of determining whether particular expenses are reasonable.

Costs for the present purpose include all costs routinely taxable under Rule 54(d). Attorney fees are treated separately. This provision supersedes the construction of Rule 68 adopted in *Marek v. Chesny*, 473 U.S. 1 (1985), under which statutory attorney fees are treated as costs for purposes of Rule 68 if, but only if, the statute treats them as costs.

Several limits are placed on remedies based on attorney fees incurred after a Rule 68 offer expired. The fees must be reasonable. The award is reduced by deducting from the amount of reasonable fees the monetary difference between the offer and the judgment. To the extent that the judgment is more favorable to the offeror than the offer, it is fair to attribute the difference to the fee expenditure. This reduction is limited to monetary differences. Differences in specific relief are excluded from this reduction because the policy underlying the benefit-of-the-judgment rule is not so strong as to support the difficulties frequently encountered in setting a monetary value on specific relief.

The attorney fee award also is limited to the amount of the

judgment. A claimant's money judgment can be reduced to nothing by a fee award, but out-of-pocket liability is limited to costs. A defending party's exposure to fee shifting is made symmetrical by limiting the stakes to the money amount of the judgment. If no monetary relief is awarded, attorney fee remedies are not available to either party. This result not only avoids the difficulties of setting a monetary value on specific relief but also diminishes the risk of deterring litigation involving matters of public interest.

Several examples illustrate the working of this "capped benefit-of-the-judgment" attorney fee provision.

Example 1. (No shifting) After its offer to settle for $50,000 is not accepted, the plaintiff ultimately recovers a $25,000 judgment. Rejection of this offer would not result in any award because the judgment is more favorable to the offeree than the offer. Similarly, there would be no award based on an offer of $50,000 by the defendant and a $75,000 judgment for the plaintiff.

Example 2. (Shifting on rejection of plaintiff's offer) After the defendant rejects the plaintiff's $50,000 offer, the plaintiff wins a $75,000 judgment. (a) The plaintiff incurred $40,000 of reasonable post-offer attorney fees. The $25,000 benefit of the judgment is deducted from the fee expenditure, leaving an award of $15,000. (b) If reasonable post-offer attorney fees were $25,000 or less, no fee award would be made. (c) If reasonable post-offer fees were $110,000, deduction of the $25,000 benefit of the judgment would leave $85,000; the cap that limits the award to the amount of the judgment would reduce the attorney fee award to $75,000.

Example 3. (Shifting on rejection of defendant's offer) After the plaintiff rejects the defendant's $75,000 offer, the plaintiff wins a $50,000 judgment. (a) The defendant incurred $40,000 of reasonable post-offer attorney fees. The $25,000 benefit of the judgment is deducted from the fee expenditure, leaving a fee award of $15,000. (b) If reasonable post-offer attorney fees were $25,000 or less, no fee award would be made. (c) If reasonable post-offer fees were $110,000, deduction of the $25,000 benefit of the judgment would leave $85,000; the cap that limits the fee award to the amount of the judgment would reduce the attorney fee award to $50,000. The plaintiff's judgment would be completely offset by the fee award, and the plaintiff would remain liable for post-offer costs.

Example 4. (Successive offers) After a defendant's $50,000 offer lapses, the defendant makes a new $60,000 offer that also lapses. (a) A judgment of $50,000 or less requires an award based on the amount and time of the $50,000 offer. (b) A judgment more than $50,000 but not more than $60,000 requires an award based on the amount and time of the $60,000 offer. This approach preserves the incentive to make a successive offer by preserving the

potential effect of the first offer.

Example 5. (Counteroffers) The effect of each offer is determined independently of any other offer. Counteroffers are likely to be followed by judgments that entail no award or an award against only one party. The plaintiff, for example, might make an early $25,000 offer, followed by $20,000 of fee expenditures before a $40,000 offer by the defendant, additional $15,000 fee expenditures by each party, and judgment for $42,000. The plaintiff's $25,000 offer is more favorable to the defendant than the judgment, so the plaintiff is entitled to a fee award. The $35,000 of post-offer fees is reduced by the $17,000 benefit of the judgment, netting an award of $18,000. The defendant is not entitled to any award.

In some circumstances, however, counteroffers can entitle both parties to awards. Offers made and not accepted at different stages in the litigation may fall on both sides of the eventual judgment. Each party receives the benefit of its offer and pays the consequences for failing to accept the offer of the other party. The awards are offset, resulting in a net award to the party entitled to the greater amount. As an example, a plaintiff might make an early $25,000 offer, then incur reasonable attorney fees of $5,000 before the defendant's $60,000 offer, after which each party incurred reasonable attorney fees of $25,000. A judgment for $50,000 would support a fee award for each party. The $50,000 judgment is more favorable to the plaintiff than the plaintiff's expired offer. The $50,000 is less favorable to the plaintiff than the defendant's expired offer. The attorney fee award to the plaintiff would be reduced to $5,000 by subtracting the $25,000 benefit of the judgment from the $30,000 of post-offer fees. The attorney fee award to the defendant would be reduced first to $15,000 by subtracting the $10,000 benefit of the judgment from the $25,000 of post-offer fees. The $15,000 award to the defendant would be set off against the $5,000 award to the plaintiff, leaving a $10,000 net award to the defendant.

Example 6. (Counterclaims) Cases involving claims and counterclaims for money alone fall within the earlier examples. Each party controls the terms of any offer it makes. If no offer is accepted, the final judgment is compared to the terms of each offer. (a) The defendant's offer to pay $10,000 to the plaintiff to settle both claim and counterclaim is followed by a $25,000 award to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $15,000 to the defendant. This net is $25,000 more favorable to the defendant than its offer. If the defendant's reasonable post-offer attorney fees were $35,000, the attorney fee award payable to the defendant is $10,000. (b) If the defendant's reasonable post-offer attorney fees in example (a) had been $45,000, the attorney fee award payable to the defendant would be

limited to the $15,000 amount of the net award on the merits. (c) The defendant's offer to accept $10,000 from the plaintiff to settle both claim and counterclaim is followed by an award of nothing to the plaintiff on its claim and a $40,000 award to the defendant on its counterclaim. The result is treated as a net award of $40,000 to the defendant, which is $30,000 more favorable to the defendant than its offer.

Contingent Fees. The fee award to a successful plaintiff represented on a contingent fee basis should be calculated on a reasonable hourly rate for reasonable post-offer services, not by prorating the contingent fee. The attorney should keep time records from the beginning of the representation, not for the post-offer period alone, as a means of ensuring the reasonable time required for the post-offer period.

Hardship or surprise. Rule 68 awards may be reduced to avoid undue hardship or reasonable surprise. Reduction may, as a matter of discretion, extend to denial of any award. As an extreme illustration of hardship, a severely injured plaintiff might fail to accept a $100,000 offer and win a $100,000 judgment following a reasonable attorney fee expenditure of $100,000 by the defendant. A fee award to the defendant that would wipe out any recovery by the plaintiff could be found unfair. Surprise is most likely to be found when the law has changed between the time an offer expired and the time of judgment. Later discovery of vitally important factual information also may establish that the judgment could not reasonably have been expected at the time the offer expired.

Statutory Fee Entitlement. Rule 68 consequences for a party entitled to statutory attorney fees have been governed by the decision in *Marek v. Chesny*, 473 U.S. 1 (1985). Revised Rule 68 continues to provide that an otherwise existing right to a statutory fee award is cut off as to fees incurred after expiration of an offer more favorable than the judgment. The only additional Rule 68 consequence for a party entitled to statutory fees is liability for costs incurred by the offeror after the offer expired. The fee award provided by subdivision (e)(1)(B) for other cases is not available. These rules establish a balance between the policies underlying Rule 68 and statutory attorney fee provisions. It is desirable to encourage early settlement in cases governed by statutory attorney fee provisions just as in other cases. Effective incentives remain important. The award of an attorney fee against a party entitled to recover statutory fees, however, could interfere with the legislative determination that the underlying claim deserves special protection. The balance struck by Rule 68 does not address the question whether failure to win a judgment more favorable than an expired offer should be taken into account in determining whether any particular statute supports an award for fees incurred before expiration of the offer.

Settlement. All potential effects of a Rule 68 offer expire upon acceptance of a successive Rule 68 offer or other settlement. This rule makes it easier to reach a final settlement, free of uncertainty as to the prospect of Rule 68 consequences. The prospect of Rule 68 consequences remains, however, as one of the elements to be considered by the parties in determining the terms of settlement.

Judgment more favorable. Many complications surround the determination whether a judgment is more favorable than an offer, even in a case that involves only monetary relief. The difficulties are illustrated by the provisions governing offers to a party demanding relief. The comparison should begin with the exclusion of costs, attorney fees, and other items incurred after expiration of the offer. The purpose of the offer process is to avoid such costs. Costs, attorney fees, and other items that would be awarded by a judgment entered at the expiration of the offer, on the other hand, should be included. An offer that matches only the award of damages is not as favorable as a judgment that includes additional money awards. Beyond that point, comparison of a money judgment with a money offer depends on the details of the offer, which are controlled by the offeror. An offer may specify separate amounts for compensation, costs, attorney fees, and other items. The total amount of the offer controls the comparison. There is little point in denying a Rule 68 award because the offer was greater than the final judgment in one dimension and smaller — although to no greater extent — in another dimension. If the offer does not specify separate amounts for each element of the final judgment and award, the same comparison is made by matching any specified amounts and treating the unspecified portion of the offer as covering all other amounts. For example, a defendant's lump-sum offer of $50,000 might be followed by a $45,000 judgment for the plaintiff. The judgment is more favorable to the plaintiff than the offer if costs, attorney fees, and other items awarded for the period before the offer expired total more than $5,000.

Comparison of the final judgment to successive offers requires that the judgment be treated as if entered at the time of each offer and adjusted to reflect any Rule 68 award that would have been made had judgment been entered at that time. To illustrate, a plaintiff's $25,000 offer might be followed by reasonable attorney fees of $15,000 before a defendant's $35,000 offer, followed by a $30,000 judgment. The judgment is more favorable to the plaintiff than the offer because a $30,000 judgment at the time of the offer would have supported a $10,000 fee award to the plaintiff. The judgment and fee award together would have been $40,000, $5,000 more than the offer.

Nonmonetary relief further complicates the comparison between offer and judgment. A judgment can be more favorable to the offeree even though it fails to include every item of nonmonetary

relief specified in the offer. In an action to enforce a covenant not to compete, for example, the defendant might offer to submit to a judgment enjoining sale of 30 specified items in a two-state area for 15 months. A judgment enjoining sale of 29 of the 30 specified items in a five-state area for 24 months is more favorable to the plaintiff if the omitted item has little importance to the plaintiff. Any attempt to undertake a careful evaluation of significant differences between offer and judgment, on the other hand, would impose substantial burdens and often would prove fruitless. The standard of comparison adopted by subdivision (e)(4)(A)(ii) reduces these difficulties by requiring that the judgment include substantially all the nonmonetary relief in the offer and additional relief as well. The determination whether a judgment awards substantially all the offered nonmonetary relief is a matter of trial court discretion entitled to substantial deference on appeal.

The tests comparing the money component of an offer with the money component of the judgment and comparing the nonmonetary component of the offer with the nonmonetary component of the judgment both must be satisfied to support awards in actions for both monetary and nonmonetary relief. Gains in one dimension cannot be compared to losses in another dimension.

The same process is followed, in converse fashion, to determine whether a judgment is more favorable to a party opposing relief.

There is no separate provision for offers for structured judgments that spread monetary relief over a period of time, perhaps including conditions subsequent that discharge further liability. The potential difficulties can be reduced by framing an offer in alternative terms, specifying a single sum and allowing the option of converting the sum into a structured judgment. If only a structured judgment is offered, however, the task of comparing a single-sum judgment with a structured offer is not justified by the purposes of Rule 68, even when a reasonable actuarial value can be attached to the offer. If applicable law permits a structured judgment after adjudication, however, it may be possible to compare the judgment with a single sum offer. Should a structured judgment offer be followed by a structured judgment, it seems likely that ordinarily the comparison should be made under the principles that apply to nonmonetary relief, since the elements of the structure are not likely to coincide directly.

Multiparty offers. No separate provision is made for offers that require acceptance by more than one party. Rule 68 can be applied in straight-forward fashion if there is a true joint right or joint liability. An award should be made against all joint offerees without excusing any who urged the others to accept the offer; this result is justified by the complications entailed by a

different approach and by the relationships that establish the joint right or liability. Rule 68 should not apply in other cases in which an offer requires acceptance by more than one party. The only situation that would support easy administration would involve failure of any offeree to accept, and a judgment no more favorable to any offeree. Even in that setting, a rule permitting an award could easily complicate beyond reason the already complex strategic calculations of Rule 68. Offers would be made in the expectation that unanimous acceptance would prove impossible. Acceptances would be tendered in the same expectation. Apportioning an award among the offerees also could entail complications beyond any probable benefits.

Subdivision (f). Rule 68 does not apply to actions certified as class or derivative actions under Rules 23, 23.1, or 23.2. This exclusion reflects several concerns. Rule 68 consequences do not seem appropriate if the offeree accepts the offer but the court refuses to approve settlement on that basis. It may be unfair to make an award against representative parties, and even more unfair to seek to reach nonparticipating class members. The risk of an award, moreover, may create a conflict of interest that chills efforts to represent the interests of others.

The subdivision (f) exclusions apply even to offers made by class representatives or derivative plaintiffs. Although the risk of conflicting interests may disappear in this setting, the need to secure judicial approval of a settlement remains. In addition, there is no reason to perpetuate a situation in which Rule 68 offers can be made by one adversary camp but not by the other.

October, 1994 Committee Minutes: Rule 68

Rule 68

Rule 68 has been before the Committee for some time. At the April, 1994 meeting, it was concluded that further action should await completion of the Federal Judicial Center study of Rule 68. John Shapard, who is in charge of the study, put it aside over the summer for the purpose of completing the survey of practices surrounding attorney participation in voir dire examination of prospective jurors. See the discussion of Rule 47(a) above.

An informal survey of California practice was described. California "section 998" uses costs as an offer-of-judgment sanction, but costs commonly include expert witness fees in addition to the more routine items of costs taxed in federal courts. Generally this sanction is seen as desirable, although respondents generally would like more significant sanctions. Most thought the state practice was more satisfactory than Rule 68. There was no strong feeling against the state practice. One lawyer thought the state practice restricts his freedom in negotiating for plaintiffs. This state practice seems preferable to the complicated "capped benefit-of-the-judgment" approach embodied in the current Rule 68 draft.

Another comment was that Rule 68 becomes an element of gamesmanship in fee-shifting cases. It is like a chess game – an extra shield and tool in civil-rights litigation. It is working close to a casino mentality. But Rule 68 has meaning only in cases where attorney fees are thus at stake. It would be better to abandon it.

Professor Rowe described his ongoing empirical work with Rule 68, investigating the consequences of adding attorney-fee sanctions. The work does not answer all possible questions. An offer-of-judgment rule may have the effect of encouraging strong small claims that otherwise would not support the costs of suit; this hypothesis has not yet been subjected to effective testing. There does seem to be an effect on willingness to recommend acceptance of settlement offers, and perhaps to smoke out earlier offers. Results are mixed on the question whether such a rule may moderate demands or, once an offer is made, encourage the offeror to "dig in" and resist further settlement efforts in hopes of winning sanctions based on the offer. And there is a possible "high-ball" effect that encourages defendants to settle for more, just as there may be a "low-ball" effect that encourages plaintiffs to settle for less.

John Frank reminded the Committee of the reactions that met the efforts in 1983 and 1984 to increase Rule 68 sanctions. At the time, he had feared that efforts to pursue those proposals further might meet such protest as to bring down the Enabling Act itself. He also noted that there are other means of encouraging settlement, and imposing sanctions, that involve less gamesmanship and more

neutral control. "Michigan mediation," which was recognized as a form of court-annexed arbitration with fee-shifting consequences for a rejecting party who fails to do almost as well as the mediation award, was described. The view was expressed that this and other alternate dispute resolution techniques have made Rule 68 antique in comparison.

Some members of the Committee suggested that the best approach would be to rescind Rule 68. It might work well between litigants of equal sophistication and resources, but it is not fair in other cases, even if it is made two-way. A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view, but also support for an attempt to provide more effective sanctions in a form less complicated than the present draft.

Alfred Cortese noted that Rule 68 has been "studied to death." An ABA committee looked at it but could not reach any consensus. Most lawyers are adamantly opposed to fee-shifting sanctions.

After further discussion, it was concluded that the time has not come for final decisions on Rule 68. It has significant effect in actions brought under attorney fee-shifting statutes that characterize fees as costs. Repeal would have a correspondingly significant effect on such litigation. Even if the present rule seems hurtful, there should be a better idea of the consequences of repeal. It was agreed that the motion to repeal would be carried to the next meeting, or until such time as there is additional information to help appraise the effects of the present rule or the success of various alternative state practices.

Agenda Item VII-VIII

ADMIRALTY RULES B, C, E

These proposals to amend the Supplemental Admiralty Rules spring from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings. In rem admiralty procedure has long been invoked for civil forfeiture proceedings. The frequency of civil forfeiture proceedings has grown dramatically in recent years.

These proposals draw two major distinctions between forfeiture and admiralty proceedings, reflected in Rule C(6)(a) and (b). A longer time to respond is provided in forfeiture proceedings. And forfeiture proceedings allow an automatic right to participate to a broader range of claimants than is permitted in admiralty proceedings; admiralty procedure will continue to require intervention where intervention has been required in the past.

Other changes reflect the renumbering of Civil Rule 4 in 1993. The change in Rule B(2)(a) is described in the draft Committee Note, and has not seemed controversial. All that is at stake here is the showing of notice to the defendant that must be made to support a default judgment. Notice by any means of service authorized by Civil Rule 4 seems sufficient, particularly in comparison to the alternatives allowed by paragraphs (b) and (c).

The change in Rule B(1)(e) is controversial. Rule B(1) is mainly concerned with authorizing maritime attachment and garnishment in an in personam admiralty action. In addition, however, it allows a plaintiff to "invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property" "*pursuant to Rule 4(e).*" The reference to Rule 4(e) invokes Rule 4 as it was before the 1993 amendments. Former Rule 4(e) allowed use of state attachment and garnishment procedures whenever state law allowed them. This provision was redesignated as Rule 4(n)(2) in 1993, and was substantially narrowed. Use of state law garnishment or attachment is now permitted only on "showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule." This draft adopts Rule 4(n), and with it adopts the Rule 4(n) limitation. The Maritime Law Association believes that state remedies should be made more widely available in admiralty proceedings than in other proceedings. It would delete the incorporation of Rule 4(n). The result would be that state-law attachment and garnishment could be used even though personal jurisdiction could be obtained. The justification is advanced that state law often provides more convenient and effective means of security. Civil Rule 64 already provides for use of state prejudgment security remedies, however, and no cogent reason has yet been offered to show that Rule 64 is inadequate to the needs of admiralty. (If Rule 64 were not available in admiralty, the more obvious remedy would be to incorporate Rule 64 rather than permit open-ended reliance on state quasi-in-rem jurisdiction. Admiralty Rule A provides that the Civil Rules apply in admiralty "except to the extent that they are inconsistent with these Supplemental Rules." There is no apparent inconsistency between Rule 64 and Admiralty Rule B. Such explicit authority as

there is supports use of Rule 64 in admiralty proceedings. See T.J. Schoenbaum, *Admiralty and Maritime Law*, 2d ed. 1994, pp. 893-894.)

The only other matter that remains controversial at the end of the drafting process is no more than a drafting question. Rule C(6) now refers to "the claimant of property." The division of Rule C(6) into separate subdivisions (a) for forfeiture and (b) for admiralty rests on the desire to establish different standards for immediate participation. In forfeiture proceedings, C(6)(a) provides for participation by "a person who asserts an interest in or right against the property." In the words of the draft Committee Note, "[t]his category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession." In admiralty proceedings, C(6)(b) provides for participation by "a person who asserts a right of possession or an ownership interest in the property." The dispute surrounds "ownership." The Maritime Law Association prefers to refer to "a legal or equitable ownership interest." In support of this view, they express concern that an unadorned reference to "ownership" may exclude not only equitable "ownership" interests but also more exotic forms of interest that are established by foreign laws and that should satisfy the test for participation in an in rem admiralty action. The Reporter prefers to refer to "ownership." "Ownership" is an all-embracing term that includes legal, equitable, and foreign-law concepts. The concern with foreign-law concepts, indeed, provides one of the strongest arguments for referring only to ownership. The division between law and equity is a peculiar Anglo-American concept. If the rule is implicitly limited to "legal" and "equitable" ownership, there will be great opportunity for misdirected disputes about the characterization of interests created by other legal systems. These disputes will at best involve costly distraction. At worst, they will lead to unfortunate results.

The Supplemental Rules, on the whole, are not well drafted. An attempt to read through present Rule C(3), for example, is a challenge. Adhering to the precept that style should be improved when a rule is amended, substantial style changes have been made in these draft rules. The changes have been slightly restrained, however, by a desire to avoid trespassing on the familiar. A few remaining style choices are indicated in the draft. Absent directions from the Committee, they will be resolved by the Reporter and the Style Committee before publication of any proposal that may emerge.

August, 1997 Revision

Rule B. Attachment and Garnishment: Special Provisions

(1) **When Available; Complaint, Affidavit, Judicial Authorization, and Process.**

(a) If a defendant in an in personam action is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees [to be] named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment, and the plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) **(i)** If the property is a vessel or tangible property on board a vessel, the clerk must deliver the summons, process, and any supplemental process to the marshal for service.

(ii) If the property is other tangible or intangible property, the clerk must deliver the summons, process, and any supplemental process to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies for attachment and garnishment or similar seizure of the defendant's property under Rule(s) 4 ~~(a)~~ ~~[as well as] [in addition or in the alternative to]~~ the remedies provided

in this Rule. Only Rule E(8) of these Rules applies to state remedies so invoked.

(2) **Notice to Defendant.** No default judgment may be entered except upon proof — which may be by affidavit [— of one of the following]:

(a) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) that the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) that the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

Committee Note

Rule B(1) is amended in two ways, and style changes have been made.

The service provisions of Rule C(3) are adopted in paragraph (d), providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel.

The provision that allows the plaintiff to invoke state attachment and garnishment remedies is amended to reflect the 1993 amendments of Civil Rule 4. Former Civil Rule 4(e), incorporated in Rule B(1), allowed general use of state quasi-in-rem jurisdiction. Rule 4(e) was replaced in 1993 by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought.

Rule B(2)(b) is amended to reflect the 1993 redistribution of the service provisions once found in Civil Rule 4(d) and (i). These provisions are now found in many different subdivisions of Rule 4. The new reference simply incorporates Rule 4, without designating the new subdivisions, because the function of Rule B(2) is simply to describe the methods of notice that suffice to support a default judgment. Style changes also have been made.

Rule C. In Rem Actions: Special Provisions

* * * * *

(2) **Complaint.** In an action in rem the complaint must:

(a) be verified;

(b) describe with reasonable particularity the property that is the subject of the action;

(c) in an admiralty and maritime proceeding, state that the property is within the district or will be within the district while the action is pending;

(d) in a forfeiture proceeding for violation of a federal statute, state:

(i) the place of seizure and whether it was on land or on navigable waters;

(ii) whether the property is within the district, and if the property is not within the district the statutory basis for the court's exercise of jurisdiction over the property; and

(iii) all allegations required by the statute under which the action is brought.

(3) **Judicial Authorization and Process.**

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(ii) **(A)** In other actions, the court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist the court must [enter an order] direct[ing] the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(B) But if the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue [a summons and] a warrant for the arrest [of the vessel or other property that is the subject of the action]. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the clerk must deliver the warrant and any supplemental process to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the clerk must deliver the warrant and any supplemental process to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(c) Deposit in court. If the property that is the subject of

the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue — in addition to the warrant — a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) Supplemental process. The clerk may upon application issue supplemental process to enforce the court's order without further order of the court.

(4) Notice. No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 10 days after execution, the plaintiff must promptly — or within the time that the court allows — give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. §§ 31301 et seq., as amended.

* * * * *

(6) Responsive pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest

or right:

(A) within 20 days after the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows;

(ii) an agent, bailee, or attorney must describe the authority to file a statement of interest in or right against the property on behalf of another; and

(iii) a person who files a statement of interest in or right against the property must serve an answer within 20 days after filing the statement.

(b) **Maritime Arrests and Other Proceedings.** In an in rem action not governed by subdivision (a):

(i) A person who asserts a right of possession or an ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after the earlier of (1) the execution of process, or (2) completed publication of notice under subdivision C(4), or

(B) within the time that the court allows.

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or an ownership interest must file an answer within 20 days after filing the statement of interest or right.

(c) **Interrogatories.** Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served at the time of answering the complaint.

Committee Note

Style changes have been made throughout the revised portions of Rule C. Several changes of meaning have been made as well.

Subdivision 2. In rem jurisdiction originally extended only to property within the judicial district. Since 1986, Congress has enacted a number of jurisdictional and venue statutes for forfeiture and criminal matters that in some circumstances permit a court to exercise authority over property outside the district. 28 U.S.C. § 1355(a)(1) allows a forfeiture action in the district where an act or omission giving rise to forfeiture occurred, or in any other district where venue is established by § 1395 or by any other statute. Section 1355(b)(2) allows an action to be brought as provided in (b)(1) or in the United States District Court for the District of Columbia when the forfeiture property is located in a foreign country or has been seized by authority of a foreign government. Section 1355(d) allows a court with jurisdiction under § 1355(b) to cause service in any other district of process required to bring the forfeiture property before the court. Section 1395 establishes venue of a civil proceeding for forfeiture in the district where the forfeiture accrues or the defendant is found; in any district where the property is found; in any district into which the property is brought, if the property initially is outside any judicial district; or in any district where the vessel is arrested if the proceeding is an admiralty proceeding to forfeit a vessel. Section 1395(e) deals with a vessel or cargo entering a port of entry closed by the President, and transportation to or from a state or section declared to be in insurrection. 18 U.S.C. § 981(h) creates expanded jurisdiction and venue over property located elsewhere that is related to a criminal prosecution pending in the district. These amendments, and related amendments of Rule

E(3), bring these Rules into step with the new statutes. No change is made as to admiralty and maritime proceedings that do not involve a forfeiture governed by one of the new statutes.

Subdivision (2) has been separated into lettered paragraphs to facilitate understanding.

Subdivision (3). Subdivision (3) has been rearranged and divided into lettered paragraphs to facilitate understanding.

Paragraph (b)(i) is amended to make it clear that any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant, is to be served by the marshal.

Subdivision (4). Subdivision (4) has required that public notice state the time for filing an answer, but has not required that the notice set out the earlier time for filing a statement of interest or claim. The amendment requires that both times be stated.

A new provision is added, allowing termination of publication if the property is released more than 10 days after execution but before publication is completed. Termination will save money, and also will reduce the risk of confusion as to the status of the property.

Subdivision (6). Subdivision (6) has applied a single set of undifferentiated provisions to civil forfeiture proceedings and to in rem admiralty proceedings. Because some differences in procedure are desirable, these proceedings are separated by adopting a new paragraph (a) for civil forfeiture proceedings and recasting the present rule as paragraph (b) for in rem admiralty proceedings. The provision for interrogatories and answers is carried forward as paragraph (c). Although this established procedure for serving interrogatories with the complaint departs from the general provisions of Civil Rule 26(d), the special needs of expedition that often arise in admiralty justify continuing the practice.

Both paragraphs (a) and (b) require a statement of interest or right rather than the "claim" formerly required. The new wording permits parallel drafting, and facilitates cross-references in other rules. The substantive nature of the statement remains the same as the former claim. The requirements of (a) and (b) are, however, different in some respects.

In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or a right against the property involved. This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession. In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings.

In an admiralty and maritime proceeding governed by paragraph (b), a statement is filed only by a person claiming a right of possession or ownership. Other claims against the property are advanced by intervention under Civil Rule 24, as it may be supplemented by local admiralty rules. The reference to ownership includes every interest that qualifies as ownership under domestic or foreign law. If an ownership interest is asserted, it makes no difference whether its character is legal, equitable, or something else.

Paragraph (a) provides more time than paragraph (b) for filing a statement. Admiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings.

Paragraphs (a) and (b) do not limit the right to make a restricted appearance under Rule E(8).

Rule E. Actions In Rem and Quasi In Rem: General Provisions

* * * * *

(3) Process.

Reporter's Version

(a) Territorial Limits of Effective Service. In rem process, as well as maritime attachment and garnishment, may be served only:

(i) within the district; or

(ii) outside the district when authorized by statute.

MLA Version

(a) Process in rem or of maritime attachment and garnishment in admiralty and maritime proceedings shall be served only within the district.

(b) Process in rem or quasi in rem in forfeiture cases may be served outside the district when authorized by statute.

(~~b~~c) * * *

* * * * *

(7) Security on Counterclaim.

(a) When a person who has given security to respond in damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security to respond in damages to the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the

original claim must be stayed until this security is given, unless the court directs otherwise.

(b) The plaintiff is required to give security under paragraph (a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment, whether under these Supplemental Rules or under Rule ~~4(n)~~ 64, may be expressly restricted to the defense of such claim, and in that event is not an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sale.

* * * * *

(b) Interlocutory Sales; Delivery.

(i) On application of a party, the marshal, or other person having custody of the property, the court may order all or part of the property sold – with the sales proceeds, or as much of them as will satisfy the judgment, paid into court to await further orders of the court – if:

(A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or disproportionate; or

(C) there is an unreasonable delay in securing release of the property.

(ii) In the circumstances described in (i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

* * * * *

(10) **Preservation of Property.** When the owner or another person remains in possession of property attached or arrested under the provisions of Rule E(4)(b) that permit execution of process without taking actual possession, the court, on motion of a party or on its own, may [must] enter any order necessary to preserve the property and to prevent its removal.

Committee Note

Style changes have been made throughout the revised portions of Rule E. Several changes of meaning have been made as well.

Subdivision (3). Subdivision (3) is amended to reflect the distinction drawn in Rule C(2)(c) and (d). Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c), while service in forfeiture proceedings may be made outside the district when authorized by statute, as reflected in Rule C(2)(d).

Subdivision (7). Subdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action.

Subdivision (8). Subdivision (8) is amended to reflect the change in Rule B(2)(f) that incorporates state law quasi-in-rem jurisdiction under Civil Rule 4(n). The reference to attachment and garnishment includes all forms of borrowed state process, whatever the state name may be.

Subdivision (9). Subdivision 9(b)(ii) is amended to reflect the change in Rule C(6) that substitutes a statement of interest or right for a claim.

Subdivision (10). Subdivision 10 is new. It makes clear the authority of the court to preserve and to prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

Civil Rule 14

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. * * * The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, ~~the claimant of~~ a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or ~~claimant~~ person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant * * *.

Committee Note

Subdivisions (a) and (c) are amended to reflect revisions in Supplemental Rule C(6).

NOTES TO AUGUST, 1997 ADMIRALTY RULES DRAFT

Inevitably, the process of incorporating the changes made in the August 12 conference call has suggested a few other changes, all minor. These Notes provide a guide to most of the changes; I would like to flag them all, but I am confident that one or two will escape my attention. Each careful reading by subcommittee members will suggest still further improvements.

Line 11: This is the first of several places where we have restored "the plaintiff or the plaintiff's attorney," ousting the suggested substitute "or its attorney."

Line 17: Now the court enters the order, replacing issues.

Lines 27, 31: Paragraph (d) is made parallel to C(3)(b)(i) and (ii). (There are still several places where B could be made more parallel to C, but I doubt the value of creating still more departures from present B.) Now the clerk must deliver the process, replacing "process shall be delivered by the clerk."

Lines 40 to 43: We have decided to expressly incorporate Rule 4(n) quasi-in-rem jurisdiction. In line 42, I prefer "as well as" as a replacement for "in addition or in the alternative to." The choice to incorporate 4(n) is to be flagged for special comment.

Line 47-48: We did not decide what to do with the bracketed material; I would prefer to delete it as unnecessary.

Lines 49 to 55: We have rearranged the first two subparagraphs, departing from the present structure because we thought service is better than mailing. "Has" in line 50 has been changed to "have."

Lines 66 to 73: This part of the Note has been revised to reflect the continued incorporation of state quasi-in-rem jurisdiction, now by referring to 1993 Rule 4(n).

Line 107: We did not talk about this, and for the moment I have opted not to add the stock phrase used later: "the vessel or other property [that is the subject of the action] without * * *." I think that only property is forfeited, so this stands well. An alternative change might be in line 104: "When the United States files a complaint demanding a forfeiture of property * * *."

Lines 109 to 124: What had been (ii) and (iii) are collapsed into (ii)(A) and (B). The main reason for the change is that the exigent circumstances provision of (B) applies only in the actions described in line 112; the former structure might have been confusing. In the process, I found a few more words that I would as soon discard; they are bracketed on lines 112, 113, 119, and 120-121. I think that with this structure, it is safe to let lines 122 to 124 stand alone, without a more explicit connection to lines

116 to 121.

Lines 126, 130, 139-140: All three places now adopt the full "property that is the subject of the action."

Lines 143 to 144: This is simplified "controlling the property to show cause why it" rather than "controlling the freight, property, or proceeds to show cause why they."

Lines 155 to 157: The "but publication may be terminated" was the unanimous choice over the alternative offered in the June draft.

Lines 177 to 178, 180 to 181: We have adopted the full-blown version: "statement of interest in or right against the property."

Line 186, 202: We have chosen "ownership" over "legal or equitable ownership." This choice is to be flagged for special attention.

Lines 188, 194, 199: In each place we refer to a statement of right or interest. This is different from the "interest in or right against the property" used in C(6)(a), and deliberately so. (I hope it is safe to refer generically to the time "to file a statement of interest in or right against the seized property" in C(4), lines 158-159.)

Lines 247 to 248: We have added the MLA belt-and-suspenders language: "addressed to a vessel or tangible property on board a vessel." This takes care of people who read the Note but do not read the Rule.

Lines 266 to 270: This is new. It reflects our concern that there otherwise might be some confusion about the effects of Rule 26(d). (I chose not to refer to the admiralty interrogatory practice as "inconsistent" with Rule 26(d), in part because Rule 26(d) begins: "Except when authorized under these rules * * *." I am not at all sure whether "these rules" would incorporate the Supplemental Rules.)

Line 293: This substitutes Tom's sturdy "else" for my "more esoteric."

Lines 298 to 299: These were redlined to ask whether they are needed. We voted to keep them.

Lines 303 to 315: I was granted permission to continue both a Reporter's version and the MLA version. Note that since it is now the Reporter's version, "in a forfeiture case" has been dropped from the end of line 308.

Lines 336 to 337: the brackets are removed now that we have opted to incorporate Rule 4(n) rather than a more general reliance on state quasi-in-rem jurisdiction.

Line 365: We changed "occupant" to "another person."

Lines 369 to 370: Here, I prefer "may." If we are to adopt a more mandatory form, under the new convention "must" would be preferred over "shall." We significantly shortened the final portion on the theory that preserving the property entails preserving "its contents, value, and income." Although we did not think of it, our new version has the added virtue that it avoids the appearance of inconsistent directions when steps that preserve value diminish income, and so on.

Lines 384 to 388: This is new, reflecting the choice to continue to incorporate Rule 4(n) as the means of adopting state quasi-in-rem jurisdiction.

Line 395: "[O]ccupant" has been changed to "other person," see line 365.

Lines 404 to 405, 409 to 410: We voted for this language rather than the alternative "a person who asserts a right of possession or an ownership interest."

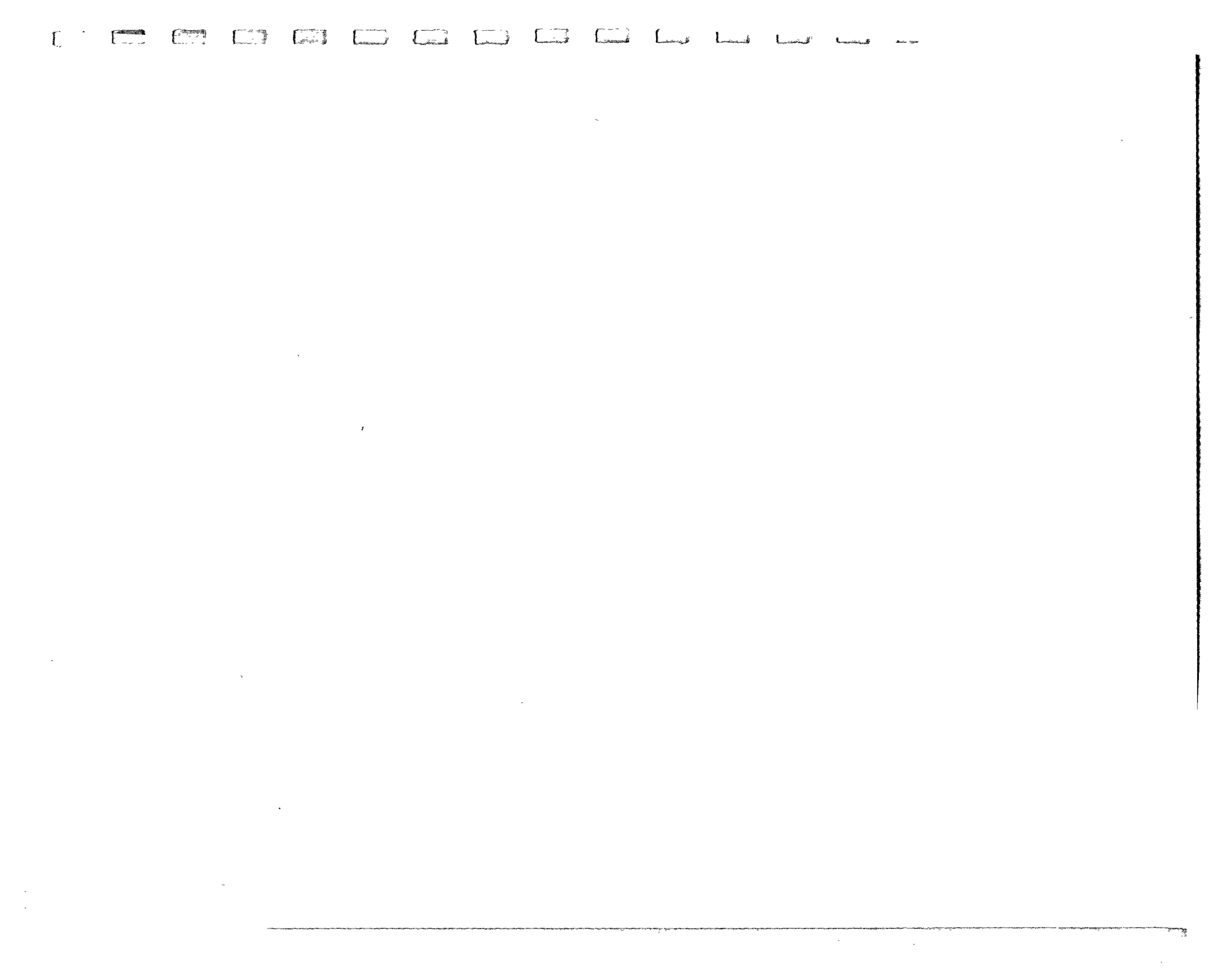
Agenda Item IX

Technical Change Note: Civil Rule 6(b)

Civil Rules 74, 75, and 76 are to be rescinded in response to repeal of the statutory provisions permitting appeal from the final judgment of a magistrate judge to the district court rather than the court of appeals.

In the process, Rule 6(b) was overlooked. Rule 6(b) permits "enlargement" of the time periods prescribed by various rules, but does not law an extension of time for actions taken under specified rules. Rule 74(a) is one of the specified rules.

Rule 6(b) should be amended to delete the reference to Rule 74(a). This is a purely ministerial change to correct an original oversight. But it is a change that should be made.



Agenda Item X

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

September 22, 1997

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Civil Justice Reform Act*

The final report of the Judicial Conference to Congress on the Civil Justice Reform Act recommends that the rules committees consider amending several rules of the Federal Rules of Civil Procedure. (A copy of the full report had been sent all committee members this past summer.) The attached Executive Summary of the report contains all the Judicial Conference's recommendations.

In accordance with established procedures, the report's recommendations dealing with proposed changes to the civil rules are referred to the Advisory Committee on Civil Rules for its consideration. The following pertinent recommendations are listed for the committee's review:

1. "Consider whether F.R.Civ.P. 16 should be amended to require a judicial officer to set the date of trial to occur within a certain time..." (Summary page 3.)

2. "Continue its ongoing project re-examining the nature and scope of discovery and disclosure, including whether specific time limitations on discovery should be required by national rules." (Summary page 3.)

3. Continue the ongoing "project re-examining the scope and substance of discovery, including whether the advantages of national uniformity outweigh the advantages of permitting locally developed procedures as an alternative to F.R.Civ.P. 26(f) and what effect of courts using other alternative procedures might be." (Summary page 6.)

4. "Re-examine the need for national uniformity in applying F.R.Civ.P. 26(a) as part of its ongoing project re-examining the scope and nature of discovery and disclosure...." (Summary page 6.)

5. "Review the courts' experiences with F.R.Civ.P. 16 regarding ADR and consider whether any changes in the Civil Rules are needed to enhance the role of ADR." (Summary page 6.)

6. Consider requiring the "submission of joint discovery plans at an initial pretrial conference" as part of its ongoing project re-examining the scope and nature of discovery and disclosure. (Summary page 7.)

John K. Rabiej

THE CIVIL JUSTICE REFORM ACT OF 1990

FINAL REPORT

ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY

ASSESSMENT OF PRINCIPLES, GUIDELINES & TECHNIQUES

Submitted by the Judicial Conference of the United States

Transmitted by Leonidas Ralph Mecham, Secretary

MAY 1997

EXECUTIVE SUMMARY

Introduction

The Judicial Conference of the United States submits the following report in accordance with sections 104(c) and 105(c) of the Civil Justice Reform Act of 1990 ("CJRA" or "the Act"). This report is the Conference's third, and final, report to Congress under the Act. It assesses the experience of the federal courts in applying the civil litigation cost and delay reduction measures suggested in the Act, and offers a series of recommendations for continuing the judiciary's efforts to ensure prompt, inexpensive resolution of civil disputes.

Background

Congress enacted the CJRA to explore the causes of cost and delay in civil litigation. The Act required all 94 federal district courts to implement "civil justice expense and delay reduction plans" that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes" (28 U.S.C. § 471). It identified a series of case management principles, guidelines, and techniques for the courts to consider in making their plans. It also established pilot programs in ten districts to test the effectiveness of the Act's principles and guidelines for cost and delay reduction, as well as demonstration programs in five other districts to test systems of differentiated case management and other methods of cost and delay reduction (including alternative dispute resolution (ADR)). The Judicial Conference was directed to study the results of these experiments with the aid of an independent consultant and, on the basis of its assessment, to propose either an extension of the pilot program to other courts or the implementation of alternative measures for reducing expense and delay in civil litigation.

Although some judges have viewed this legislative approach to civil justice reform with reservations, the judiciary has a longstanding commitment to sound case management. The "just, speedy, and inexpensive" resolution of civil disputes has been an abiding purpose of the federal courts for 60 years under Rule 1 of the Federal Rules of Civil Procedure. The intensive review of litigation procedures required by the Act has provided the courts with both a format and a source of funding to continue their efforts to improve and enhance judicial management of civil dockets. And, the judiciary adopted almost all of the principles, guidelines, and techniques in the Act through the 1993 amendments to the Civil Rules and the policy directions set forth in the December 1995 *Long Range Plan for the Federal Courts*. The additional experience gained through the pilot courts, demonstration programs, and other experimentation under the Act has been useful to the courts, providing information that can aid policy-making in the future.

Evaluation of the Pilot Program

Under the CJRA, the Judicial Conference is required to review the pilot court programs and assess whether other districts should be required to implement all the case management principles and guidelines tested in the pilot programs. In preparing this report, the Conference has reviewed: (a) an independent evaluation by the RAND Corporation of the CJRA principles, guidelines, and techniques applied in the pilot courts; (b) a Federal Judicial Center evaluation of the differentiated case management and ADR demonstration programs; and (c) the experiences of all 94 district courts in implementing their CJRA cost and delay reduction plans.

Although the judiciary has adopted most of the principles, guidelines and techniques in the Act, the Judicial Conference does not support expansion of the Act's case management principles and guidelines to other courts *as a total package*. This recommendation is based in large part on the RAND study of the pilot courts. The RAND study found that the pilot program *per se* did not appear to have significant impact on cost or delay reduction because the courts were already following most of the Act's principles, guidelines, and techniques and more importantly, the cost of litigation was driven by factors other than judicial case management procedures. However, that study did find six procedures suggested in the CJRA that are effective, when used in combination, in reducing delay without increasing costs: (1) early judicial case management; (2) early setting of the trial schedule; (3) shortening discovery cutoff; (4) periodic public reporting of the status of each judge's docket; (5) conducting scheduling and discovery conferences by telephone; and (6) implementing the advisory group process. This report therefore sets forth proposed alternatives based in large part on the CJRA experiment, and provides findings, commentary, and recommendations regarding specific CJRA principles, guidelines, and techniques for effective case management. As outlined below, these alternative measures and recommendations constitute the Judicial Conference's alternative expense and delay reduction program for the federal courts.

The Conference's Alternative Cost and Delay Reduction Program

Measures to be Implemented by the Judiciary

1. The CJRA Advisory Group Process Should Continue.

The Judicial Conference believes that the advisory group process proved to be one of the most beneficial aspects of the Act by involving litigants and members of the bar in the administration of justice. The Conference recommends that the district courts continue to use advisory groups to assess their dockets and propose recommendations for reducing cost and delay; that the courts, in consultation with the advisory groups, continue to perform regular assessments; and that Congress provide additional and adequate funding to continue the advisory group process.

2. Statistical Reporting of Caseflow Management Should Continue.

Because of its effectiveness in reducing case disposition time, the Conference endorses the docket reporting requirements established in the CJRA. The Conference plans to continue these reporting requirements after the Act has expired. In addition, the Conference encourages individual districts to develop or enhance internal statistical reporting capabilities to encompass all case types and judicial officers.

3. Setting Early and Firm Trial Dates and Shorter Discovery Periods in Complex Civil Cases Should be Encouraged.

One of the most important findings of the RAND study is that an early and firm trial schedule, combined with limited time for discovery, can reduce delay in complex civil litigation without increasing costs. This type of early case management was found to have no effect on lawyer satisfaction or views on fairness, and already exists under the Federal Rules of Civil Procedure. In light of these findings, the Conference recommends that its Committee on Court Administration and Case Management consider procedures to encourage judicial officers to set early trial dates. The Conference also recommends that its Committee on Rules of Practice and Procedure: (1) consider whether F.R.Civ.P. 16 should be amended to require a judicial officer to set the date of trial to occur within a certain time; and (2) continue its ongoing project re-examining the nature and scope of discovery, including whether specific time limitations on discovery should be required by national rule.

4. The Effective Use of Magistrate Judges Should be Encouraged.

The RAND study found that some magistrate judges may be substituted for district judges on non-dispositive pretrial activities without drawbacks and with an increase in lawyer satisfaction. Recommendation 65 of the *Long Range Plan for the Federal Courts* discusses the role of magistrate judges and notes that they are "indispensable resources readily available to supplement the work of life-tenured district judges in meeting workload demands." Therefore, the Conference recommends the effective use of magistrate judges, consistent with Recommendation 65 of the *Long Range Plan for the Federal Courts.*

5. The Role of the Chief Judge in Case Management Should be Increased.

As recognized in the RAND report, the chief judge is an important institutional leader. The Conference directs its Committee on Court Administration and Case Management to expand its research agenda to include further study and recommendations relating, if appropriate, to the role and training of the chief judge in institutional caseflow management.

6. Intercircuit and Intracircuit Judicial Assignments Should be Encouraged to Promote Efficient Case Management.

Visiting judges can provide a great deal of assistance in reducing backlogged dockets, thereby enabling courts to set early and firm trial dates. Existing statutes allow judicial officers to be temporarily transferred to courts facing judicial emergencies due

to a backlogged dockets. Because these statutes provide powerful tools to address delays in civil cases and backlogged dockets, the Conference endorses their increased utilization. The Conference also directs the appropriate Conference committees to consider how best to streamline and expedite the use of intercircuit and intracircuit judicial assignments.

7. Education Regarding Efficient Case Management Should be Extended to the Entire Legal Community.

One of the primary benefits emanating from the CJRA has been its educational value to the judiciary. It has furthered the judiciary's longstanding commitment to judicial and staff education in case management and has brought to the bar, through the advisory groups appointed in each district, an increased understanding of both judges' and lawyers' responsibilities in managing litigation. The Conference recommends that this educational process be extended to the entire legal community. Law schools should be encouraged to include courses on efficient case management and ADR. Continuing legal education for lawyers should include various case management processes that reduce cost and delay. Continued education for the bench and increased training for the bar would greatly facilitate case management efficiency in the federal judicial system.

8. The Use of Electronic Technologies in the District Courts, Where Appropriate, Should be Encouraged.

The prudent use of modern telecommunication and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation. The federal courts have been expanding the use of such technologies and are planning a number of future initiatives in this area.

Measures Requiring Congressional and Executive Branch Cooperation

1. The Impact of Judicial Vacancies on Litigation Delay Should be Recognized.

Thirty-nine of the CJRA advisory group reports cite the length of time required to fill a judicial vacancy as a fundamental cause of delay in the federal judicial system. Vacancies in some judgeships are a significant impediment to expeditious civil case processing because courts must function with less than a full complement of judges for extended periods of time. To ensure the ability of the federal courts to handle civil litigation in an efficient and timely manner, the Conference requests that the Executive and Legislative Branches give high priority to filling judicial vacancies. The Conference is also mindful of the need for carefully controlled growth of the Article III judiciary and the importance of exhausting other appropriate alternatives to creating new judgeships. However, once the Conference has determined that new judgeships are needed to meet the requirements of justice, prompt Congressional action to authorize those positions would aid the judiciary in reducing delay in litigation.

2. The Impact of New Criminal and Civil Statutes on a Court's Civil Docket and Resource Requirements Should Be Recognized.

While the CJRA review process has provided insight into the causes of civil litigation cost and delay, many advisory groups note that there are other factors that are beyond the control of the courts. These include: the increased volume of federal criminal prosecutions; the "federalization" of criminal law; and the creation of additional federal civil causes of action. It is certainly the prerogative of the Executive and Legislative Branches to pursue these policy objectives; however, it should be recognized that they may have an adverse effect on the overall disposition of civil cases. Congress should consider the impact of existing laws and pending legislation on the need to limit the size and contain the growth of the judiciary. Failure to balance these conflicting aims will increase the delay in litigation as dockets become overcrowded. When new legislation is enacted, Congress should allocate the resources necessary for its implementation.

3. Sufficient Courtroom Space Facilitates Case Management and Should be Available.

The assurance of an available courtroom allows judges to dispose of cases expeditiously by setting firm trial dates, which promotes settlement in civil cases and results in less time to disposition in those cases that do go to trial. The judiciary is aware of the current budget constraints and is actively exploring ways to contain the cost of space needed by the courts. However, the Conference counsels great caution in seeking cost savings by reducing the number of courtrooms.

Recommendations Regarding the Principles and Guidelines of the CJRA

1. The Differential Treatment of Civil Cases to Reduce Cost and Delay is Endorsed.

The Conference recommends that individual districts continue to determine on a local basis whether the nature of their caseload calls for the track model or the judicial discretion model for their differentiated case management (DCM) systems.

2. Early Case Management as Provided in F.R.Civ.P. 16(b) is Endorsed.

The RAND study found the principles of setting an early and firm trial date and setting a shorter discovery period to be two of the most effective elements of the CJRA. Therefore, the Conference endorses these principles and includes them in the "Measures to be Implemented by the Judiciary" (Measure No. 3, at pp. A-9, A-29).

3. The Use of Discovery Management Plans as Provided in F.R.Civ.P. 16 and 26(f) is Endorsed.

Currently, most district courts require the formation of a discovery schedule, and a corresponding scheduling order is typically issued pursuant to F.R.Civ.P. 16. In addi-

tion, the principle of staged discovery management was included in the 1993 amendments to F.R.Civ.P. 26. The Conference recommends that the Committee on Rules of Practice and Procedure continue its ongoing project re-examining the scope and substance of discovery, including whether the advantages of national uniformity outweigh the advantages of permitting locally developed procedures as an alternative to F.R.Civ.P. 26(f) and what the effect of courts using other alternative procedures might be.

4. Additional Information Regarding the Voluntary Exchange of Information is Recommended.

The RAND evaluation does not provide adequate information, separate from mandatory discovery, for the Conference to make a specific recommendation regarding the principle of voluntary exchange of information. Therefore, the Conference recommends that the Committee on Rules of Practice and Procedure re-examine the need for national uniformity in applying F.R.Civ.P. 26(a) as part of its ongoing project re-examining the scope and nature of discovery and disclosure, particularly whether the advantages of national uniformity in applying F.R.Civ.P. 26(a) outweigh the advantages of locally developed alternative procedures.

5. Requiring Counsel to Meet and Confer Before Filing Motions on Discovery Disputes With the Court is Endorsed.

The Conference notes that this principle was incorporated in the 1993 amendments to F.R.Civ.P. 37(a)(2)(A) and (B), 37(d), 26(c), and 26(f), which require attorneys to confer and certify in good faith that they have attempted to resolve their discovery disputes. Therefore, no further recommendation is necessary.

6. Appropriate Forms of Alternative Dispute Resolution are Encouraged.

Although many courts have found alternative dispute resolution (ADR) to be a benefit to litigants, the RAND analysis failed to discern a significant positive cost and delay impact associated with this principle. However, the Conference does believe that the positive attributes often associated with ADR argue for continued experimentation. Therefore, the Conference supports the continued use of appropriate forms of ADR and recommends that local districts continue to develop suitable ADR programs, including non-binding arbitration. The Conference also recommends that the Committee on Rules of Practice and Procedure review the courts' experiences with F.R.Civ.P. 16 regarding ADR and consider whether any changes in the Civil Rules are needed to enhance the role of ADR.

Recommendations Regarding the Techniques of the CJRA

1. The Submission of Joint Discovery Plans at an Initial Pretrial Conference is Provided for in F.R.Civ.P. 26(f).

The 1993 amendments to F.R.Civ.P. 26(f) incorporated the technique of requiring the submission of joint discovery plans at an initial pretrial conference. The rule re-

quires a general "meeting of the parties" that includes planning for disclosure and discovery, and permits local rules to exempt only particular categories of actions. In light of the RAND finding that this technique resulted in no significant change in time to disposition, the Conference does not recommend adoption of any further requirements, but it does recommend that the Committee on Rules of Practice and Procedure consider this technique as part of its ongoing project re-examining the scope and nature of discovery and disclosure.

2. Requiring a Representative With the Power to Bind the Parties to be Present at all Pretrial Conferences, as Provided in F.R.Civ.P. 16(c), is Endorsed.

The Conference notes that the 1993 amendments to F.R.Civ.P. 16(c) incorporated the technique of requiring a representative with the power to bind the parties to be present at all pretrial conferences. Therefore, no further recommendation is necessary.

3. Requiring Requests for Discovery Extensions or Postponement of Trial to be Signed by The Attorney and the Party Making the Request is Not Endorsed.

Noting the almost universal rejection of requiring requests for discovery extensions or postponement of trial to be signed by the attorney and the party making the request, the Judicial Conference does not recommend this technique.

4. The Use of Early Neutral Evaluation is Endorsed.

The Conference supports the use of early neutral evaluation (ENE) as an appropriate form of ADR, which is endorsed in Recommendation 6 of the Act's Principles & Guidelines (Recommendation 6 at pp. A-13, A-52).

5. Requiring a Representative, With the Power to Bind the Parties, to be Present at all Settlement Conferences, as provided in F.R.Civ.P. 16(c), is Endorsed.

The Conference notes that the 1993 amendments to F.R.Civ.P. 16(c) incorporated the technique of requiring a representative, with the power to bind the parties, to be present at all settlement conferences. Therefore, no further recommendation is necessary.

6. The Effective Use of Magistrate Judges Should be Encouraged.

The Conference recognizes the importance of the accessibility of judicial officers to supervise pretrial activities, and also recognizes that the use of magistrate judges can contribute to more efficient case management in the district courts and to attorney satisfaction. Therefore, the Conference supports the effective use of magistrate judges, consistent with Recommendation 65 of the *Long Range Plan for the Federal Courts*, including their use in any district court ADR programs.

Concluding Observations

The CJRA has prompted intensive efforts by the judiciary, the bar, and other litigant representatives to study and experiment with various creative approaches to the management of federal civil litigation. Those efforts—the results of which are already being seen—will continue to affect the conduct of federal court business in a direct and positive manner. As the RAND study noted, the CJRA process has "raised the consciousness" of both bench and bar, facilitating actions that achieve the goal of speedier, less expensive civil proceedings and, in the broader sense, improve the efficiency and effectiveness of the entire civil justice system.

The judiciary will maintain its efforts to enhance the delivery of justice in civil cases. In doing so, however, the courts will confront a number of issues and challenges regarding civil justice reform: (1) increasing speed of disposition while preserving the quality of justice; (2) striking an appropriate balance between national uniformity and local option in development of litigation procedures; (3) assessing the differential financial impact of CJRA-sponsored procedural reforms on various kinds of litigants and on attorneys; (4) evaluating the specific data on the impact of individual case management methods on the speed and cost of civil litigation; and (5) perhaps most importantly, confronting the practical limits to which general rules and procedures can be used to manage litigation. With the needs of justice foremost in mind, the federal courts will pursue further improvements in civil case management. They welcome the continuing interest and support of the legislative and executive branches, the bar, and the public in that endeavor

Item XI - XIII

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

September 18, 1997

MEMORANDUM TO THE CHAIRMAN AND MEMBERS OF THE ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: Status Report on Electronic Filing in the Federal Courts

Attached for your consideration is a brief report on the status on electronic filing in the federal courts and the potential issues for the rules committees arising from the judiciary's efforts to develop and implement electronic case file systems. You will receive updated reports on this topic periodically and as developments warrant.

Peter G. McCabe
Secretary to the Committee on Rules
of Practice and Procedure

Attachment

September 1997

Electronic Filing: A Status Report for the Rules Committees

I. Introduction

Recent amendments to the federal rules authorize courts to accept papers in electronic form.[1] The rules now provide that "[a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules."[2]

Several courts now are working to identify and acquire appropriate technology to accept and maintain court records in digitized form. At the national level, work is proceeding on a "core" electronic filing system that interested courts could adapt to fit local needs. And the Judicial Conference's Committee on Automation and Technology has made Electronic Case Files ("ECF") one of its priority initiatives.

Moving towards an ECF system will require the federal judiciary to resolve numerous legal and policy questions—including several that may implicate the federal rules. A recent report by the Administrative Office, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead*, provides a vision for how the courts might implement ECF systems. The report identifies some of these questions that should be resolved and suggests possible approaches for resolving them.

As outlined in the report, a fully developed ECF system would capture documents electronically at the earliest possible point, ideally from the person who creates the document. The system would not only contain everything presently included in a paper case file, but could also accommodate the court's internal case-related documents. Working on the assumption that the transition towards ECF should promote savings for the courts, an electronic case file system is expected eventually to provide at least the following:

- electronic submission of documents to, from, and within the court
- electronic service and noticing
- appropriate management of electronic documents, including storage and security

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[1] Fed. R. Civ. P. 5(e); Fed. R. Bank. P. 5005; Fed. R. App. P. 25(a)(2)(D) (all effective Dec. 1, 1996). Fed. R. Crim. P. 49(d) provides that papers in criminal actions be filed in the manner provided in civil actions.

[2] Fed. R. Civ. P. 5(e). The language of the companion bankruptcy and appellate rules is essentially the same.

- docket entries automatically through information provided in electronic form by the filing party
- case management reports based upon the electronic documents and docket entries
- quick retrieval of documents and case files, including public and remote access.

Nationally developed ECF systems delivered through the initiative will be made available to all courts, will incorporate new capabilities (such as creation of docket entries by the filing attorneys), and will replace the current case management systems used in the courts. The decision to use the systems, however, will be left to individual courts, and the assessment and utilization of the new capabilities will be left to those courts. The Administrative Office, with assistance from the courts, is about to begin the process of defining the functional requirements that ECF systems will be expected to satisfy. That process should be completed by mid-1998, after which the alternatives for meeting those requirements will be considered.

Two federal courts are already operating "prototype" ECF systems developed by staff in the Administrative Office. The Northern District of Ohio, which was the first prototype court, began receiving electronic filings in maritime asbestos cases through the Internet in January 1996. This system has managed over 9,000 such cases and handled over 125,000 docket entries (involving some 20,000 documents). Nearly 50 attorneys from around the country have not only submitted those documents in electronic form, but also simultaneously and automatically created the court's official docket entries. The bankruptcy court in the Southern District of New York has more recently begun testing in Chapter 11 cases a prototype ECF system based on the same model. At this time, filings in approximately 70 cases are being handled electronically in that court.

Beginning in the fall of 1997, the list of courts testing the AO-developed prototype systems will be expanded to include the district courts of the Western District of Missouri, the Eastern District of New York, and the District of Oregon, and the bankruptcy courts of the Southern District of California, the Northern District of Georgia, the District of Arizona, and the Eastern District of Virginia (Alexandria Division). Each of the prototype courts is being asked to test ECF functionality in handling certain types of civil actions (e.g., non-prisoner civil rights and Title VII actions, intellectual property disputes, cases involving federal, state and local governments or large national firms) and the various kinds of bankruptcy cases (Chapter 7, Chapter 11, Chapter 13). A similar Internet-based system has recently been established in the District of New Mexico, and several courts have begun constructing their own electronic case files by having court staff scan paper documents into their systems.

The 1996 rules amendments enable individual courts to authorize electronic filing by local rule, subject to any technical standards that may be adopted by the Judicial Conference. The Committee on Automation and Technology recently approved a set of "Interim Technical

Guidelines for Filing by Electronic Means." The Committee has chosen not to seek Judicial Conference approval of the standards at this time, but it will urge courts choosing to implement electronic filing to use them as guidance for their efforts. The proposed guidelines do not establish mandatory standards, but rather provide recommended approaches for experimental use subject to further evaluation by the Committee and the Conference. They focus primarily on ensuring the integrity of the record, providing an electronic filing capability that is at least as reliable as existing paper-based systems, and promoting nationwide uniformity in electronic filing procedures. The guidelines are based on proposed technical standards and guidelines that were circulated for comment among the judiciary and the interested public in late December 1996.

II. Potential Rules Issues Relating to ECF

Potential rules issues have already surfaced in the ongoing court experiments with electronic case filing. The following is a preliminary list of such issues:

- authorizing electronic filing (or certain requirements for electronic filing) by a court's standing order or case-by-case order, rather than by local rule
- allowing electronic means of service, as only mail and various methods of personal service are now authorized nationally
- adequacy of electronic filing and service of the initial case pleadings, raising filing fee and jurisdictional issues
- responsibility for, and proof of, service of pleadings
- providing notice of court orders and opinions electronically to the parties
- timeliness of filings and the possibility of computing action dates differently when filing and service are accomplished electronically by some or all parties
- verification of signatures and "Rule 11" requirements
- verification of signatures on documents not signed by the attorney (e.g., bankruptcy schedule of assets)
- document format questions, including:
  — problems with documents received in an incompatible format, including potential problems affecting timeliness and service of papers
  — incompatible software among electronic filers.

III. Conclusion

An ongoing part of the Electronic Case Files initiative will be the identification and collection of additional rules-related issues, particularly as encountered in the various prototyping efforts. The Office of Judges Programs staff assigned to the project will continue to monitor developments in prototype courts and forward relevant information to the Rules Committee Support Office for circulation to the rules committees' technology subcommittees.