P. McCabe

ADVISORY COMMITTEE ON CIVIL RULES

File Copy

Naples, Florida
May 1-2, 1997

AGENDA
Advisory Committee on Civil Rules
May 1-2, 1997

I. Opening Remarks of Chairman (Oral report)

II. Approval of Minutes of October 17-18, 1996, and March 20-21, 1997, Meetings

III. Class Action Proposal — Judge Niemeyer's Introduction to Advisory Committee's Working Papers on Proposed Amendments to Rule 23

- Report on RAND's Class Action Study (Oral Report)

A. Proposals Ready for Present Action

1. (c)(1) "When Practicable"
2. (f) "Permissive Interlocutory Appeal"

B. Proposals in Mid-Ground

1. (b)(3)(A) "Practical Ability to Pursue Without Class"
2. (b)(3)(B) "Separate-Action Interest"
3. (b)(3)(C) "Maturity"
4. Committee Note to (b)(3) Factors

C. Nature and Future of Class Action Study

1. Representation Challenged
2. (b)(3)(F) Responses
3. (b)(4) & (e): Waiting on the Supreme Court

D. Other Proposals

IV. Civil Rule 81: Habeas Corpus Return Time

V. Pending Legislation Affecting Civil Rules and Docket Sheet on Status of Civil Rules Proposals

VI. Next Meeting In Boston College of Law on September 4-5, 1997

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
597-0859

FAX-215-597-7373

Honorable David S. Doty
United States District Judge
670 United States Courthouse
110 South 4th Street
Minneapolis, Minnesota 55401

Area Code 612
348-1929

FAX-612-348-1813

Honorable C. Roger Vinson
United States District Judge
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

April 16, 1997
Doc. No. 1651

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
Hempstead, New York 11550
Area Code 516-463-5930
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

April 16, 1997
Doc. No. 1651

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

Item I-III

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 17 and 18, 1996

Note: This Draft Has Not Been Reviewed by the Committee

The Civil Rules Advisory Committee met on October 17 and 18, 1996, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by members Judge Paul V. Niemeyer, chair, Judge John L. Carroll, Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Lee H. Rosenthal, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Judge Patrick E. Higginbotham, outgoing chair, also attended. Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure, was present. Sol Schreiber, Esq., attended as liaison member of the Committee on Rules of Practice and Procedure, and Judge Jane A. Restani attended as liaison member of the Bankruptcy Rules Advisory Committee. Judge Jerome B. Simandle attended as representative of the Committee on Court Administration and Case Management. Joseph Spaniol, consultant to the Committee on Rules of Practice and Procedure, attended. Peter McCabe, John K. Rabiej, and Mark D. Shapiro represented the Administrative Office of the United States Courts; Mark Siska and Melanie Gilbert of the Administrative Office also were present. Joe S. Cecil, Donna Stienstra, and Thomas E. Willging represented the Federal Judicial Center. Observers included Alfred W. Cortese, Jr., Steve France, Charles Harvey (liaison, American College of Trial Lawyers), Russell Jackson, Fred S. Souk, H. Thomas Wells, Jr. (liaison, ABA Litigation Section), and Sam Witt.

Judge Niemeyer opened the meeting by welcoming Judge Rosenthal as a new member, and announcing the reappointment of several members.

Judge Higginbotham was greeted with expressions of great praise and deep gratitude for the energy and dedication he brought to leading the committee through several challenging projects during his term as chair, and for the remarkable programs he put together to reach out to all parts of the bench and bar in taking the Committee's class action study through to publication of recommended revisions in Civil Rule 23.

The Minutes of the April, 1996 meeting were approved.

CHAIRMAN'S REMARKS

Judge Niemeyer opened the discussion of the Committee's agenda by developing issues of program and structure.

The work of the Committee meetings has been heavy, and promises to continue to be heavy. To make best use of the limited time the Committee can work together, several working committees will be formed to enhance the work that can be done at full

Committee meetings.

The Agenda and Policy Committee is responsible for reviewing all materials that are put on the agenda for each Committee meeting. It also will be responsible for considering the long-range program of the Committee in discharging its statutory responsibility to assist the Judicial Conference with the duty imposed by 28 U.S.C. § 331 to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." The members of the Agenda and Policy Committee are Judge Scirica, chair, Judge Levi, and Phillip Wittmann.

The Technology Committee is responsible for considering the many issues that will arise in attempting to adapt court practices to the growing shift away from hard paper communication to electronic communication. The members of the Technology Committee are Judge Carroll, chair, Judge Rosenthal, and Professor Rowe. The Bankruptcy Rules Advisory Committee has worked with these problems regularly, and has been eager to adopt rules that will facilitate use of electronic means for filing and, eventually, service. The Standing Committee has created its own Technology Committee, to be composed of representatives from each of the Advisory Committees. Judge Carroll is the Civil Rules Committee's representative.

The RAND report on experience with the Civil Justice Reform Act will require close study by this Committee. The first need is to maintain contact with the Court Administration and Case Management Committee as that committee prepares to make recommendations to the Judicial Conference looking toward the report that the Judicial Conference is required to make to Congress by the end of June, 1997. This Committee will attend the March, 1997 meeting organized by the American Bar Association to study the RAND report. The committee on the RAND report is Justice Durham, chair, Assistant Attorney General Hunger, and Professor Rowe.

Discovery questions have been continually before the Committee for many years. It has been several years, however, since the Committee last explored the most fundamental issues going to the scope of discovery and the relationship between "notice" pleading and discovery. The time may have come to consider changes more fundamental than those made in recent years. The Civil Justice Reform Act manifests concern with the costs and delays associated with discovery, and may justify further study. The new disclosure practice authorized by Civil Rule 26(a) also must be studied. These matters are discussed further below. The Discovery Committee is Judge Levi, chair, Judge Doty, Judge Rosenthal, Carol J. Hansen Posegate, and Francis Fox. Because the work of this committee will be particularly heavy, efforts should be made to appoint an associate reporter especially charged with working with this committee.

Several changes in the admiralty rules are on the agenda for this meeting. The specialized nature of admiralty practice justifies appointment of a committee to review these proposals and become responsible for the admiralty rules. The Admiralty

Committee is Mark Kasanin, chair, Judge Vinson, and Professor Rowe.

The Committee Reporter is ex officio a member of each of these committees, and of the Standing Committee technology committee.

With the help of the Agenda and Policy committee, the Committee must continue to think about the character of the tasks it undertakes. Of the four proposals that were published for comment in August, 1995, only one — a modest revision of the interlocutory admiralty provisions of Civil Rule 9(h) — has been sent to the Supreme Court by the Judicial Conference. Proposed changes in the discovery protective order provisions of Rule 26(c) provoked substantial controversy, and have been held for further study in conjunction with the broader study of discovery issues to be launched over the next year. A proposal to amend Rule 47(a) to create a right of party participation in the voir dire examination of prospective jurors revealed a sharp division of views between judges and members of the bar. The committee concluded that rather than persist with a rule change, it would be better to address the misunderstandings between bench and bar by encouraging mutual educational efforts. Judges should be made more aware of the inadequacies that many lawyers perceive in judge-conducted voir dire examination. Lawyers should be more willing to deny the temptation to misuse the opportunity to participate that a majority of federal judges now afford. The proposal to amend Rule 48 to restore the 12-person civil jury was rejected by the Judicial Conference, a matter discussed later in the meeting. It was known from the beginning that these proposals would generate controversy. Such controversies may in turn reflect competing interests that are not easily reconciled in explicit rule provisions. One concern the Committee may want to bear in mind is that proposals that reveal sharp divisions among identifiable groups may not be the fair balancing of competing interests that the Committee had intended.

It also is necessary to keep in mind the constant concern that frequent changes in the rules are unsettling. Each transition to a new way of doing things imposes costs, not only in learning of the new rules and coming to understand them, but also in shaking out the problems that arise in actual implementation. It is tempting to amend a rule merely because it can be made, in some way, better. The cost of actually implementing change must be weighed carefully before indulging the temptation.

Once the Committee determines that a rule change is worthwhile, it must be committed to pursuing the change with vigor. The Committee should determine that each proposal is important and clearly right, and then support it in every way appropriate.

Rule 23 Report

Judge Niemeyer introduced the current state of the Committee's class-action proposals. The process of studying Rule 23 began in 1991. The elaborate efforts made by the Committee to reach out to concerned constituencies proved enormously beneficial in showing what the issues are. Many of the issues proved to be larger than

the grasp of the Rules Enabling Act process. A taste of these larger issues is provided by Parts I and II of the August 7 memorandum that was written to introduce the proposed changes and included in the agenda materials for this meeting.

Events inevitably continue apace outside the process of amending the rules. One current phenomenon involves increasing resort to state courts with actions on behalf of national classes. The Supreme Court has recently granted review in a case that raises the question whether a state court can recognize a mandatory national class on terms that deny any right to opt out while seeking to bind all members of the class. A direct answer to this question may have dramatic effects on the development of mass tort class actions, settlement classes, and related matters.

Just before the Rule 23 proposals were presented to the Standing Committee, a letter signed by a large group of concerned law professors urged that the Standing Committee not approve the proposals for publication. The concerns raised by the letter are in large part addressed by the Committee Note, which had not been completed — and necessarily had not been made available — when the letter was written. Several of these concerns may have abated, at least with respect to many of the signers, in the wake of actual publication of the proposals and note.

The Rule 23 proposals can be grouped into five categories. First are the modifications of the factors listed in Rule 23(b)(3) as bearing on the superiority of class treatment and the predominance of common issues. These modifications will generate controversy, particularly the balancing of costs and benefits introduced by factor (F). As a group, these changes can be read either to encourage or to discourage small-claim class actions. A more accurate assessment is that they increase trial court flexibility, expanding discretion in ways that will further reduce the scope of effective appellate review. Second is the (b)(4) settlement class. This has been the most misunderstood proposal. In fact it retains all the requirements of subdivision (a), as well as (b)(3), and — as a (b)(3) class — includes the requirements of notice and opportunity to elect exclusion from the class. Third is the change from the requirement that a certification decision be made as soon as practicable to a requirement that it be made when practicable. Fourth is the addition of an explicit requirement that a hearing be held before approving a proposed class settlement. These two changes are not likely to be controversial. Finally is the provision for permissive interlocutory appeal from certification decisions. Although the appeal provision has often engendered doubts when first described, it has not been difficult to demonstrate its virtues.

Public comment is likely to focus on (b)(3) and (b)(4). All Committee members should encourage interested students of Rule 23 to participate in one of the three scheduled public hearings. And as many members as can attend should do so. It is important, in a process that naturally focuses on differences of opinion, to find

out whether there is general support for the proposals, general opposition, or a deep division of opinion.

Judge Higginbotham then described the course of the Rule 23 proposals since the April meeting of this Committee. The first caution is to remember that the proposal package represents a minimalist approach to change. The issues the Committee decided not to address are far more complex, and in many ways more important. There are good reasons for the decisions not to address these larger issues. The proposals do not deal with classes that seek to include and bind future claimants, including those who have not yet even experienced the injuries that eventually will make them members of the class. Early proposals that would have allowed a court to deny the right to be excluded from a (b)(3) class were not pursued. Several letters were written to the Standing Committee to challenge a proposal that this Committee had not made; the misdirection made it easy to respond, but the misdirection also can obscure the real issues. The letter signed by so many academics was prepared without full knowledge of the process, and should not be taken to represent a widespread judgment about the merits of the proposals actually made. Much press attention similarly was devoted to attacking a proposal that the press thought had been made, but was not. And a good part of the initial reactions has come from people concerned with pending litigation, and the impact that the proposals might have on positions important to the litigation. The August 7 memorandum in the agenda materials was written to ensure public understanding of the proposals, protecting against the risk of premature summaries, and to underscore drafting options as well as to note some of the proposals that were put aside. It was not published with the proposals because it had not been before the Standing Committee at the June meeting.

The Standing Committee seemed to understand the message that the amount of attention devoted to the Rule 23 proposals so early in the process reflects the importance of the underlying issues. Attention and controversy should not defeat the proposals. Instead close attention must be paid to all the public comments and challenges. The Committee then must decide what is best, recommend the best, and support it. The (b)(3)(F) proposal will draw a lot of attention and comment. The Committee will benefit from it. And it is important to adhere to the minimalist approach.

It seems likely that the next major developments in class action doctrine will come in substantial part from developments on the constitutional front. The Supreme Court review of the Alabama mandatory class ruling will be an important beginning. It is important to remember that the (b)(4) settlement class proposal retains the right to opt out. The proposal in fact protects the right to opt out better than many classes that are certified for litigation and then settled after expiration of the opt-out period. Under the (b)(4) proposal, the settlement agreement must be reached before certification; the decision whether to opt out can be made with knowledge of the settlement terms. In litigation classes that

settle after expiration of the opt-out period, the right to opt out is protected only if the terms of the settlement provide it.

Discussion of the Rule 23 proposals reflected the minutes of the Standing Committee draft minutes that were included in the agenda materials. It was observed that although the Standing Committee approved the proposals for publication and comment, many members expressed strong reservations about several features of the proposals. It will be important to find ways to make clear the dependence of the (b)(4) settlement class proposal on (b)(3) class status. And it will be even more important to provide information in the Note that will help district judges know what to do with proposed settlement classes. Consumer advocates will be up in arms about the (b)(3)(F) class; many of the objections again can be met by small changes that make it clear that many small-claims classes will remain proper.

The law professors who expressed concern by writing the Standing Committee have been invited to file further comments and to appear at the public hearings. Their suggestions will be important.

It was further suggested that there are three main sets of class action problems today. First are federal-state problems. Plaintiffs are moving more and more to state courts, particularly in the wake of the Supreme Court decision that seems to entrench the full-faith-and-credit effects of state class-action judgments. There are serious questions whether it is desirable to allow a single state to bind all states by certifying a national class. Second are classes involving future claimants. The proposals leave this problem to be worked out in the courts. Third are attorney fees; perhaps proposals should be made to guide judges toward better fee awards.

Further discussion of the federal-state relations problems recognized the need to develop means of cooperation outside the rules. Means of liaison with state judges are important. The Conference of Chief Justices has a Mass Torts Litigation Committee. All the district judges who have been assigned MDL cases meet regularly, and discuss problems of relationships with state courts and state litigation. A special master has been appointed in the federal silicone gel breast implant litigation for the particular purpose of facilitating coordination among state courts and between state courts and federal courts.

The Committee was reminded that it had put aside proposals to amend Rule 23(e) by adding a check-list of factors to be considered in evaluating a proposed settlement.

Turning to the Judicial Conference rejection of the proposal to amend Rule 48 to restore the 12-person jury, Judge Higginbotham observed that the rejection was affected by expressions of opposition from various circuit district judges associations. He noted that the associations did not have all of the background materials that provided important information to this Committee in

its deliberations. He expressed concern that it is difficult to find ways of communicating the extensive deliberations of this Committee to district judges who have not sat through the deliberations. The important values served by proposals on topics such as jury size may not be as apparent as the seeming immediate lessons of their own experience. Six-person juries are obviously more convenient, and do not lead to manifestly wrong verdicts. It is difficult to communicate to busy judges the vastly improved representational quality of 12-person juries.

The 12-person jury enterprise should not be abandoned entirely. The Judicial Conference came close to returning the proposal to this Committee for further study, and the grounds for the opposition were never explained. Although concern about increased cost was a common element of the public comments, there was no concern on that score. Instead there seemed to be a general perception that smaller juries are working. Many judges now have not had any experience with 12-person civil juries. There is an apparent fear that given an opportunity for a 12-person jury, many defendants will remove actions from state courts that otherwise would remain in state court. This fear seems ill-founded; many factors control the removal decision. Another argument is that the number of peremptory challenges would not be increased; this argument ignores the fact that the number was set more than a century ago, and persisted for many years with 12-person juries. The reduction to smaller juries simply increased the effect of the unchanging statutory provision. A return to 12-person juries would merely return to the situation that had prevailed for a long time.

One possible strategy would be to reconsider the unanimous verdict requirement, considering a package that would combine a 10/12 jury verdict with restoration of the 12-person jury. This approach, however, ignores the effect of the unanimity requirement. As the Committee has regularly observed, hung juries are rare even with 12-person criminal juries that must agree beyond a reasonable doubt. The impact of the requirement is on the dynamics of decision within the jury, not the ability to reach a verdict. A unanimity requirement forces the jury to pay close attention to each member, considering the views of each and responding or adjusting all views to reach a consensus. More viewpoints are represented in a 12-member jury, and all viewpoints are considered when unanimity is required.

It is not possible to argue that a 6-person jury is better than a 12-person jury. It is very difficult to argue that it is as good.

Committee discussion of the Rule 48 proposal noted that in some districts it may be difficult to find 12 qualified jurors for some cases because the population is thin, and some cases involve employers or institutions that involve many members of the community.

It also was asked, as a general matter, whether it is possible to find ways to get information to the circuit district judges

associations in ways that will encourage better informed responses to Committee proposals. No concrete means were suggested.

Discussion of the 12-person jury proposal led back to review of the proposal for party participation as a matter of right in voir dire examination. The committee devoted a lot of time to the endeavor. The result has been not a rule change, but work with the Federal Judicial Center that has given a more important role to voir dire in the programs of instruction for district judges. There may be other means of educating judges about the importance of 12-person juries. Judges have the discretion to seat more than 6 jurors now, and many routinely select 8 or 10 in cases that are likely to be at all protracted. Continued attention to the subject may encourage more use of larger juries. Experience may in turn help prepare the way for reconsideration of the 12-person jury proposal in a few years.

RAND CJRA REPORT

Members of the Committee have reviewed the September, 1996 draft report prepared by the RAND Institute for Civil Justice to evaluate local experiments under the Civil Justice Reform Act. The report is Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace, and Vaiana, *Just, Speedy, and Inexpensive? An Evaluation of Case Management under the Civil Justice Reform Act*. This draft is described as "a final report of a project. It has been formally reviewed but has not been formally edited." At the same time, it is "not cleared for open publication."

Judge Jerome Simandle, of the Court Administration and Case Management Committee (CACM), attended this meeting to explain the work being done by CACM with the Rand Report. CACM is the Judicial Conference Committee that has overseen the RAND study, and will prepare recommendations for the report that the Judicial Conference is required to make to Congress by June 30, 1997. The Judicial Conference will meet in early March. CACM meets early in December. It is expected that CACM will share its anticipated report and recommendations with this committee as soon as it is practicable to do so. CACM plans to deliver its materials to the Judicial Conference no later than February 11.

Preliminary discussion raised the question whether any of the findings in the RAND report suggest changes in the Civil Rules. The RAND researchers were frustrated because the Civil Justice Reform Act did not set up a formal experiment along the lines that support careful social science research and conclusions. Cases were not assigned at random to different management tracks. Few judges made any significant changes from the ways they had managed cases before the local plans were adopted. What was possible, then, was a comparison of large numbers of cases that in fact were managed in different ways. The only clear conclusion is that in cases that lie outside the "minimal management" category, it is possible to achieve a shortened time to disposition without increasing costs only by a combination of three management techniques: early case management, early discovery cutoff, and an

early trial date. All of these techniques are authorized under the present Civil Rules. The only change that might be made in response to this finding would be to change the present authorization into a mandate.

The lack of obvious occasions for change was approached from another perspective. Many had expected that the report would provide a real opportunity for reexamining many aspects of present procedure. Instead, the findings seem noncontroversial. At least on first view, they seem generally to reinforce received views about good case management practice. Even the indications that in some settings it costs more to achieve speedier disposition than to allow litigation to take its course according to the natural pace of the parties is not surprising.

The findings about the effects of Civil Rule 26(a)(1) disclosure, and the many variations adopted by different district plans, will be of great interest to this committee. At the same time, they are remarkably tentative. There is a repeated emphasis on the findings through lawyer surveys that lawyers in districts that have adhered to mandatory disclosure do not like the policy, but that lawyers who have actually engaged in mandatory disclosure seem to like it. This seeming puzzle may reflect a general hostility arising from anticipated fears about disclosure that are assuaged by actual experience with disclosure. But a close look will be necessary to determine whether this is the explanation, or whether there is some other explanation. Other studies also are being made of mandatory disclosure, particularly as districts evaluate experience under their own plans. There will be much to be learned from them.

This discussion of mandatory disclosure led to comments anticipating the later general discussion of discovery. Concerns have been expressed with the lack of uniformity arising from the explicit provision in Rule 26(a)(1) that authorizes local rules that opt out of the national rule. When the CJRA expires, local choices to opt out must be expressed by local rule. The Federal Judicial Center surveys of disclosure practices indicate that most of the districts that have opted out of the national rule indeed have adopted local rules. When the opt-out provision was adopted, it was partly with a view to learning from experience with different local approaches. The Standing Committee Self-Study suggested that this Committee may wish to reevaluate the opt-out. At the same time, it will take several years of experience to support intelligent evaluation of experience with the national rule. The rule was greeted with widespread hostility. Even if it had been warmly received, time is required for lawyers to adjust to the best means of using disclosure and the Rule 26(f) conference. Time also will be required before large numbers of cases have gone through all discovery and trial. Actual trial of substantial numbers of cases will be required to provide information about failures to disclose and the sanctions that result. The RAND report found a de minimis level of pretrial disclosure motions; the predictions that Rule 26(a)(1) would engender substantial pretrial

dispute have not been borne out in these years in these districts. But the fear that evidence will be challenged and often excluded at trial for failure to disclose remains to be tested.

Close coordination with the Court Administration and Case Management Committee will play an important role in addressing the RAND report. Other work will remain to be done, however. This committee will attend the ABA conference on the RAND report in Tuscaloosa next March, shortly after the Judicial Conference meets to consider its report to Congress. The Judicial Conference report will be an important event in the aftermath of the CJRA experiments, but it will not be the final chapter. The ABA conference will be a very important next step, drawing from a wide cross-section of bench, bar, and legislative representatives. It will have the benefit of time to reflect on the RAND report, the CACM recommendations, and perhaps on other early reactions to the report. One of the topics for the conference will be study of the ways in which the RAND findings and the underlying data can be brought to bear on the rulemaking process.

Discussion of the RAND report concluded with focus on the ways in which this Committee can interact with the Court Administration and Case Management Committee. Judge Simandle noted that the RAND report points in certain directions on judicial management. It measures time and money, however, and cannot address such matters as detailed discovery policy. RAND has designed a report true to the intent of Congress. There never has been a study like this. They were devoted in collecting the data. The data, however, do not point ineluctably in any precise directions. The final Judicial Conference Report must report on the six principles and six management guidelines identified in the Act, and on whether any of these principles or guidelines should be implemented by changes in the Civil Rules. If adoption of these principles and guidelines is not recommended, the Judicial Conference report also is to identify alternative, more effective programs to reduce cost and delay. The Judicial Conference also is invited to initiate proceedings for adoption of rules implementing its recommendations. For all of these possible effects on this Committee, it is the Court Administration and Case Management Committee that is charged with Judicial Conference administration of the Judicial Conference response. The role of this Committee will be to coordinate as effectively as possible through the new Committee on the Rand Report.

DISCOVERY

When appointment of the Discovery Committee was announced, it was observed that most studies of the causes of popular dissatisfaction with the administration of civil procedure focus in large part on discovery. Discovery is expensive. Discovery is often conducted in a mean-spirited way. Discovery is used as a strategic tool, not to facilitate resolution of a controversy. Attorney self-regulation too often fails to work, as adversariness gets in the way of more professional behavior. Egos and tactics

intrude. Over-use by discovery out of any reasonable proportion to the needs of the case may be more common than more direct abuse. The new disclosure practice is badly fractured as many districts have opted out of the national rule and adopted different local variations. The American College of Trial Lawyers has proposed that it is once again time to reconsider the basic scope and nature of discovery. If any aspect of the rules is broken, discovery is it. The most optimistic inquiry will be the search for relatively modest changes that could bring substantial improvements. This quest will be successful if changes can be found that meet with general acceptance by plaintiffs and defendants. If a proposed change is generally regarded as unfair by one side or the other, there is a real prospect that in fact it is unfair. If we are to look at discovery, the project will require several years to bring to fruition. The problems are complex.

As complex as the problems are, caution is necessary. Lawyers and judges do not like frequent rule changes. Discovery practice has been changed many times. The Civil Rules, moreover, have become "organic" in the sense that they are understood and implemented as a seamless whole. Changes are appropriate only when there is a clear case for the change.

One possible approach would be to adopt a three-stage process. First would come disclosure, perhaps modified to require actual production of documents, deleting the option to simply identify them. The second stage would be lawyer-directed discovery. This stage could be limited in various ways. The numbers of interrogatories and depositions permitted by present rules might be reduced. The length of depositions could be limited. Document discovery could be cabined. Even the number of requests for admissions might be curtailed. The third stage would require court management. Discovery conferences, or other pretrial management formats, would be a mandatory element of more expansive discovery tailored to the actual needs of individually complex cases.

The old ABA proposal to narrow the scope of discovery authorized by Rule 26(b)(1) has been reviewed by this Committee in the past. It does not seem likely that it would effect substantial changes if it were adopted. At a minimum, it needs more study before it might be embraced.

As discussed in reviewing the RAND study, disclosure practice is fragmented. If the mandatory disclosure system of Rule 26(a)(1) proves successful, it might be useful to amend it to require actual production of documents, at least as to "core" documents.

Rule 26(c) protective order practice remains on the Committee agenda. The Committee's proposal was sent back by the Judicial Conference for further study. The proposal was republished, extensive comments were provided, and the Committee concluded that protective orders are so directly related to broader discovery topics that they must be studied together.

The organic aspect of the rules is nowhere more apparent than

in the relation between discovery and pleading. Notice pleading was adopted with the view that discovery would become the primary means of developing and exchanging information before trial. Discovery in fact has assumed the major role. Discovery relies on the lawyers to regulate themselves. In some cases, at least, the result seems to be disproportionate expenditure of money and effort in the quest for the elusive "smoking gun" that litigants hope may exist, or in the effort to beguile a deponent into saying unwilling things.

If the Committee is to undertake a broad reexamination of discovery, it will be important to follow the model that was used with consideration of Rule 23. At the very outset, means must be found to solicit the views and proposals of organized groups. The American College of Trial Lawyers has provided an excellent dossier of information and suggestions. The ABA, ATLA, other bar groups, and judges groups should be consulted. The views of this Committee and the suggestions received from other groups could be used by the Discovery Committee to provide the focus for a conference that would address the most important-seeming ideas. The conference might be scheduled for early next September. At the October meeting following the conference, this Committee could reflect on the papers and ideas presented at the conference and establish a set of projects for study by the Discovery Committee. The spring, 1998 meeting could begin work on specific proposals drafted by the Discovery Committee. Throughout this process, efforts should be made to help the bench and bar become aware of the proposals being considered. If possible, it should be made clear that the proposals have been made to the Committee by the many sources that are to be consulted. They will become Committee proposals only when adopted as recommendations.

General discussion of discovery topics followed. One observation was that indeed discovery practice is deteriorating, and that one source of the problem is that much discovery is conducted by "litigators" who are not trial lawyers. These litigators have no idea of what is possible or necessary at trial, and cast the discovery net far wider than any plausible trial use.

Notice pleading remains a problem for disclosure. Particularly in product liability litigation, the initial pleadings commonly give no coherent picture of what the problems will be.

Another view was that, at least as a matter of intuition, there does not seem to be much abuse. The proposal to narrow the scope of Rule 26(b)(1) does not seem likely to change much. There are problems of overusing discovery in marginal cases.

It was suggested that state experience should be studied. At the Dallas conference in 1995, Stephen Susman described Texas proposals to control discovery. New Jersey has a tracking system. Other courts have tracking systems. There may be much to be learned from experience with these systems.

The "rocket docket" system in the Eastern District of Virginia

also deserves attention. Many lawyers report, often informally, that it works well in many cases but also has problems. The problem most often identified is a lack of flexibility — a perception that it is too difficult to win variations in the set schedule even for cases that genuinely need more time. But it is a great place to file a case if your client cannot afford extensive discovery. With adjustments, this model might prove very attractive.

In contrast, Louisiana was described as a state in which a state-court trial cannot be scheduled while discovery remains "open," and in which trial can be avoided indefinitely simply by refusing to close discovery.

One of the observers suggested that discovery reform is a noble cause, but that it is too timid. Notice pleading should be on the agenda, and the very framework of trials. The simplest solution may be the most direct and radical — discovery might be abolished entirely. Of course this would require different pleading rules, and time limits on trial, along with limits on the numbers of witnesses. Anything remotely resembling current discovery practices cannot survive into the 21st Century.

This suggestion met the response that in some continental systems, discovery is actually integrated with trial. Trial is held in phases. There is a hearing, more facts are gathered in response to the issues indicated by the hearing, another hearing is held, and so on. Of course this approach would prove difficult with jury trial. But it has been used in bench trials in this country, and might prove useful in more general practice.

The Criminal Rules were held up as a model of a procedure with limited discovery, with the suggestion that they are not satisfactory. Time limits on depositions were suggested as a more practicable remedy for at least one part of the problem.

Members of the Committee have suggested in the past that perhaps the rules for document discovery should be separated from the general scope of discovery, and narrowed. It also has been suggested that discovery might be controlled by requiring that the demanding party state the facts that make desired discovery relevant. These are interesting ideas. The statement of fact relevance could help avoid the snares of notice pleading.

Discussion returned to the fragmentation of disclosure practice under Rule 26(a). It was suggested that it had been a mistake to allow for local variations. One of the results will be that each district will become comfortable with its own particular practice, and resist change to a uniform national system. Uniformity is a high value, and we should seek to restore it to disclosure. Diverse local rules are valid under Rule 83, at least after expiration of the Civil Justice Reform Act, only because Rule 26(a) authorizes them. The Standing Committee self-study has commended the importance of national uniformity, and indeed the desire to reduce local variations is one of the driving forces

behind the Local Rules Project. At the same time, there are strong pressures from the district courts for local autonomy, for "district rights," that will be hard to resist.

The desire to establish a nationally uniform disclosure practice does not immediately dictate what the uniform practice shall be. It is important to know whether the system adopted by Rule 26(a) is the right one. Initial reactions were hostile. Growing experience seems to be softening attitudes. The survey by the Eastern District of Pennsylvania of local disclosure experience revealed a high level of satisfaction among lawyers, and an even higher level of satisfaction among judges. Other CJRA reports may tell us more.

Representatives of the Federal Judicial Center, Joe S. Cecil and Thomas E. Willging, discussed the types of empirical research the Center might be able to do in support of the discovery project. It has been twenty years since the Center last did a broad discovery project, see Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (FJC 1978). Disclosure and discovery will play central roles in the evaluation of experience under the Civil Justice Reform Act, and a study of protective orders was done for the Committee's work on Rule 26(c). The methods used for the 1978 study cannot be replicated today, since they relied on court filings under a system that required that discovery materials be filed with the court. They expected to be able to do a review of all other empirical work on discovery, and to undertake at least a survey to gather additional information. Within the constant constraints of time and competing projects, they may be able to undertake additional studies. The data gathered by RAND for the CJRA report may provide useful information. It may be possible to gather some additional data. They plan to work with this Committee and the Discovery Committee to design the most useful project that can be managed.

A motion to approve the discovery project outlined above was passed unanimously.

Magistrate Judge Appeals

Section 207 of S. 1887, the Federal Courts Improvement Act of 1996, to be signed into law this month,[1] reshapes the provisions in 28 U.S.C. § 636 for appeal from a judgment entered by a magistrate judge following consent to trial before the magistrate judge. Section 636(c) formerly provided two alternative appeal paths. Absent agreement by the parties at the time of consenting to trial before the magistrate judge, the judgment of the magistrate judge is entered as the judgment of the district court and appeal lies to the court of appeals in the ordinary course. The parties, however, could agree at the time of reference to the magistrate judge that any appeal would be taken to the district court. The judgment of the district court on appeal from the

[1] The legislation was in fact signed on October 19, 1996.

magistrate judge could be reviewed only by petition to the court of appeals for leave to appeal. The power to choose initial review in the district court has been rescinded.

Removal of the opportunity to consent to appeal to the district court requires conforming amendments to the Civil Rules. Civil Rules 74, 75, and 76 govern appeals from the magistrate judge to the court of appeals; they are now redundant and should be abrogated. Portions of Civil Rule 73 also must be made to conform, with appropriate changes in the title and catchlines. The reference to § 636(c)(7) in Rule 73(a) now should be made to § 636(c)(5). Rule 73(d), which describes the optional appeal route to the district court, must be abrogated. In Rule 73(c), the clause "unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule" likewise must be deleted. Portions of Forms 33 and 34, as well as their captions, must be changed to reflect these changes.

The Committee agreed by consensus that these changes must be made. Discussion centered on the timing of the changes.

The first timing question goes to the effect of the changes on cases pending at the time of the statute's enactment. There will be many cases — for the most part concentrated in a few districts — in which the parties have consented both to trial before the magistrate judge and to appeal to the district court. The opportunity for appellate review quickly and inexpensively close to home may have been, in some of these cases, a significant reason for agreeing to trial before a magistrate judge. It seems likely that the courts will conclude that although the statute effects a procedural change that should apply to all pending cases in which the parties have not yet consented to a district-court appeal, they also may be persuaded that established consents should be honored. Many of these cases will have concluded before final action can be taken to remove the now redundant portions of the Civil Rules. Some, however, may be expected to linger on for many months. Not only may some cases prove complex, but in some the initial judgment may be reversed by the district court with a remand for further proceedings before the magistrate judge.

This timing question sets the framework for the second question. The ordinary requirements that rules changes be published for public comment can be suspended for changes that merely conform the rules to statutory changes. The proposed amendments do no more than recognize the elimination of the district-court appeal alternative. If publication is not ordered, it would be possible for the Standing Committee to recommend the changes for adoption by the Judicial Conference at its March, 1997 meeting. If the Judicial Conference approves the changes, they could be forwarded to the Supreme Court promptly. Given advance warning that the rules changes may be coming, the Court would have more than a month to review the changes before the deadline for submission to Congress. If submitted to Congress, the earliest the changes could take effect would be December 1, 1997, more than a

full year after enactment of the new statute. The alternative path of publication and public comment would mean that the earliest effective date for the changes would be December 1, 1998.

It was pointed out that under 28 U.S.C. § 2074(a), when the Supreme Court adopts rules of procedure, the Court fixes the extent to which a new rule applies to pending proceedings, "except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies." This provision confirms the conclusion that the present rules will continue to apply to any case in which the courts conclude that the opportunity to appeal to the district court remains available. It is the application of the statutory changes to pending cases that will control, not the effective date of the Civil Rules changes.

The Committee concluded unanimously that there is no need for public comment on the proposed conforming changes, and that it is better to seek to delete the misleading provisions of these rules as soon as possible. It is the Committee's recommendation that the Standing Committee recommend the conforming changes to the Judicial Conference for adoption without any period for public comment, and for timely action by the Supreme Court.

The Committee also discussed the question raised by several Seventh Circuit cases in which new parties are added to an action after the original parties have all consented to trial before a magistrate judge. Even when the new parties proceed without objection through trial, the Seventh Circuit has ruled that the right to a district-court trial has not been waived and that an appeal from the final judgment of the magistrate judge must be dismissed. This problem could be corrected by amending Civil Rule 73(b). One approach would be to require that the reference to the magistrate judge be withdrawn unless the new parties are given the opportunity to consent and expressly consent. Another approach would be to provide that failure to object to trial before the magistrate judge waives the right to district-court trial. This approach could be triggered in many ways: failure to object within a stated period; failure to object within a stated period after actual notice that the original parties have consented to trial before a magistrate judge; failure to object before beginning trial before the magistrate judge; or yet some other event. Judge Restani reported that the Bankruptcy Rules Committee has twice considered this issue and concluded not to act. There is some sense that this problem may be unique to the Seventh Circuit – that other courts have found effective ways to deal with the problem that do not require wasting a trial completed before the magistrate judge.

The issue of consent by parties added after all original parties have agreed to trial before the magistrate judge will be kept on the Committee agenda.

Admiralty Rules B, C, E

The Maritime Law Association and the Department of Justice have proposed several changes in Admiralty Rules B, C, and E. Among the many changes, four should be regarded as the most important.

Rule B(1) would be amended to adopt the alternatives to service by a marshal that were earlier adopted for Rule C(3); there is no clear reason to explain the failure to adopt these provisions in Rule B(1) at the time they were adopted for Rule C(3).

Rule B(2) would be amended to reflect the ways in which Civil Rule 4 was restructured in 1993. Rule B(2)(b) has incorporated the service of process provisions of former Rule 4(d). Those provisions have been redeployed throughout Rule 4, and conforming changes must be made.

Rule C(2) would be amended to reflect the many recent statutes that provide for forfeiture proceedings in one district involving property situated outside the district.

Rule C(6) would be amended by adopting a new subdivision (a) governing forfeitures. The Department of Justice has long been anxious to adapt the in rem procedures of Rule C to the needs of forfeiture proceedings. The most significant difference is that Rule C(6)(a) would provide for direct participation by all persons who have claims against the property to be forfeited. Rule C(6)(b), on the other hand, would provide for direct initial participation only by those claiming possessory or ownership interests in the property attached in an in rem proceeding. Those having other claims against the property would continue to be subject to an intervention requirement, although this requirement has not been spelled out on the face of the rule.

Discussion of these proposals followed several paths.

The proposals were drafted in the style of the current Supplemental Rules, in an effort to hold changes to a bare minimum. The present style, however, is often confusing. In reviewing the proposals, the Admiralty Rules Committee was asked to review and incorporate the suggestions of the Standing Committee's Style Committee.

A question was raised as to the continuing need for any admiralty rules. It was suggested that the rules have continued to play a vital role since the basic integration of admiralty procedure with the general Civil Rules.

The reference in the draft of Rule C(6) to "equity ownership interest" also was questioned. This term appears both in subdivision (a), which applies to forfeitures, and in subdivision (b). Although it is asserted that admiralty practitioners will understand that equity ownership embraces legal ownership, it was suggested that "ownership interest" is a safer and more encompassing term. This suggestion may prove true not only for

judges and attorneys not fully familiar with admiralty practice, but also and especially true for land-based lawyers who confront the term in the forfeiture rule. One alternative would be to refer to "legal or equity ownership interest," but even that alternative might seem to exclude some forms of ownership, particularly those that may arise under the laws of other countries. Consideration should be given to changing the draft so that it refers only to "ownership interest," to be supplemented by a comment in the Committee Note that all forms of ownership interest are included.

A question also was raised as to the portions of Civil Rule 4 to be incorporated into Rule B(2). As it stood, the B(2) incorporation of Civil Rule 4(d) included the provisions for service on the United States and on states. The proposal is that these provisions, now separately numbered, not be incorporated in the new B(2) because of the problems with immunity against attachment of property owned by the federal or state governments. The justification for making this change in the rule should be explored further.

Rule C(6) now allows interrogatories to be served with the complaint, and calls for answers to the interrogatories at the time of answering the complaint. It was asked whether this procedure corresponds to special needs of admiralty practice that justify departure from the timing provisions of Civil Rule 26(f).

The materials submitted with the proposals include the observation that at times a federal court may entertain a proceeding for forfeiture under state law. This question should be explored further.

Judge Stotler observed that the Criminal Rules Committee has been considering forfeitures under Criminal Rule 32, and that the project is being developed further to address the problems of third-party claims. There also may be jury-trial questions in civil forfeitures, although nothing in the proposed rules addresses these questions in any way.

The Admiralty Committee was asked to have a proposal ready for action in time for the spring meeting of this Committee. The Agenda Committee will then be able to determine whether there is time on the spring meeting agenda to consider the questions that may remain.

Copyright Rules

A report was made on the lack of progress in seeking expert advice on the way to approach the Copyright Rules of Practice. In 1964, the Committee recommended to the Standing Committee that these rules should be repealed; at the same time, it recognized that the Standing Committee might deem it wise to defer to Congress, which even then was considering proposals that eventually led to adoption of the 1976 Copyright Act. The Standing Committee did choose to defer, apart from repeal of former Copyright Rule 2. Even in 1964, the Committee believed that the no-notice impoundment procedures provided by the Copyright Rules were fundamentally

unfair. The due process tests that limit ex parte judicial action have developed significantly since 1964, and the seizure provisions of the 1976 Act, 17 U.S.C. § 503, seem inconsistent with the Copyright Rules. The 1964 proposal was that a new Civil Rule 65(f) should be adopted, explicitly invoking the procedures for temporary restraining orders and interlocutory injunction orders. This proposal would have the advantage of bringing copyright practice fully into the uniform rules of procedure. It also would retain the power to grant no-notice impoundment on a showing that notice might defeat the opportunity to grant effective relief.

After discussion about the difficulty of finding impartial sources of advice — a difficulty that was felt by the Committee in 1964 — it was moved that advice should be sought from such organizations as could be found. Unless cogent contrary advice should be provided, the next step should be to draft an amendment of Rule 81(a) that would delete the limits on application of the Civil Rules to copyright actions, and also to draft a repeal of the Copyright Rules. These drafts should be submitted to the ABA, selected copyright lawyers, and the Department of Justice for reactions. Unless some good reason is found for maintaining a special set of copyright procedures, the 1964 approach still seems sound. If indeed reason is found to continue to have special copyright rules, then advice must be sought on the ways in which the present rules should be reformed.

Rule 81(a)(1)

The Reporter was instructed to determine whether the United States District Court for the District of Columbia continues to exercise jurisdiction in mental health proceedings. If this jurisdiction has been transferred to the District courts, the final sentence of Rule 81(a)(1) should be repealed.

Rule 5: Service by Private Carrier or Electronic Means

Two quite distinct proposals have been made to amend Rule 5. One is that service by private express service should be made available as an alternative to service by mail. The other is that the way should be opened for service of documents other than the original summons and complaint by electronic means. The Bankruptcy Rules Committee has been considering provisions that would allow adoption of local rules authorizing service by electronic means. These proposals were referred to the Technology Committee.

Expert Witness Panels; Mass Litigation Trial Depositions

The Judicial Conference has appropriated funds to support a court-appointed panel of neutral experts in the consolidated MDL litigation involving silicone gel breast implants. This procedure is regarded as an experiment; it is being reviewed by another Judicial Conference committee.

This development was brought to the Committee's attention because it may lead to future proposals to amend the Civil Rules as well as the Evidence Rules. The order in the breast implant cases

contemplates that the court-appointed experts may be deposed for the purpose of generating testimony that will be admissible, through the depositions, in all of the MDL cases once they are remanded for trial in the districts of original filing. It is hoped that many state courts as well will find means of admitting the depositions in evidence. The MDL order invokes an analogy to Civil Rule 32(a)(3)(D) and (E). There may be an occasion in the future to consider adoption of revisions to Rule 32, and perhaps other rules, to facilitate once-for-all depositions of both expert and fact witnesses whose testimony is relevant in many repeated trials. The time to consider such possibilities remains in the future.

Committee discussion reflected some concerns about the practice of using court-appointed experts. It was also noted, however, that there are real problems in persuading the best qualified experts to appear as expert trial witnesses under present trial procedures.

Evidence Rule 103

In 1995, the Evidence Rules Committee published a proposal to add a new Evidence Rule 103(e) to govern the effects of in limine rulings on proffers of, or objections to, anticipated trial evidence. The proposal would have required both objections and proffers to be renewed at trial unless the court explicitly states that its ruling is final, or unless the context clearly demonstrates that the ruling is final. This proposal reflects the majority rule among the circuits, but would revise the practice in some circuits. Public comments on the rule were mixed. Some comments supported the rule. Other comments suggested that the presumption should be reversed — that the rule should provide that pretrial objections or proffers need not be repeated at trial unless the court explicitly indicates that its ruling is tentative. The Evidence Committee divided into three groups. A majority favored adopting a rule, but divided equally on the choice between these two rules. A strong minority preferred to adopt no rule. The Evidence Committee decided to solicit the advice of the Civil and Criminal Rules Committees.

Discussion found the Committee as uncertain as the Evidence Rules Committee. It was pointed out that the problem is that things change at trial. Because the full context of trial may not be the context that was assumed in making the in limine ruling, it should be required that objections or proffers be renewed. There is a risk that the trial court will rule in the pretrial context, but be reviewed by the appeals court on the basis of a trial context that was not considered by the trial court because the question was not renewed at trial.

It was suggested that the most serious problem arises in the situation of criminal defendants who seek pretrial rulings on the admissibility of prior convictions for impeachment purposes. The Supreme Court has ruled that a criminal defendant cannot obtain review of a pretrial ruling unless the defendant takes the stand at

trial. That range of problems is better addressed by the Criminal Rules Committee, along with the related question whether the pretrial objection is waived by a defendant who chooses to introduce at trial evidence that the court refused to exclude by a pretrial ruling. A defendant may wish to introduce the evidence to reduce the impact of having it introduced by the prosecution, but may fear waiver of the pretrial ruling. The Committee was advised, however, that the Criminal Rules Committee has concluded that it has no advice to offer on the proposed evidence rule.

Another observation was that trial lawyers are too cautious now, routinely renewing every objection and proffer without offering any additional ground for consideration. By encouraging even more of this behavior, the published proposal is a step backward. It was rejoined, however, that it would be dangerous for a trial lawyer to rely on a pretrial ruling. If a pretrial ruling is unfavorable, a good lawyer will try to reach the desired result in a different way, particularly by offering excluded evidence in a different form. The opposing lawyer may feel uncertain whether the pretrial ruling covers the new gambit. The trial judge also may feel caught unaware when a pretrial question is not renewed.

To further confuse the issue, it also was suggested that in almost all cases the context of the pretrial ruling makes it clear whether renewal at trial is required. Many judges simply defer most in limine questions to trial. Others make expressly conditional rulings. It was suggested that it is a trap to try to cover all possibilities in the rule.

Reference also was made to the provisions of Civil Rule 46, which abolish the need for formal exceptions, and the analogous provisions of Criminal Rule 51. The spirit of these provisions seems inconsistent with the published evidence proposal.

A straw vote on the question whether to advise adoption of some rule by the Evidence Committee produced 2 votes in favor of adopting a rule and 7 votes against. A second straw vote on whether the published proposal should be the rule adopted, if some rule is to be adopted, produced 2 yes votes.

Two specific suggestions were made for transmission to the Evidence Rules Committee. One was that there may be special difficulties in the draft Rule 103(e) reference to a "final" ruling. Finality is a risky concept that may mislead the court or the parties about the court's continuing power at trial to reconsider and revise an in limine ruling. If the Evidence Rules Committee goes forward with a proposal, it would be better to delete the reference to finality and to address the problem by providing that a pretrial motion need – or need not – be renewed. The other suggestion was that any new rule should be drafted in a way that does not make the trial judge responsible for making it clear whether an in limine ruling excuses any need for renewal at trial. A party who wants a clear pretrial determination whether renewal at trial is excused should bear the responsibility for explicitly requesting an explicit determination at the time of the

in limine proceeding.

The Reporter will communicate the substance of this discussion to the Reporter for the Evidence Rules Advisory Committee.

Self-Study

Judge Wm. Terrell Hodges, chair of the Judicial Conference Executive Committee, has sent the quinquennial questionnaire asking this Committee to consider its continuing role and function. The Committee considered the several questions and responded: (1) this Committee should continue to function. (2) The workload of the Committee seems appropriate, neither too great nor too small. (3) The size of the Committee is desirable. (4) Committee membership seems generally to be adequately representative, although it would be desirable to have greater representation of lawyers who regularly represent plaintiffs. (5) The work performed by the Committee seems appropriate to its assigned jurisdiction. (6) Many of the topics addressed by the Committee overlap with other committees. Overlap is particularly common with the other rules advisory committees, as might be expected; the Standing Committee continues to devise and revise means of coordinating the work of the advisory committees. Liaison members among the advisory committees are very helpful in this respect. There also is some overlap with other Judicial Conference committees. There is frequent overlap with matters handled by the Court Administration and Case Management committee, as illustrated by the discussion of the Rand report at this meeting. It would be desirable to establish a formal liaison between the Rules Committees and the Court Administration and Case Management Committee. There also is frequent overlap on issues of technology. The newly created Standing Committee Technology Committee will help to coordinate with other Judicial Conference committees in this area. Finally, this Committee urges continuing consideration of a question raised by the Standing Committee's Self-Study committee, whether the chairs of each of the advisory committees should be made voting members of the Standing Committee.

Next Meeting

It is too early to tell whether there will be so much work to do before the June meeting of the Standing Committee that this Committee cannot discharge all its responsibilities in conjunction with its meeting in conjunction with the ABA Rand Report program in March. April 24 and 25 were tentatively chosen as the dates for a second meeting should one be required.

Respectfully submitted,

Edward H. Cooper, Reporter

Draft Minutes

CIVIL RULES ADVISORY COMMITTEE

March 20 and 21, 1997

NOTE: THIS DRAFT HAS NOT BEEN REVIEWED BY THE COMMITTEE

The Civil Rules Advisory Committee met on March 20 and 21, 1997, at the University of Alabama School of Law. Committee members also attended the CJRA Implementation Conference held at the School of Law by the American Bar Association from March 20 through March 22. The meeting was attended by Judge Paul V. Niemeyer, Chair, and Judge John L. Carroll, Judge David S. Doty, Francis H. Fox, Esq., 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. Richard L. Marcus attended as Special Reporter for the Discovery Subcommittee. Former Committee chair Judge Patrick E. Higginbotham also was present. Sol Schreiber, Esq., attended as liaison member from the Committee on Rules of Practice and Procedure. Judge Jerome B. Simandle represented the Committee on Court Administration and Case Management. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts, and Karen Kremer of that office also attended. Donna Stienstra represented the Federal Judicial Center. Observers included Deborah Hensler and James Kakalik of the RAND Institute for Civil Justice; Judge Eduardo C. Robreno; Judith Resnik; and Jonathan W. Cuneo and Alfred W. Cortese, Jr.

Judge Niemeyer opened the meeting with a report on the Federal Judicial Center program to expand the coverage of jury voir dire practices in its judicial education programs. He also noted several bills pending in Congress on subjects that may be of interest to the Committee. One proposes a study of judicial activism. Another is the reintroduction of the Sunshine in Litigation Act that has engaged the Committee's attention in connection with the continuing study of discovery protective orders and Civil Rule 26(c). A third would add a new 28 U.S.C. § 1292(b)(2) to provide for interlocutory appeal from class action certification orders, in terms that parallel the interlocutory appeal proposal published for comment in August, 1996, as new Civil Rule 23(f). The fourth carries forward the "Contract with America" proposals with respect to offers of judgment and Civil Rule 68.

Judge Niemeyer also reported on the January meeting of the Committee on Rules of Practice and Procedure. He discussed with the Standing Committee the discovery project being launched by this Committee, the status of the public hearings on the proposed class-action rule amendments, and this Committee's work with the Committee on Court Administration and Case Management in framing a Civil Justice Reform Act report for the Judicial Conference. He noted that the Standing Committee had approved the recommendation to revise the Civil Rules and forms to reflect the statutory abolition of the option to appeal from the judgment of a magistrate

judge to a district court. The Judicial Conference has approved this recommendation and submitted it to the Supreme Court for transmittal to Congress in time to take effect on December 1, 1997.

Discussion of these reports noted that Civil Rule 68 has long engaged the Committee's attention. The issues have proved difficult, and many of the suggestions for revision test the limits of the Rules Enabling Act process. It may prove wise to defer further consideration pending developments in Congress. Rule 68 may yet provide the occasion for exploring means of cooperating with Congress in matters that involve the Civil Rules but that may best be addressed through the exercise of Congressional power to make substantive law.

RAND CJRA REPORT

The Civil Justice Reform Act requires that the Judicial Conference report to Congress on experience under the Act. The Committee on Court Administration and Case Management has primary responsibility for drafting a report to be considered by the Judicial Conference. This process was discussed briefly in open session, and later – again briefly – in executive session. It was pointed out in the open session that the Civil Rules Advisory Committee has a deep interest in the results of the local district experiments under the CJRA. Many of the principles and techniques fostered by the CJRA have been embodied in the Civil Rules. Experience under the act will call for study of other possible changes in the rules. This Committee worked with the Committee on Court Administration and Case Management in furtherance of this interest, and the cooperative endeavor proved highly successful.

Civil Rule 23

Civil Rule 23 will be the focal point of the May 1 and 2 meeting of the Committee. It was noted that the public comments and testimony on the proposals published in August, 1996, provided broad, deep, and varied reactions. The comments went not only to the proposals that were made but also to matters that had been considered by the Committee but deferred and to matters that had not been considered by the Committee. The preliminary discussion at this meeting is designed to help form the agenda for the May meeting.

A first quick summary of the comments and testimony observed that there was much controversy surrounding the Rule 23(b)(3)(F) proposal that would allow consideration of the balance between probable individual relief and the costs and burdens of class litigation. Much controversy also surrounded the Rule 23(b)(4) settlement class proposal. Although there were spirited comments addressed to many of the other proposals, most advanced issues that the Committee had already explored in depth.

The comments and testimony also addressed more fundamental challenges to the nature of Rule 23. Many witnesses stated that the number of class actions has expanded dramatically in the last

two or three years, often in state courts. The insurance "rounding up" case from Texas became a symbol of a deep dispute about the purpose of class litigation. To many, the case represents the best of class actions, providing very small individual awards but forcing disgorgement of a large total sum wrongfully taken from very many people. To others, the case represents the worst of class action excesses. The question thus framed is whether Rule 23 is – or should be – a private attorney-general device that enables self-appointed representatives and counsel to enforce public claims. This use of Rule 23 has many steadfast supporters. It is challenged, however, by others who believe that class actions should serve only the procedural purpose of achieving efficiency through aggregation.

With this introduction, it was suggested that there are more than a thousand class action settlements every year. Perhaps 50 of them might fairly be characterized as "bad" dispositions. The balance between good and bad dispositions demonstrates the success achieved by Rule 23.

The dilemma posed by the current debate includes Enabling Act concerns. Any change in Rule 23 will, in some sense, have substantive consequences. Rule 23(b)(3) has had enormous substantive consequences. Substantive effects will follow from changes that expand it, narrow it, or expand it in some directions while narrowing it in others. The central recurring question is whether the class action is an appropriate regulatory device without regard to the benefits reaped by individual class members.

Many of the comments suggested that the proposals simply do not go far enough to restrain the unfortunate excesses of contemporary class litigation. Should the Committee undertake a more fundamental review of Rule 23?

A more specific suggestion, taken up by many of the comments, is that the opt-out class should be replaced – in some settings or in all settings – by an opt-in class. One approach would be to adopt the opt-in class for cases that seem to offer only de minimis individual relief. The question whether there is sufficient private interest to justify private adversary litigation could be tested by limiting the class to those who opt in. If the aggregate benefits actually sought by willing class members who choose to opt in justify the costs and burdens of class litigation, well and good. It even would be possible to leave the decision whether to pursue the litigation to the class representatives and counsel: if they are willing to pursue the action on behalf of those who have opted in, the action can proceed without any requirement that a judge attempt to balance benefits against costs.

The opt-in class proposal led to renewed discussion of the (b)(3)(F) small-claims proposal. It was stated that the purpose of the proposal was to separate out the "coupon" class, the class that seeks only the substantive goals of deterrence and disgorgement. The published proposal presents the difficult problem of striking

a balance between costs and benefits. An opt-in class alternative would alleviate this problem. Opt-in classes need not lead to a proliferation of opt-in class actions growing out of the same underlying events. One answer would be to apply claim preclusion against any potential member of an opt-in class who had actual notice of the class but chose not to opt in. Even without preclusion, however, there often would not be a series of class actions. The risk of returning to the pre-1966 "one-way intervention" practice through nonmutual issue preclusion could be met by providing that potential members of the opt-in class could not use any judgment to support issue preclusion.

Turning to settlement classes, it was agreed by consensus that action on the (b)(4) proposal should be deferred until the Supreme Court has decided *Amchem Products, Inc. v. Windsor*, No. 96-270, argued on February 19, 1997.

Another theme sounded during the public comment period was that many of the proposals seem driven by the growing use of class actions to dispose of mass tort litigation, particularly dispersed mass torts. It was noted that recent appellate decisions seem to have exerted a substantial restraining effect on certification of mass-tort classes (and suggested that this result shows the importance of the interlocutory appeal proposal). The suggestion was made that the Committee should reexamine the possibility, abandoned some years ago, of a new and separate rule for mass tort classes. This approach would avoid the danger that changes made in Rule 23 to address mass tort problems may cause unnecessary difficulties in many other fields characterized by mature and useful class-action practice. The difficulties, however, are manifold. Perhaps the most direct difficulty is in defining the boundaries of a "mass tort" rule. It might be limited to personal injury cases, perhaps covering such matters as thresholds for numbers of victims, dispersion of injuries in time and place, and severity of injuries; a different emphasis on the value of "issues" classes; special rules for choice of law; and particular answers for the subsequent stages of assessing such necessarily individual issues as injury, specific causation, contributory fault, and damages. Provision might be made for the problem of "future" claimants who have been exposed to a harm-causing agent but have not yet suffered injury. Efforts might even be made to integrate such a rule with supporting legislation. The potential artificiality of excluding property damage claims might be met by allowing property damage claims to be resolved under the rule so long as the personal injury threshold were met. If these boundary problems can be surmounted, a more fundamental challenge will remain. The content of the rule must be defined. The definition must account for the predictable fact that most of the claims in most of these classes will arise under state law, not federal. Great care must be taken to avoid untoward substantive impact on these state-law claims.

Another proposal advanced by several witnesses was that the

"common evidence" element of predominance should be made an explicit factor in (b)(3) classes. The proposal would require that common proof resolve all, or substantially all, elements of class members' claims. The result will be to avoid the need for thousands of individual "minitrials" after a reduced set of common issues is resolved on a class basis. It was rejoined that in fact there are not thousands of minitrials. Defendants do not insist on this approach. And a commonality of proof requirement, taken very far, would make class litigation almost impossible.

Some of the comments urged that any Rule 23 revision should address problems of notice. Notices in (b)(3) classes now are commonly unintelligible — even sophisticated lawyers must spend hours attempting to decipher them. A "plain English" requirement should be added. Something also might be done to authorize lower cost notice in small-claims classes, and perhaps to require notice in (b)(1) and (b)(2) classes.

Attention turned from these new proposals to specific issues addressed to the published proposals. It was urged that the "maturity" element added to factor (b)(3)(C) was addressed to mass tort cases, and should be removed if mass torts are not to remain a focus of any Rule 23 revisions. Demanding maturity in other settings could upset well-established practices.

If the balancing approach to small-claims classes in proposed factor (b)(3)(F) goes forward, drafting changes may be required. Many have suggested that it should be made clear whether aggregate class benefits may be considered, and whether the projection of probable relief requires or permits a preliminary evaluation of the merits.

The hearing requirement added to subdivision (e) in conjunction with the (b)(4) settlement class proposal was the target of several comments. It has been urged that courts now routinely hold hearings, but do not hold hearings when an action brought as a class action is dismissed before class certification and in circumstances that do not involve any risk of collusion or injury to putative class members. There is little need for this revision unless it is tied to settlement class provisions or other changes in subdivision (e). And there may be risks. It has been urged that many pro se actions are brought as class actions on claims that warrant immediate dismissal; the risk that a hearing must be had in every such case is inappropriate. It also has been suggested that many cases involve first a hearing and approval of a settlement, then administration of the settlement over a protracted period, and finally dismissal; the proposal might be read to require a second hearing before the final dismissal.

The first task for the May meeting will be to decide what steps to take next with the Rule 23 proposals. For some time it has been supposed that it would be best to address Rule 23 once, in a single package. Circumstances, however, may have changed in ways that support separation of the initial package. The challenges

raised by the comments and testimony make it appropriate to consider the prospect of proposing more fundamental changes in Rule 23. The Supreme Court's consideration of an important settlement-class case counsels delay at least on settlement-class proposals. In this setting, it may be appropriate to consider separating the package. Two or even three tracks might be followed. Some proposals could be carried through the regular steps that follow publication: they can be reconsidered in light of the comments and testimony, revised if appropriate, and — if the revisions to not require a second publication — sent ahead for submission to the Judicial Conference, the Supreme Court, and Congress. Others might be held for further study, recognizing that additional proposals are likely to require some time for deliberation, likely further publication, and further consideration. It is always possible that some proposals might be found in a posture that warrants immediate publication; if that should happen, it would be necessary to decide whether to delay immediate action even on proposals that otherwise would be ready to go ahead now.

A set of materials dealing with these matters will be prepared for the May agenda.

At the invitation of the Committee, Deborah Hensler of the RAND Institute for Civil Justice described the design and ongoing progress of a RAND study of class actions. The study is designed to follow a different methodology than the study done for the Committee by the Federal Judicial Center, and to supplement it by looking at different sources and kinds of information. One element is to attempt to develop a sense of the number of class actions by gathering information from electronic data bases, to be supplemented by interviews with counsel. Attention also is being paid to trends. It seems clear even now that class actions remain a relatively rare phenomenon in the total universe of litigation. Corporations and others facing large numbers are talking of dozens or scores of class actions, not hundreds. The "Fortune 50" are the most frequent targets, and they face far larger numbers of individual actions than class actions. Everyone reports significant growth, often speaking of a doubling or tripling in the last three years. Most of the growth, particularly in the last year and a half, has been in state court class actions. The subjects of class litigation also are more diverse than in the past. Mass tort claims are not frequently certified for class treatment, and many of the initial certifications have failed. There also seem to be mass tort property damage cases that are much like personal injury cases; drawing a boundary between "mass tort" classes and other classes may prove difficult. It is clear that a single event many indeed generate multiple class actions — they are viewed as "competing" classes, whether by independent filings in the same jurisdiction or by filings in different jurisdictions. A second element is to measure the dynamics of class litigation. This stage will rely exclusively on interviews with lawyers. Lengthy interviews have been completed with some 50 different people, including leading practitioners in the plaintiffs' bar,

corporations in most sectors of the economy, and so on. Much attention has focused on small damages cases. Generally they do not involve classes all of whose members have suffered only small injuries. And generally they do not involve mere "technical" violations of the law. Some do seem to involve individual claims too small to support the cost of individual notice. This is a rapidly changing area of practice. The lawyers involved in this practice are excited by the challenge, and among the finest lawyers in the country. And these kinds of cases would persist even if Rule 23 were repealed; they would remain as families of related cases, managed together.

Discovery Committee

The Discovery Committee led discussion of the project to review the discovery rules and practice. Complaints of discovery abuse continue to be pressed. It remains difficult, however, to define abuse. Equal difficulties arise with attempts to diagnose, measure, or cure abuse. The other broad issues are no easier. Is discovery too costly by some measure, either generally or in more specific ways that can be profitably addressed by rules changes? Are there proposals that will reduce cost or delay and prove acceptable to all sides?

The project now is in the phase of developing a "smorgasbord of ideas" for the September meeting. The October meeting will pick out the ideas to be developed by the Discovery Committee for the March, 1998 meeting.

It was recognized that there is a powerful view that no changes should be made in the discovery rules. The "no changes" view is particularly popular among judges and academics.

The Discovery Committee began work by holding a January conference in San Francisco in conjunction with the Rule 23 hearings. The lawyers invited to the conference were not a random group. They were selected because of their rich experiences and demonstrated interest in continuing procedural reform. Collectively, they have many years of experience from practice in all sections of the country, representing parties who span the full spectrum of federal-court litigants. The meeting generated substantial levels of agreement on some topics, and disagreement on others. The result was not a crisis report, nor any demand for radical relief. There was a clear consensus that something much like modern discovery is essential. The question is how much discovery, not whether there should be discovery.

There also seemed to be agreement that there are no general problems arising from practice under Rules 33 (interrogatories), 35 (physical and mental examinations), or 36 (requests for admissions). Nor was there much concern with civility.

Compared to the "no changes" view, the January conference showed a different view. They believe that discovery has gotten worse over the last five years. The problem is not so much abuses

as the demands in the "documents" case. There seems to be a substantial practice of over-discovery, but it does not seem to involve calculated abuse for tactical advantage. The document-discovery input is enormous. The actual output of materials useful for pretrial or trial purposes is minuscule. The problems are aggravated in the "one-way" case in which one party holds almost all the documents; when both parties hold substantial volumes of documents, it is much more likely that they will cooperate to find means to manage reasonable discovery.

Apart from the cases with massive document discovery, there may be some problems with concealment. Rules that effect unintentional waiver of privilege also may deserve attention; quite apart from the intrinsic merit of the waiver rules, the fear of waiver exacts a high cost in reviewing documents for discovery responses.

There also was a consensus at the San Francisco meeting that national uniformity is desirable. The Department of Justice seems particularly interested in achieving more uniformity. One obvious need for attention is the variety of disclosure practices that have emerged from the Civil Justice Reform Act programs and the authorization given by Civil Rule 26(a)(1).

There is a strong sense that in most cases discovery is not a problem. The problems seem to be associated with "complex" cases. Defining complex cases may not be easy, however, and there are good reasons to fear an attempt to cure whatever problems may arise in complex cases by rules changes that will apply to cases that generally to not generate problems.

The protective order question remains part of this more general discovery project. The years of study and the two published proposals to amend Rule 26(c) brought this topic close to completion, but the conclusion was deferred with the thought that the discovery terrain might be changed by the broader project. One of the problems addressed by the published proposal continues to demand attention — discovery materials produced in one action may be returned, destroyed, or sheltered by a continuing protective order that forces the parties to parallel litigation to unnecessary work in duplicating the same discovery efforts.

General discussion suggested that one approach to document discovery is to make the demanding party sort it out. If a demand seems excessive, rather than produce the responding party can simply force a motion to compel. The process that leads to a motion can lead to a reasonable result.

It was observed that problems often arise from delegation of discovery to the youngest lawyer involved with a case. Inexperienced lawyers do not know what they will need for trial, and fear criticism if they do not ask for enough.

It also was suggested that the key to successful discovery is active judicial oversight. There are some reasonable grounds for

disagreement among the parties. Ready access to a judge can help the process immeasurably. Although the RAND report on CJRA experience suggests that magistrate judges can play a useful role, involvement of a district judge can be important. One task may be to attempt to sort out the frequency and success of different patterns of judicial behavior: how many judges hold themselves available for telephone discovery conferences? How many delegate problems to magistrate judges? How many take the view that the parties should resolve all discovery disputes for themselves?

Some lawyers have urged that it should be possible to work out a standard protocol identifying the types of documents that are reasonably discovered in various types of litigation. The protocols could be generated by bringing together plaintiff and defendant lawyers from each area of practice. Securities lawyers could work out a protocol for securities cases, antitrust lawyers for antitrust cases, employment discrimination lawyers for employment discrimination cases, and so on. Other lawyers have expressed doubt about this approach, and observe that often it will be difficult to determine which category matches a particular case.

The view was expressed that much good is done during the premotion conferences that most districts require. The lawyers work out most problems without judicial intervention. And magistrate judges accomplish a lot in resolving the problems that the lawyers cannot work out.

The Discovery Committee is working with the Federal Center to develop a questionnaire to be sent to all lawyers involved in a sample of 1,000 recently concluded cases. There is a limit, unfortunately, on how much can be asked. The more complex the questionnaire, the lower the level of response will be.

Disclosure practices under Rule 26(a)(1) and under local district variations also were discussed. It was urged that there is a substantial and unfortunate delay at the start of trial by the combined effect of the disclosure rule, the suspension of discovery and disclosure until the Rule 26(f) conference, and the mandatory scheduling order provisions of Rule 16(b). One response has been to issue an "initial" scheduling order at the start of the litigation, subject to revision when a regular scheduling order can be entered under Rule 16(b). It has been suggested that there is a tension between Rule 16 and Rule 26, but at the same time the theory of the 1993 amendments was that the Rule 26(f) conference is necessary to make the Rule 16(b) scheduling order effective.

The possible sources of information on the working of various local disclosure practices, including the "national" rule, were discussed. The RAND CJRA data base is available for study by the Administrative Office and Federal Judicial Center, and RAND itself will be asking some further questions. The data base includes information on lawyer hours and "judge minutes" devoted to discovery, and on discovery motions. The data will be searched to see what kinds of cases generate high levels of discovery, or

frequent discovery disputes. These findings can be related to the policies used – early mandatory disclosure, voluntary disclosure, and so on.

There are a growing number of local CJRA reports. The Eastern District of Pennsylvania has done an elaborate study of disclosure. The Eastern District of New York also has an elaborate study; it may prove instructive to compare their experience with disclosure to experience in the adjacent Southern District of New York, which has rejected disclosure. The Federal Judicial Center has full data on district-level practices, but the options commonly made available to individual judges within each district make it difficult to achieve district-wide comparisons. This phenomenon accounts for the choice to base the FJC survey on a case-level comparison, not a district-by-district approach.

It was suggested that the FJC study might usefully ask for lawyer responses to half a dozen policy questions, seeking "positions, not data."

Many lawyer associations have been asked to contribute ideas to the discovery project. Among them are ATLA, the ABA Litigation Section, the Defense Research Institute, Lawyers for Public Justice, and the American College of Trial Lawyers. The American College has been involved in the launching of the discovery project, and it is hoped that all of these groups – as well as any others than can be brought into the process – will provide much help.

Other Rules

Other pending Rules topics were addressed briefly.

The Copyright Rules will be on the agenda for discussion at the September meeting if time allows; otherwise they will be addressed at the October meeting.

The proposals to revise the Admiralty Rules may be ready in time for presentation at the May meeting. If not, they will be on the agenda for one of the fall meetings.

A Department of Justice proposal to amend Rules 4 and 12 to extend the time to answer in "Bivens" actions was presented in draft form. This proposal will be on the agenda for discussion at the September or October meetings.

Judge Higginbotham

Judge Higginbotham was presented a Resolution of the Judicial Conference of the United States recognizing his service as Chair of the Civil Rules Advisory Committee and as a member, from 1987 to 1993, of the Federal-State Jurisdiction Committee. In accepting the resolution, he observed that it is very important that the Advisory Committee continue the openness policy that it has been following, and that it continue to be willing to engage the hard issues. Congress will be deferential to the process as long as the

Committee continues to engage the important issues openly, thoughtfully, and rationally. He also noted that the Committee has been fortunate to have the very strong and thoughtful support of the Administrative Office staff.

Respectfully submitted,

Edward H. Cooper, Reporter

Item III

REPORTER'S MEMORANDUM

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

He testified:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paul V. Niemeyer
March 15, 1997

I Proposals Ready for Present Action

The characterization of the Rule 23(c)(1) and (f) proposals as ready for present action is conditional. As with each of the next two groups, the choice rests on a preliminary appraisal of the public comments and testimony in relation to earlier Committee deliberations. Committee consideration may lead to quite different evaluations. Even if each proposal can be recommended for present adoption in a form that does not demand a second publication, the question of severability remains. A decision that two items are ready to go forward now, while others deserve continuing consideration, would force attention to questions of timing. There is some attraction to amending a rule once, or at well separated intervals, not in rapid-flowing succession.

(c)(1) "When Practicable"

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

Most of the comments and testimony on this proposal were favorable. The most common observations echoed two observations in the draft Note. Actual practice is to certify when practicable, not "as soon as" practicable. This practical approach to practicability is often followed even in courts that have local rules specifying a deadline for certification. Time is required to develop information about what the issues will be; expanding the time before certification will make for better-informed decisions. Deferring the certification decision also is helpful in supporting precertification determination of motions to dismiss or for summary judgment. It also was observed — more often in comments addressed to other proposals than in the comments addressed directly to the (c)(1) proposal — that the practice of conditional certification does not provide effective protection against the dangers of hasty certification. Even a conditional certification generates substantial pressure to settle, in part because even a conditional certification acquires a momentum that is difficult to stop.

Opposing comments rested in large part on opposition to precertification motions to dismiss or for summary judgment. It is urged that the time required for discovery on the merits for summary-judgment purposes will unreasonably delay certification. One comment suggested that it would be better to require still earlier certification rulings, so that class members who learn of a pending class action in the media are not left in prolonged doubt about the fate of the action. Another opposed the proposal only to the extent that it was tied by the Note to settlement classes.

There is a drafting suggestion that "when practicable" is not necessary — the elimination of the "as soon as" requirement makes

it surplusage. The same thought could be conveyed by these words: "The court shall determine by order whether an action brought as a class action is to be so maintained." Still greater simplification could be managed: "The court shall determine by order whether to certify an action brought as a class action. The order may be conditional, and may be altered or amended before the decision on the merits." Although style improvements are always tempting, these proposals seem minor. The change from the current language is emphasized by the published draft. It likely is better to retain the language of the published draft.

The Note will need changes if it is decided to go ahead with (c)(1) now but to defer action on other proposals that added to the reasons for proposing the (c)(1) change. The possible deferral or disappearance of these reasons does not argue for putting aside (c)(1). The many supporting comments did not rest on these reasons. Although the (c)(1) change would be made even more desirable by adoption of the settlement class proposal, or the new factors in (b)(3), the independent reasons for the change are sufficient to justify present adoption. The draft Note might be changed as follows:

COMMITTEE NOTE

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

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These practices may reflect the dominance of practicability as a pragmatic concept that effectively has translated "as soon as" to mean "when." ~~Public comments and testimony entrench the observation that~~ The amendment simply conforms the language of the rule to predominant current practice. The inquiries needed to support a realistic application of the predominance and superiority requirements for certification of a (b)(3) class, for example, may be weakened by undue pressure for an early certification decision. The amendment makes this approach secure ~~and supports the changes made in subdivision (b)(3) and the addition of subdivision (b)(4). Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise the factors identified in new or amended subparagraphs (A), (B), (C), and (F). Certification of a settlement class under new subdivision (b)(4) cannot happen until the parties have reached a settlement agreement, and there should not be any pressure to reach settlement "as soon~~

~~as practicable."~~ The certification decision also may be deferred to support attempts to settle the action.

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

(f) Permissive Interlocutory Appeal

This proposal would create an opportunity to appeal an order granting or denying certification. The determination whether to permit an appeal would be confided solely to the discretion of the court of appeals. Comment and testimony were mixed, providing enthusiastic support and equally enthusiastic opposition. It is fair to say that most opposition came from those who sought to present the concerns of typical plaintiffs, while most support came from those offering the perspective of defendants. Although there is much detail in the many observations, there is little that is new to the Committee. It is not surprising that little new information has appeared. The interlocutory appeal provision has persisted without significant change from the earliest drafts, and was reviewed by many eyes before it was published. The constant character of the differing views suggests that the time has come for final Committee action on this proposal. Further work should be required only if the Committee decides to propose substantial changes that would warrant publication for a second round of public comment.

As published, proposed Rule 23(f) would read:

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

Support for the Proposal — and Beyond

Comments supporting increased opportunities for review of certification orders before final judgment emphasize the inadequacy of present appeal opportunities. 28 U.S.C. § 1292(b) requires certification by the judge who has made the certification order, and even a willing judge may have difficulty with the criteria that prevent free use of § 1292(b). Mandamus is not satisfactory because many courts apply the traditional and very demanding tests that make mandamus truly an extraordinary remedy. While increased use of mandamus might more often satisfy the need for review, there would be an undesirable strain on ordinary mandamus standards. These views lead at least to approval of the proposal. They also lead beyond the proposal to suggestions that the Note should be revised to retract several limiting suggestions. A few comments suggest further expansion of the opportunity to appeal, including creation of an appeal as a matter of right.

The perceived inadequacy of § 1292(b) rests in part on the concern that a district judge may so believe in the correctness of an order that has required much hard thought as to overlook the forceful or compelling arguments on the other side. In addition,

some comments suggest that class certification may be ordered as a bludgeon to coerce settlement; in these cases, appeal certification will be denied to preserve the desired settlement pressure.

The need for appeal was often expressed in terms of the coercive settlement effects generated by class certification. Many different phrases were used to assert that certification can cause irreparable injury. In addition, a somewhat smaller number of comments noted that denial of certification can prove the death knell of the litigation.

Practical effects also were anticipated. The prospect of appeal may encourage greater rigor by district courts. The temptation to use class certification to induce settlement will be reduced.

Some observers suggested that there is great disuniformity in district-court class-action practices. Final judgment appeals have not provided sufficient opportunities to develop a uniform body of law. More frequent appeals will create more uniformity. Uniformity in turn will discourage the "long-shot" filings that rely on the more extreme occasional uses of Rule 23, and may reduce the temptation to file repeatedly in different courts until one judge can be persuaded to certify a desired class.

The opportunity to appeal will be more valuable if the (c)(1) proposal is adopted, reducing the pressure to make hurried certification decisions. A more relaxed approach to the certification decision will develop a better record, supporting both better decisions whether to grant appeal and the opportunity for better-informed and more useful decisions on the merits of the appeals that are accepted.

Many of those who endorse the proposal urge that it does not go far enough to facilitate prompt review. The strongest suggestion is that there should be appeal as a matter of right from an order granting or denying certification.

The most common suggestion is that the Note detracts unduly from the promise of the rule. In response to concerns that certification appeals would be sought too often, and perhaps granted too often, the Note was written to provide several reassurances that this new appeal opportunity is a special tool, to be used with restraint. These portions of the Note are redlined below to facilitate reconsideration. It is urged that the Note should merely describe the new procedure, leaving it to the courts of appeals to develop their own standards for review. The Note is seen as a distraction that will fuel fruitless debates about the meaning of the Note, not about the actual considerations that should control the decision whether to grant an appeal. The paragraph that invites district judges to comment on the utility of an appeal also is challenged. Reliance on district judge views is feared as a regression toward the constraints that weaken the value

of § 1292(b).

Another common suggestion was that the Note is too neutral on the desirability of a stay pending appeal. The most enthusiastic view is that there should be an automatic stay of district court proceedings pending appeal. More restrained views would rely less on district court discretion, and would use the Note to urge the frequent need to avoid the great costs of pretrial proceedings pending appeal from an order that grants certification.

The 10-day limit for appeal has been questioned on the ground that the more appeal-worthy the order, the greater the value of seeking trial court reconsideration. The time should be 10 days from the order or from an order denying reconsideration. Although the suggestions to not make the point, this approach may require a time limit for seeking reconsideration. The time for seeking reconsideration is controlled by entry of judgment; class certification orders are, in addition, expressly made subject to reconsideration at any time. In order to avoid applications for appeal supported by a motion for reconsideration made long after the initial order, an express limit could be attached to the appeal time. One example would be that the time to apply for permission to appeal is 10 days from the initial order, or 10 days from action on a motion to alter or amend that is made no later than 10 days from the initial order. These questions tie to another suggestion, which would borrow from the interlocutory injunction appeal statute to allow appeal not only as to the initial certification decision but also from any subsequent order "continuing, modifying, refusing, dissolving, or refusing to dissolve or modify the order granting or denying class certification."

The lack of expressed standards is questioned by those who support the proposal as well as those who oppose it. One possibility, urged primarily by those who oppose, is that the rule should adopt the constraints of § 1292(b): the order must involve "a controlling question of law as to which there is substantial ground for difference of opinion" and it must be found "that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Another possibility is to suggest standards in the Note. The standards offered include certification of a nationwide class, the need to resolve an important conflict in district court decisions, identification of a novel or unsettled question, and a substantial departure from the accepted and usual course of judicial proceedings.

Opposition to the Proposal

The central themes of the arguments opposing the appeal proposal recur repeatedly. Present opportunities for review by

extraordinary writ or § 1292(b) appeal are adequate.[1] Additional appeal opportunities will become the occasion for added cost and delay. Defendants will seek review of every order granting certification, and indeed will be encouraged to resist certification — and to multiply the grounds of resistance — solely for the purpose of adding cost and delay. Even the valiant lawyer who would not resort to such tactics will feel irresistible client pressure to exhaust every possible opportunity for review. The opponents add that virtually all defendants support the proposal or wish to expand it, while virtually all plaintiffs oppose it, proving that the proposal is pro-defendant and not substantively neutral. At most, an opportunity should be given to plaintiffs to appeal denial of certification; defendants should not be allowed an appeal from class certification. There is no reason to treat class certification decisions as a special exception to the final-judgment requirement, and there are many reasons to reject any such exception.

A more pointed argument questions the value of appellate review. Certification decisions must reconcile a number of complex and often conflicting factors, and depend on tangled facts. On this view, district courts have immediate and regular experience with the realities of administering Rule 23. Appellate courts lack this direct experience, and in the nature of the selective review process are likely to confront only the pathological cases. The result will be a growing body of appellate case law that distorts and misdirects class-action practice. A variation of this argument is that district courts, taking comfort in the availability of review of serious mistakes, will become less careful about certification decisions.

The Note suggestion that an order granting certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability" is challenged as wanting empirical support. The FJC study is offered as proof that there is no empirical support. And it is asserted that in fact defendants are not forced to settle.

Some of the opposition arguments rest on the effect of other proposals. The most direct argument is that proposed factor (b)(3)(F) will entail preliminary consideration of the merits, entangling appeals with reconsideration of the merits.

The proposals for revision advanced by the opponents often — and not surprisingly — reverse the proposals for extension advanced

---

[1] It is perhaps significant that the comments do not rely on the adequacy of review incident to interlocutory injunction appeals, much less on the adequacy of review on appeal from a judgment final in the traditional sense that there is nothing left to be done, unless it be to execute a judgment for the plaintiff.

by the proponents. The desire to spell out factors that guide or control discretion is noted above.

One clear suggestion is that if (f) should be adopted in any form, it should be limited to mass torts and any other identifiable area of class litigation that presents substantial numbers of novel and unsettled questions. Class-action practice is said to be well settled in many other areas, offering little opportunity for profit and much risk of mischief if pretrial appeals are facilitated.

Other suggestions urge that cautionary language in the Note be incorporated in the text of the Rule. These suggestions focus on the various admonitions that review should be granted with restraint, and on the reflection that district-court advice can assist the decision whether to grant review.

The debate about stays pending appeal is maintained on the opposition side by arguments that the rule should expressly permit discovery on the merits while any appeal is pending.

Resolution

These are familiar arguments. The Committee has considered them time and again. Time and again, the Committee has accepted the view that the proposed appeal provision will cause little added expense or delay in the vast majority of cases. This view rests on experience with § 1292(b) applications for permission to appeal — even in these cases, with the support of trial-court certification, the courts of appeals are able to decide whether to allow an appeal in very little time. Significant delay and added cost will occur only in the cases presenting questions so serious as to justify permission to appeal. The comments and testimony provide the occasion for one final reconsideration, but add little that is new to the Committee. There is no evident need to present draft variations of the published proposal.

After reconsideration, the most serious question raised by the comments is whether to modify the Note by reducing the attempt to guide appeals-court discretion. The repeated references to § 1292(b) may be confusing, because they may be read to import the limiting § 1292(b) criteria that were deliberately omitted from the rule. The intent was to refer to the scope of appeals-court discretion under § 1292(b). The most common explanation of the discretion element under § 1292(b), however, is that this discretion parallels the Supreme Court's discretion on petitions for certiorari. Perhaps the reference should be directly to certiorari discretion.

Possible Note Revisions

One of the many possible versions of the Note is set out below. Because the cautionary statements were so deliberately adopted, they are emphasized by redlining rather than overstriking. New material continues to be underscored.

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

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

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

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

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

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

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

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.

(A) Practical Ability To Pursue Without Class

Proposed factor 23(b)(3)(A) would add as a factor pertinent to the predominance and superiority determinations

> **(A)** the practical ability of individual class members to pursue their claims without class certification;

As often happens, the comments supporting the proposal were less detailed than the opposing comments. Some were simply that the proposal has it right, or that this is a sound beginning in a process that should limit (b)(3) classes still further.

Many of the comments emphasized the need to "return to fundamentals." The core of adversary litigation remains a contest between individual litigants, directly controlled by the parties themselves. Individual party control is essential to control the lawyers, to ensure that the litigation serves the intended purpose of aiding the parties rather than the lawyers. Rule 23(b)(3) has evolved into a body of judge-made law that has no acceptable foundations in the intent of the framers or in the theory of private-party adversary litigation. Although ATLA does not support the proposal, it states that the purpose of Rule 23 is to aggregate small claims, not to achieve efficiency in disposing of individually large claims; that there is an important individual interest in personal injury and death claims that demands individual control.

The importance of individual control is tied in some of the comments to the needs for individual proof. Focusing on mass torts, it is urged that mass torts ordinarily require individualized proof on such issues as specific causation and damages, and that class actions cannot accommodate the need for such proof. The alternative of an "issues" class to resolve such matters as "general causation" is rejected as undesirable.

The role of individual control also was tied to a perspective caught up in proposed factor (B). This approach would emphasize the importance of alternatives that do not involve individual control. Smaller classes, consolidation under § 1407, and aggregation by other means may all sacrifice individual control but prove better than a single huge class litigation in a single court.

Several comments focused on the problems that arise when a single class includes individual claims that are strong on the merits and substantial in amount with other individual claims that are weak on the merits or insubstantial in amount. These cases present an unavoidable sacrifice of the interests of the strong and substantial claimants to the interests of others. This conflict of interests is avoided by emphasizing the importance of individual litigation.

Extension of (A) also was urged. Consideration should be given not only to individual litigation but also to the prospect of administrative relief or self-correction by the defendant. This approach would bring in small individual claims that do not support individual litigation. On this view, better relief or lower cost may be achieved by administrative proceedings, judicial proceedings instituted by public agencies, or the defendant's own acts. One formulation would add four words: "the practical ability of individual class members to pursue their claims or otherwise obtain relief without class certification."

The proponents also urged that the Note should not encourage small-claims classes. The illustration of a product defect that causes a small number of personal injuries and causes widespread loss of product value was challenged, apparently on the ground that the value loss is — if it ever is real at all — a self-fulfilling function of the publicity that surrounds class litigation.

Arguments challenging the proposal took many forms. The central propositions are that: courts already take account of this factor to the proper extent; the right to opt out protects individual interests in any event; the rule works well now; any change will cause sort-term confusion and long-term administrative headaches; many class members who are able to pursue individual litigation prefer to remain in a class action; class members with large individual claims may be the best possible class representatives; and class litigation may support remedies that are not possible in individual actions. Other arguments will be summarized after these arguments are elaborated.

The argument that the valid part of (A) is embraced by present practice begins with the present rule, which makes pertinent "the interest of members of the class in individually controlling the prosecution or defense of separate actions." Practical ability, the element emphasized by proposed (A), is distinct from interest, but it has no meaning unless there is an interest in separate litigation. If there is no interest, the ability is not relevant. If there is an interest in separate litigation, the lack of ability bears only on certifying a class after all. The attempt of (A) is only to ensure that courts focus on the practical ability, but no real guidance is offered as to the nature of the intended change.

This emphasis on the interest in separate litigation underlies the most common observation. Comment after comment emphasized that many class members who would be able to pursue individual litigation prefer to remain in a class action. This observation was linked to the observation that many classes include a wide spectrum of claims, from rather small to quite large. One illustration was the corrugated container antitrust litigation, involving individual claims that ranged from less than $100 to about $10,000,000. The preference for class litigation may rest on several factors. One is the cost of pursuing even a sizable claim

on the merits — antitrust and securities litigation provided the most frequent illustrations. Another is the fear of retaliation; ongoing relationships are not jeopardized by comparatively anonymous participation in class litigation in the way that follows from direct adversary litigation. And an efficiency argument is tied to the preference argument: there is no reason to force the inefficiencies of separate litigation on those who prefer to remain in the class.

The importance of continuing to involve large claimants in the class was often addressed by reference to the 1995 private securities litigation reform legislation. That legislation creates a presumption that the best class representative is the one with the largest individual claim.

Claimants with large individual claims, it is urged, also are those for whom the opportunity to opt out is most meaningful. They are most likely to be sufficiently sophisticated to understand the class-action notice, most likely to be represented or to seek legal advice, and most likely to act on a wise assessment of individual advantage. The litigant who is truly able to pursue individual litigation also is truly able to opt out without adding further complication to the rule. The importance of large claimants is stressed from another perspective as well. Exclusion of large claimants from the class definition makes it more difficult to achieve settlement — a phenomenon that may be attributed to the bargaining power of their claims, or that instead may be attributed to the defendant's desire to achieve "global peace." The risk that the strong claims will be reduced in negotiation for the advantage of weak claims can be met, it is urged, by subclassing.

One comment, focusing on mass torts and drawing from the heart-valve experience, urged that even if every class member is able to pursue individual litigation, class litigation can achieve remedies that are not available in individual actions. The judgment in that litigation included funding for research that would benefit the class.

The administrative confusions foretold for (A) are many and dire. The predictions rest in part on the lack of any identified criteria for measuring the practical ability to pursue separate litigation. Does ability depend on the size of individual claims? Individual resources? Ability to secure contingent-fee representation? Individual savvy and sophistication? Actual desire? Other factors? The lack of criteria supports projections that many criteria will be relevant, or will be claimed to be relevant. Application of these criteria in turn will lead to extensive discovery. Defendants commonly have better information about many factors bearing on individual ability than is available to class representatives by other means. Identification of class members is only the beginning. Information about the nature of their transactions or events is important. So is information about

the probable size of their claims. Beyond this point, it will be urged that practical ability turns on the probable merits of the claim, leading to discovery and dispute about the merits. (This prediction is particularly difficult to unravel — a defendant who wants to argue that individual class members are able to pursue individual actions is not likely to make strong arguments about the strength of their claims on the merits. Perhaps the point is that the defendant will argue that the issues that will prove its nonliability are simple and clear, so that individual litigants can easily pursue separate actions.) The most dire prediction is that discovery must extend to each prospective class member, so as to measure capacity to litigate, interest in separate litigation, and the like.

Another argument stresses the desire to achieve like treatment of like-situated claimants. Individual actions will lead to recovery for some class members, but not others.

Some comments suggested that (A) is drawn from concern with the large individual claims held by members of mass-tort classes, and that this concern should be addressed separately without jeopardizing the present successes of Rule 23 in other fields. In similar fashion, it was urged that any concern with future claims should be addressed directly.

A concern not often addressed directly, but made explicit at times, was that factor (A) would make it possible for courts hostile to Rule 23 to defeat desirable class actions. This was tied to the view that by excluding all large individual claims, the class could be narrowed to a point that would make it infeasible to bear the risks and costs of litigation even if the class were certified.

Two suggestions were made for the Note. It should not refer to (b)(1) and (b)(2) classes, see pages 6-7 of the published version. And the Note should say, as a preface to all the (b)(3) factors, that no one factor should predominate.

The balance to be struck among all these comments is not clear. Perhaps the first question to be resolved is whether (A), as proposed, offers a significant improvement in administration of (b)(3) classes. The value of proceeding further with (A) as published, or in some other form, may come to depend heavily on the determination whether to propose other changes in (b)(3). If it is decided to go ahead, it will be important to address some of the objections. As always, it is easier to address objections by revising the Note than by elaborating the rule itself. The Note can say that this is only one factor; that account should be taken of the ability to provide effective notice on terms that will ensure the reality of the opt-out right; that administration should not descend to elaborate discovery, detailed individual assessments, predictions of the merits, or the like; that large claims should be excluded from the class definition only for

reasons that overcome the frequent desire of those who have large claims to remain in the class, the benefits of retaining large claims in the class – including better representation and better supervision of the representatives, as well as greater uniformity of outcomes; and so on. Putting all of that and more into the text of the rule will be a challenge.

Rather than set out possible Note provisions separately here, a combined Note reflecting suggestions on factors (A), (B), and (C) is set out after the discussions of (B) and (C).

(B) Separate-Action Interest

Proposed factor (B) would make several modest changes in present factor (A):

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

The Note ties these changes to the new factor (A) emphasis on the "practical ability" to pursue claims without class certification. Most of the comments and testimony tied the two factors together; the points identified in discussing factor (A) reappear here as well.

The arguments advanced in support of the proposal emphasized the importance of individual control of litigation that has important individual consequences. It was suggested that the opportunity to opt out of a (b)(3) class does not fully protect this interest. As with factor (A), it was suggested that aggregation of claims into a single class diminishes the value of strong individual claims that are traded off for the benefit of weak individual claims. Approval was expressed for the Note statement that concern for judicial efficiency should not overcome the interest in individual litigation.

Support for the purpose of factor (B) also suggested extensions. The Note suggestion that individual interests might be outweighed by the need to marshal limited assets was assailed as "an invitation to mayhem"; this need is better addressed by bankruptcy or a "limited fund" (b)(1) class. The evident intent to pare back class certification of mass tort actions was approved in terms suggesting that still more forceful steps should be taken to restrict or defeat mass-tort classes.

The most direct criticism was that the focus on mass torts may have obscured the potential impact of (B) in other settings. There might be a tendency to exclude large claims from more traditional class actions, as in the securities field, with undesirable consequences. This criticism was supplemented by the view that there is no demonstrated need for change.

There also was criticism of the Note on the ground that it seems to suggest that a class should be certified whenever individual litigation is not feasible. It should be made clear that a class has public value only when "consistent with the underlying substantive claims established by Congress."

Factor (B) was the part of the proposals that was intended to focus attention on the full range of alternatives to class treatment. Individual actions are not the only alternative. Different or smaller classes, intervention, consolidation, and transfer for coordinated pretrial proceedings or trial were listed

in the Note. This change was framed by deletion of the reference to "individually controlling" in the present rule. The comments and testimony generally ignored this aspect of the proposal. A few of the comments on factor (A), indeed, suggested that something should be said about the alternatives that lie between a nationwide class and stand-alone individual actions.

Outside of the public comment process, forceful challenges have been addressed to the value of individual litigation in mass tort situations. Professor Mullenix has warned against romantically unrealistic views of the realities of "individual" litigation. The reality is said to be that most victims do not have real relationships with their attorneys. The attorneys have "inventories" of clients who do not and cannot play any realistic role in making decisions about litigation or settlement. Claims are settled in large packages, often without any real knowledge of the clients, and the allocation among different claimants is made by their common attorney. Class actions at least provide some measure of judicial supervision and reduce transaction costs for the benefit of all concerned.

Perhaps because it is so closely tied to present factor (A), proposed factor (B) has generated little comment. For the same reason, it does not embody any urgent reform. It should remain tied at least to factor (A), and probably to (C) and even (F) as well.

(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.

The probability that a claim would support individual litigation depends in part on the expected recovery. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median individual class-member potential recovery figures reported by the Federal Judicial Center study ranged from $315 to $528. These amounts are far below the level that would be required to support individual litigation, unless perhaps in a

small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases may sweep into a class many members whose individual claims would support individual litigation, controlled by the class member. In such cases, denial of certification or careful definition of the class may be essential to protect these plaintiffs. Concern for protecting the interest in individual litigation will be heavily affected by the means available to ensure a genuinely effective opportunity to request exclusion from the class. To the extent that clear notice can be effectively communicated to class members who have adequate legal representation, individual decisions whether to request exclusion provide the best measure of individual interests. Greater responsibility falls on the court as the prospect of well-informed individual opt-out decisions weakens. If effective notice is impossible – and it is most obviously impossible when addressed to persons who may not even be aware of their potential class membership – there is no real opportunity to request exclusion, and [great care must be taken to protect individual interests]{the very foundation for a (b)(3) class is missing.} ~~As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. More complicated variations of this problem may arise when different persons suffer injuries that are similar in type but that vary widely in extent. A single course of securities fraud antitrust violation, for example, may inflict on many people injuries that could not support individual litigation and at the same time inflict on a few people or institutions injuries that could readily support individual litigation. The victims who could afford to sue alone may be ideal representatives if they are willing to represent a class, and may be easily able to protect their interests in separate litigation if a (b)(3) class is certified. If a (b)(1) or (b)(2) class were certified, however, the court should consider the possibility of excluding these victims from the class definition.~~

Individual litigation may affect class certification in a different way, by shaping the time when a substantial number of individual decisions illuminate the nature of the class claims. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that involve highly uncertain facts that may come to be better understood over time. 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 (A) is new. The focus on the practical ability of individual class members to pursue their claims without class certification can either encourage or discourage class certification. This factor discourages – but does not forbid – class certification when so many individual class members can practicably pursue individual actions that a class action is not superior. In making this determination, it must be remembered that class members who could practicably pursue individual litigation may prefer the efficiencies of class litigation. Class members with large individual stakes may often be the best class representatives, and even those who prefer not to be representatives may help to protect the interests of all members by actively supervising the representatives. The public interest also may be served by the efficiency and uniform results achieved by class adjudication. If there are strong reasons to believe that class members who prefer individual litigation can make effective use of the right to request exclusion from the class, there may be little need for concern with this factor.

{**NOTE**: this language probably would need support by new language in the text of (A) – something like: "the practical ability of individual class members to pursue their claims, or have their interests protected, without class certification."} The interests of class members also may be protected by means other than individual litigation. Public enforcement, by regulatory agency or judicial proceedings, may be the most efficient means of protecting class and related public interests. Self-correction by a defendant may afford all needed relief. A court may defer a certification decision for a reasonable period when there is a realistic prospect of relief by these means. Other forms of aggregated private litigation also may be superior to a proposed class, as noted with factor (B).

If individual class members cannot practicably pursue individual actions, on the other hand, factor (A) encourages class certification. This encouragement may be offset by new

subparagraph (F) if the probable relief to individual class members is too low to justify the burdens of class litigation. [**ALTERNATIVE:** The encouragement is not absolute. A class action is not automatically made superior by the finding that many or even all class members cannot practicably pursue individual litigation.]

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

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

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.

Preliminary Consideration of the Merits

The Committee devoted much time to the proposal that certification of a (b)(3) class should depend on some evaluation of the probable success of the class claim, defense, or issues. Professor McGuire has renewed the suggestion, as summarized in the appended notes.

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."

Issues Trials

The common-evidence proposals invite further consideration of "issues" classes. Earlier Committee drafts emphasized the rule that classes may be certified as to specific issues. The emphasis was part of the focus on mass torts. Thus such issues as "general causation" might properly be resolved on a class basis, establishing part of the foundation for individual proof of individual causation and damages in other proceedings. One comment suggests that Rule 23 should be amended to reduce the role of issues classes. Trial of a single issue denuded of factual context is thought to be undesirable.

Pleading Particularity

The possibility that Rule 23 might impose more demanding pleading standards was considered by the Committee, in part under the spur of the various bills that led to the securities litigation reform legislation. The consideration never led to drafting. A few comments renew the suggestion that there should be more strict pleading requirements. More detailed pleading could perform in part the function sought by the controversial suggestion that there should be a preliminary look at the merits, without the complications. It could serve in part the functions performed by a "common evidence" requirement. There are no suggestions more detailed than "heightened" or "particularized" pleading. The analogy to Rule 9(b) is manifest.

Opt-In Classes

Many comments urge that the opt-out approach be abandoned. The most fundamental common thread is that plaintiffs should not become involved in litigation, nor bound by its outcome, unless they give genuine consent. Failure to opt out does not signal knowing consent. The cure is not better notice but substitution of an opt-in requirement that will ensure the reality of class members' consents. The proponents of this approach are confident

that it will reduce dramatically the size of many of the "consumer" classes now artificially swollen by failure of the opt-out mechanism.

The virtues of opt-in classes are thought to extend beyond the core value of consent. Opting in removes any concern about "personal jurisdiction" as to members of a plaintiff class, or about the appropriateness of disposing of all claims under a single choice of law. The election to opt in demonstrates actual notice, and removes concerns that those who do not opt out failed to get notice, could not understand the notice, or were too intimidated to act. Perhaps most important, particularly in settlement cases, opting in reduces concerns about conflicts of interest within the group designated as the "class."

A particular variation of the opt-in class proposal ties opt in classes to the questions that arise from classes formed around very small individual claims. One of the arguments advanced to support aggregation of very small claims is that even small injuries should be redressed. The response is that redress is important only for those who want it. Requiring that individuals with very small claims at least make the effort to be included in the class will show whether there is any value in the individual redress dimension of class relief. Proponents of this approach would urge that it forces debate on the alternative view that small-claims classes are important means of deterring unlawful conduct that inflicts individually small injuries on many people.

The first Rule 23 drafts considered by the Committee blended together the separate forms of class actions now authorized by subdivisions (b)(1), (b)(2), and (b)(3). As part of this approach, the court was authorized to prohibit opting out from any form of class, or to permit opting in to any form of class. The most recent opt-in provisions were included in the March, 1996 draft as subdivision (b)(4). This approach treated the opt-in "class" as a

means of permissive joinder, and suggested several factors to be considered in evaluating the choice between a mandatory class, an opt-out class, and an opt-in class. It did not respond directly to the concern of many observers that district courts would be tempted to use an opt-in class certification as an easy way out of difficult choices. This concern might be met by adding a limit that allows certification of an opt-in class only on specific findings that explain why an opt-out class cannot properly be certified.

Two comments suggest variations on the opt-out procedure. One is that members of a "futures" class should be allowed to opt out of the class during a reasonable period of time after discovering individual injury. The other is that the right to opt out might be extended to (b)(1) and (b)(2) classes, as provided in the early drafts considered by the Committee.

Attorney Fees

A wide variety of suggestions have been made as to attorney fees. Among them: (1) Simultaneous settlement negotiations on class relief and fees should be prohibited. (2) Fees should be calculated on a lodestar basis; "coupons" and like noncash relief should not be counted in determining the fee. (3) Fees paid separately by the defendant, not out of the class recovery, create conflicts of interest that cannot be resolved. Such arrangements should be prohibited. (4) Fees should be restricted in cases that settle at an early stage. (5) Fees should be awarded a person who successfully opposes a certification request. (6) A portion of fees should be withheld until relief has been effectively distributed; if there is "coupon" relief, fees should depend on the coupon redemption rate. (7) Fees should be awarded those who successfully object to proposed settlements. (8) Fees should be apportioned if some part of the value of a class claim has been created by other lawyers involved in separate litigation.

Multiple Related Class Actions

The Committee gave some consideration to the problems that arise from overlapping class actions, but determined to make no proposals. It was felt that multiple federal actions can be reconciled through the Judicial Panel on Multidistrict Litigation, while the problems of overlapping state-court actions may require solutions beyond the reach of the Enabling Act process. The suggestion that help might be provided by treating a certified federal class as an artificial "entity" was put aside.

Some of the comments urge that the single most pressing problem today arises from overlapping or sequential state-court class actions. The most direct remedy urged is that state court classes be limited to citizens of the forum state. That remedy presents obvious Enabling Act problems. The comments, indeed, tend to recognize the probable need for action by statute rather than by Civil Rule.

Notice

The March, 1996 draft included a rather elaborate revision of the subdivision (c) notice provisions. These revisions were put aside at the April, 1996 meeting on the ground that they were not as important as the several proposals that had been recommended for publication. None of the comments approach the detail of that draft.

The debates about the legitimacy of small-claims classes and settlement classes have underscored the problems of representation theory and thus underscore the need to think further about notice.

Several comments bewail the inadequacy of most class-action notices. "Plain language" requirements are urged.

Professor Shapiro suggests that the costs of notice in small claims classes are staggering, and that an easy remedy would be to delete the requirement of individual notice. The March, 1996 draft suggested individual notice to a sample of class members.

Regulatory Deference

Several comments suggested, in a variety of ways, that the list of (b)(3) factors should refer explicitly to the prospect that government action will satisfy needs that otherwise might be served by class litigation. A modest version suggests that class certification should be postponed until pending federal regulatory action has been resolved. A less modest version would adopt some form of "primary jurisdiction" approach, deferring certification until it has been determined that government agencies will not initiate regulatory actions.

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

---

[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.

[redacted]

Rule 23. Class Actions (March, 1996 draft)

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

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

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

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

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

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

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

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would

establish incompatible standards of conduct for the party opposing the class, or

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

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

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

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

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

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

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

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

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

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

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

litigation; and

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

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

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

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

(C) potential conflicts of interest among members;

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

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

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

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

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

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

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

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

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

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

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

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to

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

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

(3) Whether or not favorable to the class,

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

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

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

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

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

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

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

(1) Before determining whether to certify a class the court

may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

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

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

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

(i) refusal to certify a class;

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

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

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

(C) ~~(3)~~ impos~~e~~ing conditions on the representative

parties, class members, or ~~on~~ intervenors;

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

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

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

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

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

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

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of

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

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

DRAFT ADVISORY COMMITTEE NOTE

March, 1996

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

Stylistic changes also have been made.

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

amendments.

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

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

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

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

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

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

In another direction, class certification may be sought as to individual claims that would not support individual litigation

because of a dim prospect of prevailing on the merits. Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force – a substantial settlement value – when the small probability of defeat is multiplied by the amount of liability to the entire class.

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

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

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

individual issues of comparative fault, specific causation, and damages for resolution in other proceedings.

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

Superiority and necessity take on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many

individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

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

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

The "first look" approach adopted by item (iii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses "are not insubstantial on the merits." This phrase is chosen in the belief that there is a wide — although curious — gap between the higher possible requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims "on the merits," not to the dollar amount or other values that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

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

The prospect-of-success finding is readily made if

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

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

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

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

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

[Alternative that would reflect substitution of new factor (A) in the matters pertinent to finding superiority for the proposed item (ii) requirement that a class action be "necessary" for the

fair and efficient disposition of the controversy.] The list of factors that bear on the finding whether a class action is superior to other available methods for the fair and efficient [disposition] of the controversy has been amended in several ways.

Factor (A) is added to focus on the question whether class certification is needed to accomplish effective enforcement of individual claims. The need for class certification is a practical concept. This factor is intended to underscore the importance of individual fairness as well as overall fairness and efficiency. Certification is needed for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount. Such classes provide the traditional and abiding justification for (b)(3) certification. Certification ordinarily should not be used, on the other hand, to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not needed for them, even if it would be more efficient in the sense that it consumes fewer litigating resources, and also more fair to the extent that it may achieve more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, whether or not there are individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be needed if there is to be any [adjudication] of the claims, but it is neither superior nor needed for the fair and efficient [adjudication] of the claims.

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

Yet another problem, presented by some recent class-action

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

Factor (B), formerly factor (A), is amended to emphasize the ability of individual class members to pursue their claims through means other than the proposed class. Often the alternative means will be individual litigation, fully controlled by the litigant. The alternative separate actions, however, also may involve aggregation on some other basis, including certification of a differently defined class that is not individually controlled by all parties.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is "related" and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy.

The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

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

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

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

certainly prevail on the merits.

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

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these

class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

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

Factor (G) (H) is added to resolve some, but by no means all, of the questions that have grown up around the use of "settlement classes." Factor (G) (H) bears only on (b)(3) classes. Among the many questions that it does not touch is the question whether it is appropriate to rely on subdivision (b)(1) to certify a mandatory non-opt-out class when present and prospective tort claims are

likely to exceed the "limited fund" of a defendant's assets and insurance coverage. This possible use of subdivision (b)(1) presents difficult issues that cannot yet be resolved by a new rule provision. Subdivisions (c)(1)(A)(2) and (e) also bear on settlement classes.

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

Factor (G) (H) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important and even vitally important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully-informed

challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, particularly if the action appears to have been shaped by a settlement agreement worked out even before the action was filed.

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

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

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

actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

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

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

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

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

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

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

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

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

Factor (D) emphasizes the need to consider the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy. In compelling circumstances, this interest justifies certification of a (b)(1)(A)

class. It also may bear on certification of a (b)(2) class. In less compelling circumstances, it may justify certification of an opt-out class under (b)(3), including a settlement class. Resort to a (b)(4) opt-in class should be had only after canvassing the suitability of certification under these other subdivisions.

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

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

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

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

suggest only that practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the rule is applied to require determination "when" practicable, it does no harm. The requirement is deleted, however, to support implementation of other changes in Rule 23. Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise probable success on the merits and to determine whether the public interest and private benefits justify the burdens of class litigation. These and similar inquiries should not be made under pressure of an early certification requirement. {Consideration of a precertification motion to dismiss or for summary judgment under subdivision (d)(1), for example, readily justifies posponement of the certification decision.} If related litigation is approaching maturity, indeed, there may be positive reasons for deferring the class determination pending developments in the related litigation.

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

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

Subparagraph (B) permits alteration or amendment of an order granting or denying class certification at any time before final

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

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

The provisions that require consideration of the merits in determining whether to certify a (b)(3) class may show a strong probability that a plaintiff class will win on the merits. In such circumstances, subdivision (c)(2)(A) authorizes the court to order that a defendant advance part or all of the expense of notifying the class.

Item (i) adopts a functional notice requirement for (b)(1) and (b)(2) class actions. Notice should be directed to all identifiable members of the class in circumstances that support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine mailing. If substantial burdens would be imposed by an effort to reach all class members, however, the means of notice can be adjusted so long as notice is calculated to reach a sufficient number of class members to ensure the opportunity to protect class interests in the questions of certification and adequate

representation. The notice requirement is less exacting than the notice requirement for (b)(3) actions because there is no right to opt out of a (b)(1) or (b)(2) class. If a (b)(3) class is certified in conjunction with a (b)(2) action according to the requirements of subdivision (b)(5), the notice requirements for a (b)(3) action must be satisfied as to the (b)(3) class.

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

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

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

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

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

Paragraph (1) is new. It confirms the general practice found by the Federal Judicial Center: courts frequently rule on motions under Rules 12 and 56 before determining whether to certify a class. Some courts have feared that this practice might violate

the former requirement that a class determination be made as soon as practicable after the action is filed. Elimination of that requirement should banish any doubt, but this paragraph is added to remind courts and parties of this helpful practice.

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

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

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

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

(f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal

from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permsision to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." These differences warrant modest differences in the procedure for seeking permission to appeal from the court of appeals. Appellate Rule 5.1 has been modified to provide the appropriate procedure.

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

class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

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

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

Item IV

Reporter's Preliminary Note

Civil Rule 81(a)(2): Habeas Corpus Return Time

This Note is cautiously captioned preliminary because your Reporter knows nothing of habeas corpus practice. The problem is presented by Magistrate Judge Mary Stanley Feinberg, whose opinion in *Wyant v. Edwards*, S.D.W.Va. No. 1:97-0023, is appended. It is another in the string of pesky Rule 81 problems that seem to arise because people seem not to bother with consulting Rule 81 when making related rules changes.

One thing that makes the problem pesky is that it is difficult to state directly. The source of the problem begins with the time limits set in 28 U.S.C. § 2243 for the return to a petition for habeas corpus. These limits have been partly superseded by Civil Rule 81(a)(2), which in turn seems to have been superseded by Rules 1(b) and 4 of the Rules Governing Section 2254 Cases. The problem is whether Rule 81(a)(2) should be amended to recognize this apparent supersession, or whether some more drastic course should be taken.

The foundation of federal habeas corpus jurisdiction is set by 28 U.S.C. § 2241. Section 2243 provides that a judge or court entertaining an application for habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted. It further provides that the writ or order to show cause "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed."

The first supersession of the § 2243 time limits was effected by the 1971 amendment of Civil Rule 81(a)(2). Since 1971, Rule 81(a)(2) has provided:

> (2) These rules are applicable to proceedings for * * * habeas corpus * * *, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

The Advisory Committee Note explained the reasons why additional time may be needed for state-prisoner petitions under § 2254. "The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause."

The next step came with the adoption of the Rules Governing

Section 2254 Cases, effective on February 1, 1977. Rule 4 provides that the judge may order summary dismissal of a petition.

> Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 4 cuts entirely free of the 3-day, 20-day, and 40-day periods, and likewise drops the "good cause" element. The Advisory Committee Note explains that Rule 4 accords "greater flexibility than under § 2243 in determining within what time period an answer must be made." After briefly describing § 2243 and the modification made by Rule 81(a)(2), the Note says: "In view of the widespread state of work overload in prosecutors' offices * * *, additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made."

All of this leaves things clear for habeas corpus petitions filed by state prisoners. Rule 4 supersedes both § 2243 and Rule 81(a)(2). Rule 81(a)(2) is, to this extent, misleading. Some amendment is required.

There is no parallel problem for motions for relief by federal prisoners under § 2255. Rule 4(b) of the § 2255 rules provides that the judge "shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court * * *." The Advisory Committee Note explains that this Rule 4 "has its basis in § 2255 * * * which does not have a specific time limitation as to when the answer must be made."

The awkward problem arises from petitions for habeas corpus filed under § 2241 by people who are not in state custody — and who thus are outside § 2254 and the direct operation of the § 2254 rules — and who are not seeking relief available under § 2255. As to them, there is a compelling argument that the time limits of Civil Rule 81(a)(2) have been superseded by the § 2254 rules through Rule 1(b). Rule 1(a) states that these rules govern the procedure on applications under § 2254. Rule 1(b) states:

> **(b) Other situations.** In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

This provision establishes discretion, not a command. Apparently it leaves a district court free to apply the § 2254 rules — including the return-time provision of Rule 4 — or not to apply the rules. The discretion to apply a discretionary time rule, however, is effectively power to supersede the Rule 81(a)(2) limit of 3 days, to be extended only for good cause and for no more than an additional 20 days.

Rule 11 of the § 2254 rules muddies the picture to some extent. It provides:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

This provision should not be read to undo the effects of § 2254 Rule 4 on Civil Rule 81(a)(2). For § 2254 petitions, it is clear that Rule 4 supersedes Rule 81(a)(2). There is no reason to ignore Rule 4 under Rule 11, which applies only "to petitions filed under these rules," when dealing with a habeas corpus petition that is not filed under § 2254 and thus is not literally "filed under these rules."

The conclusion that § 2254 Rule 4 supersedes the return-time limits of Civil Rule 81(a)(2) is supported by such scant authority as appears to exist. The history is explored in Judge Feinberg's opinion. The clear ruling was made in Kramer v. Jenkins, N.D.Ill.1985, 108 F.R.D. 429, a habeas corpus proceeding brought by a petitioner in federal custody. Judge Nordberg concluded that Rule 4 supersedes § 2243 time limits under the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 4 likewise supersedes Civil Rule 81(a)(2) because it was adopted several years after Rule 81(a)(2) was amended. In Clutchette v. Rushen, 9th Cir.1985, 770 F.2d 1469, 1473-1475, the court, dealing with a petition under § 2254 by a state prisoner, confirmed that Rule 4 supersedes both the specific day limits and the good cause requirement of Rule 81(a)(2). (Bennett v. Collins, E.D.Tex.1993, 835 F.Supp. 930, reflects the many extensions of return time that were permitted before the respondent's persistent delays in meeting even generously extended limits drove the court to impose sanctions.)

The result seems to be clear enough. The 3-day, 20-day, and 40-day return-time limits in Rule 81(a)(2), and the good-cause limit, have been superseded by Rule 4. Supersession is direct for all cases covered by § 2254. In other cases, it requires exercise of the district court's discretion to invoke Rule 4 through Rule 1(b).

It is not clear whether this result was intended. There are seemingly persuasive reasons to embrace it nonetheless. Return time is governed by district court discretion in habeas corpus proceedings brought by state prisoners under § 2254, and also in § 2255 proceedings. Only habeas corpus petitions that fall outside these more common proceedings remain for Rule 81(a)(2). It would be convenient to have a single procedure for all of these proceedings.

The contrary argument would be that indeed different time limits are appropriate for habeas corpus proceedings brought by people in federal detention and outside of § 2255. It may be urged that these cases often present special needs for prompt action that

were responsible for the initially tight time periods set by § 2243. It also may be urged that these petitions do not present the problems confronting state officials besieged with torrents of habeas corpus petitions.

The balance of these arguments can be struck only by those familiar with the realities of practice in the habeas corpus proceedings that present the question. It would be desirable to provide a clear answer in the rules once the answer is found. The simplest solution would be to delete the time provisions from Rule 81(a)(2). It might be better to adopt the Rule 4 time provisions into Rule 81, so as to avoid the need to work through Rule 1(b) and Rule 4. But if the Rule 4 approach is not suited to non-§ 2254 habeas corpus proceedings, then a specific provision must be crafted for Rule 81(a)(2).

As a final note, there may be some advantage in combining this question with other Rule 81 questions now on the docket. The question of copyright practice has long been on the Committee's agenda. The final sentence of Rule 81(a)(1) also is on the agenda; it refers to mental health proceedings in the United States District Court for the District of Columbia, proceedings that no longer seem to exist.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
ELIZABETH KEE FEDERAL BUILDING
601 FEDERAL STREET, ROOM 1013
BLUEFIELD, WEST VIRGINIA 24701

MARY S. FEINBERG
UNITED STATES MAGISTRATE JUDGE

304/327-0376
FAX 304/325-7662

January 28, 1997

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of the
U.S. Courts
Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Rule 1(b), Habeas Corpus Rules

Dear Mr. Rabiej:

Thank you for your assistance in providing materials concerning the adoption of Rule 1(b) of the Habeas Corpus Rules. I have enclosed a copy of the Memorandum Order which I entered on the issue. Perhaps I used a sledge hammer to swat a fly, but the time limits in § 2243 and Rule 81(a)(2) have been troublesome. I am submitting the Memorandum Order to West for publication.

Very truly yours,

Mary S. Feinberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

BLUEFIELD

THELMA WYANT,

Petitioner,

v. CIVIL ACTION NO. 1:97-0023

DAN EDWARDS, Acting Warden,
Federal Prison Camp
Alderson, West Virginia, and
BUREAU OF PRISONS, an agency of
the United States,

Respondents.

MEMORANDUM ORDER

This is a habeas corpus case filed by a federal prisoner pursuant to the provisions of 28 U.S.C. § 2241, challenging the decision by the Bureau of Prisons to deny Petitioner eligibility for early release pursuant to 18 U.S.C. § 3621(e)(2)(B).

Pending before the Court is Respondents' Motion to Reconsider Time Frame Order, which seeks additional time in which to file a Response to the Order to Show Cause entered January 13, 1997. Respondents previously filed a Motion to Extend Time, which was granted in part and denied in part, and a Response was ordered to be filed by February 5, 1997.

In the Order disposing of the Motion to Extend Time, the Court applied the provisions of 28 U.S.C. § 2243, and of Rule 81(a)(2), Fed. R. Civ. Pro., which Rule provides that a writ of habeas corpus "shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not

exceed 20 days." [Emphasis added.]

Respondents' pending Motion to Reconsider points out that Kramer v. Jenkins, 108 F.R.D. 429, 432 (N.D. Ill. 1985), addresses Rule 81(a)(2), and holds that "the Supreme Court intended to allow district courts to bypass the time limits of Rule 81(a)(2) when it promulgated Rule 4 of the 2254 Rules." (Motion, at 2.) According to Shepard's, Kramer has not been cited by any other published case. Petitioner did not object to the previous Motion to Extend Time.

The Kramer case reasons that Rule 1(b) of the § 2254 Rules states as follows: "In applications for habeas corpus in cases not covered by subdivision (a), habeas rules may be applied at the discretion of the United States district court." Therefore, the case asserts, a § 2241 habeas corpus case is one not covered by Rule 1(a) of the § 2254 Rules, and is one covered by Rule 1(b). In particular, the Kramer case holds that the district court may apply, in its discretion, Rule 4 of the § 2254 Rules, which states, in pertinent part, that "the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." 108 F.R.D. at 431. Kramer then asserts that the enabling statute for promulgation of rules, 28 U.S.C. § 2072, provides that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Therefore, Rule 4 of the § 2254 Rules prevails over 28 U.S.C. § 2243. Id. Kramer holds that Rule 4 of the § 2254 Rules also

prevails over Rule 81(a)(2), Fed. R. Civ. Pro. because Rule 81 was promulgated in 1971, and Rule 4 in 1976. Id. at 432.

The Court recognizes that 28 U.S.C. § 2243 and Rule 81(a)(2) set time limits that may be unrealistic, given the volume of prisoner habeas corpus litigation (and the inexpensive filing fee of $5.00). However, habeas corpus is intended to provide "a swift and imperative remedy in all cases of illegal restraint or confinement." Fay v. Noia, 372 U.S. 391, 400 (1963). Habeas corpus claims should receive "a swift, flexible, and summary determination." Preiser v. Rodriquez, 411 U.S. 475, 495 (1973).

Given this background and policy, the Court has engaged in considerable research, with the invaluable assistance of the Librarian of the U.S. Court of Appeals for the Fourth Circuit and the Rules Committee Support Office of the Administrative Office of the U.S. Courts, attempting to learn the origin and meaning of Rule 1(b) of the 2254 Rules. That research has yielded some information, but not a definitive answer.

The Supreme Court suggested that procedural rules for habeas corpus be promulgated in Harris v. Nelson, 394 U.S. 286, 300 n.7 (1969) ("the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery"). It appears that the original version of Rule 1, proposed September 23, 1971, addressed only "persons in custody pursuant to the judgment of a state court, or subject to such custody in the future." On September 6, 1973, Professor Paul M.

Bator of the Law School of Harvard University wrote to Professor Frank J. Remington of the University of Wisconsin Law School and other members of the committee which proposed the 2254 Rules, and pointed out that the Rules did not address Section 2241 petitions. Professor Bator wrote, "the Rules should at least explicitly tell us why they do not cover these cases, and what procedure is contemplated for them."

When a Preliminary Draft of the proposed 2254 Rules was published, Rule 1 continued to address "persons in custody pursuant to the judgment of a state court" and "persons in custody pursuant to the judgment of a state or federal court for a determination that custody to which they may be subject in the future under another judgment of a state court," but did not address § 2241 petitions. The Advisory Committee Note stated that "[b]asic scope of habeas is prescribed by 28 U.S.C. § 2241(c) and 28 U.S.C. § 2254." The rest of the Note on proposed Rule 1 concerned the issue of "custody."

When Proposed Habeas Corpus Rules were again published, this time on June 3, 1974, Rule 1 retained the language of the Preliminary Draft. On August 14, 1974, two alternative provisions for Rule 1 were proposed. Alternative No. 1 defined "custody pursuant to a judgment of a state court" in subsection (b), and then added subsection (c), as follows:

> (b) "Custody Pursuant to a Judgment of a State Court" Defined. For purposes of these rules, a person is in custody pursuant to a judgment of a state court if he is in custody pursuant to a judgment of either a state or a federal court and makes application for a determination that custody to which he may be subject in the future

> under a judgment of a state court will be in violation of the Constitution.
>
> (c) Other Situations. In applications for habeas corpus in other cases not covered by subdivision (a) or (b), these rules may be applied at the discretion of the United States District Court.

Alternative No. 2 omitted the definition of "custody pursuant to a judgment of a state court," and retained the "Other Situations" language.

In the Minutes of the Meeting of the Advisory Committee on the Federal Criminal Rules of August 28, 1975, at page 25, Professor Remington (the recipient of Professor Bator's 1973 letter) remarked, "As now cast, Rule 1 would permit use of the rules under a habeas corpus action brought pursuant to § 2241, when § 2255 was otherwise inappropriate."

In the Advisory Committee Notes (1976 Adoption) to Rule 1, no specific reference is made that the 2254 Rules may apply to § 2241 petitions for writs of habeas corpus. The Notes simply state, "[w]hether the rules ought to apply to other situations is left to the discretion of the court." Examples of "other situations" include a person in active military service, or a reservist called to active duty, but who has not reported. The Notes then address the "unclear" boundaries of the custody requirement of the habeas statutes.

When the 2254 Rules were sent to Congress pursuant to 28 U.S.C. § 2072, Congress undertook to amend some of the Rules, but not Rule 1. The Court has reviewed the legislative history concerning adoption of the 2254 Rules (Pub. L. No. 94-426, House

Report No. 94-1471, Senate Report No. 1797, and the Congressional Record for September 14, 1976 (House), and September 16, 1976 (Senate)). There was no discussion concerning the scope of the 2254 Rules and their applicability to § 2241 petitions.

The Court has carefully considered Rules 1, 4 and 11 of the 2254 Rules, Rule 81 of the Federal Rules of Civil Procedure, the Advisory Committee Notes for all those Rules, and 28 U.S.C. §§ 2241 et seq. The 1971 Amendment to Rule 81(a)(2) increased to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The amendment explicitly excluded habeas corpus cases like that of Petitioner, and left the additional time period at 20 days. The 1976 Adoption of the 2254 Rules, which became effective February 1, 1977, permits the district court, in Rule 4, to fix the time within which the respondent shall file an answer or other pleading. In the Fifth and Eleventh Circuits, the practice, even in § 2254 cases, is to order the respondent to file an answer "within the period of time fixed by the court," which is "3 days unless for good cause shown additional time is allowed which . . . shall not exceed 40 days . . .." Bagwell, David A., "Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits," 95 F.R.D. 435, 461 (1982).

The Court has also reviewed the following cases: Kramer v. Jenkins, 108 F.R.D. 429 (N.D. Ill. 1985); Bennett v. Collins, 835 F. Supp. 930 (E.D. Tex. 1993); Clutchette v. Rushen, 770 F.2d 1469

(9th Cir. 1985); Bermudez v. Reid, 570 F. Supp. 290 (S.D.N.Y. 1983), stay granted, 720 F.2d 748 (2d Cir. 1983), rev'd, 733 F.2d 18 (2d Cir. 1984); Mattox v. Scott, 507 F.2d 919 (7th Cir. 1974); Troglin v. Clanon, 378 F. Supp. 273 (N.D. Cal. 1974). Bennett applies Rule 81(a)(2) to §§ 2241 and 2254 cases, and notes that "[t]he emphasis on a timely response makes sense in so far as the purpose of the writ is to allow a person in custody to challenge a wrongful, perhaps unconstitutional, imprisonment." 835 F. Supp. at 934-35. When confronted with repeated and extraordinary delay by respondent in answering, the Bennett court held that respondent had waived the procedural default defense to the petition.

In Clutchette v. Rushen, 770 F.2d 1469, 1475 (9th Cir. 1985), the Ninth Circuit held that in a § 2254 case, the district court had discretion to grant respondent an extension of time which exceeded the 40-day limit of Rule 81(a)(2).

The Second Circuit held, in Bermudez v. Reid, 733 F.2d 18 (2d Cir. 1984), that even in the face of inexcusable disregard by respondent of a district court order to respond to a petition, default judgment should not be granted, and the district court should reach the merits of the petitioner's claim.

Mattox v. Scott, 507 F.2d 919 (7th Cir. 1975), and Troglin v. Clanon, 378 F. Supp. 273 (N.D. Cal. 1974), were both decided before the § 2254 Rules were promulgated. Nonetheless, both cases are of interest because they recognize Congress' strong interest in prompt responses being filed to habeas corpus petitions, the problem of a respondent who is slow to answer, and the necessity for flexibility

by the district court in considering late returns.

The Court recognizes that it is not unusual for the Fourth Circuit to look favorably upon precedents and practices from the Fifth (and Eleventh) Circuits. However, given the historical information concerning the promulgation of Rule 1(b) of the § 2254 Rules, the nature of habeas corpus, and the difficulties of imposing strict sanctions on a respondent custodian who is slow to answer, the Court has concluded that the § 2254 Rules were intended to apply to § 2241 cases, and that Rule 4's allowance for discretion prevails over Rule 81(a)(2)'s strict time limits.

Accordingly, it is hereby **ORDERED** that the Motion to Reconsider Time Frame Order is granted, and Respondents shall file their answer to the Order to Show Cause on or before **February 17, 1997.**

The Clerk is directed to mail copies of this Order to counsel of record, including the Alderson Legal Assistance Program at Washington & Lee University School of Law.

ENTER: January 28, 1997

Mary Stanley Feinberg
United States Magistrate Judge

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

Item V

April 1, 1997

Honorable Charles T. Canady
1222 Longworth House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Canady:

I write on behalf of the Judicial Conference's Standing Committee on Rules of Practice and Procedure to express our concerns regarding H.R. 660, and to advise you of the ongoing work by the Judicial Conference's Advisory Committee on Civil Rules on proposed amendments to Civil Rule 23 on the same subject.

H.R. 660 would amend § 1292(b) of title 28, United States Code, to allow an interlocutory appeal from a district court's class action certification decision. For several years, the Advisory Committee on Civil Rules has been studying concerns raised over the class action procedures under Rule 23 of the Federal Rules of Civil Procedure. Proposed amendments to Rule 23 that would, among other things, provide an opportunity for an interlocutory appeal of a class action certification similar to H.R. 660 will be considered by the advisory committee at its May 1-2, 1997, meeting for submission to the Standing Committee on Practice and Procedure and later to the Judicial Conference and the Supreme Court. Judge Paul V. Niemeyer, United States Court of Appeals for the Fourth Circuit, chairs the advisory committee and is stationed in Baltimore, Maryland. Judge Niemeyer would welcome the opportunity to provide you or your staff with a detailed briefing of the committee's work on this important issue.

I urge you and your colleagues on the House Judiciary Committee to allow the rulemaking process to proceed as envisioned under the Rules Enabling Act and defer consideration of H.R. 660 until the rulemaking process has finished.

Inconsistent with the Rules Enabling Act

The pending legislation affects subject matter that is covered by the Federal Rules of Practice and Procedure, and its passage would thwart the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§ 2071-77. Under the Act, proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bar, and bench. The rulemaking process is laborious and time-consuming, but the painstaking process ensures a high level of draftsmanship that frequently reduces the potential for future satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons who may be affected by a rule change have had an opportunity to express their views on it, including the public. Direct

amendment of the federal rules or a statute on the same subject circumvents this careful process established by Congress.

Ongoing Committee Work on Class Actions

The Advisory Committee on Civil Rules commenced in 1991 a comprehensive study of class actions under Civil Rule 23. It began with a review of changes proposed in 1986 by the American Bar Association that would have substantially amended the rule. The advisory committee decided to obtain more empirical data and requested the Federal Judicial Center to study all class actions terminated in a two-year period in four metropolitan districts.

Meanwhile, the advisory committee continued to study the rule. It invited experienced class action practitioners to meet with the advisory committee, held a conference at the University of Pennsylvania Law School, attended a symposium at Southern Methodist University Law School, and participated in a symposium at the New York University Law School. In addition, many lawyers and representatives of bar groups attended and spoke on class actions at several advisory committee meetings. Many commentators expressed concern that the procedural rules governing review of a class action certification decision by an appellate court were too restrictive.

On careful reflection of all this information, the advisory committee in August 1996 published for comment proposed amendments to Civil Rule 23 that, among other things, would permit interlocutory appeal of the certification decision. Public hearings held at Philadelphia, Dallas, and San Francisco were well attended and generated about 800 pages of testimony. Written comments constituting hundreds of additional pages were submitted to the advisory committee on the proposed amendments. Most of the comments on the interlocutory appeal provision were favorable. At its May 1997 meeting the advisory committee will determine whether to forward the interlocutory appeal proposal to Standing Rules Committee for approval.

Conclusion

For these reasons, I urge you to defer consideration of H.R. 660. I look forward to continuing this important dialogue on class actions with you and your colleagues on the Committee on the Judiciary. Please let me know if I can be of assistance. Thank you for your consideration.

Sincerely yours,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

cc: Subcommittee on Courts and Intellectual Property,
House Committee on the Judiciary

To amend title 28, United States Code, to allow an interlocutory appeal from a court order determining whether an action may be maintained as a class action. (Introduced in the House)

HR 660 IH

105th CONGRESS

1st Session

H. R. 660

To amend title 28, United States Code, to allow an interlocutory appeal from a court order determining whether an action may be maintained as a class action.

IN THE HOUSE OF REPRESENTATIVES

maintained as a class action may make application for appeal of that determination to the court of appeals which would have jurisdiction of an appeal of that action. The court of appeals may, in its discretion, permit the appeal to be taken from such determination if the application is made within 10 days after the entry of the court's determination relating to the class action. Application for an appeal under this paragraph shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.'.

105TH CONGRESS
1ST SESSION

H.R. 1252

To modify the procedures of the Federal courts in certain matters, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

April 9, 1997

Mr. HYDE (for himself, Mr. COBLE, Mr. CANADY of Florida, Mr. BONO, Mr. BRYANT, and Mr. GOODLATTE) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To modify the procedures of the Federal courts in certain matters, 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 *`Judicial Reform Act of 1997'.*

SECTION 2. 3-JUDGE COURT FOR CERTAIN INJUNCTIONS.

(a) REQUIREMENT OF 3-JUDGE COURT- Any application for an interlocutory or permanent injunction restraining the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground of the unconstitutionality of such State law unless the application for the injunction is heard and determined by a court of 3 judges in accordance with section 2284 of title 28, United States Code. Any appeal of a determination on such application shall be to the Supreme Court. In any case to which this section applies, the additional judges who will serve on the 3-judge court shall be designated under section 2284(b)(1) of title 28, United States Code, as soon as practicable, and the court shall expedite the consideration of the application for an injunction.

(b) DEFINITIONS- As used in this section--

(1) the term *`State'* means each of the several States and the District of Columbia;

(2) the term *`State law'* means the constitution of a State, or any statute, ordinance, rule, regulation, or other measure of a State that has the force of law, and any amendment thereto; and

(3) the term *`referendum'* means the submission to popular vote of a measure passed upon or proposed by a legislative body or by popular initiative.

(c) EFFECTIVE DATE- This section applies to any application for an injunction that is filed on or after the date of the enactment of this Act.

SECTION 3. INTERLOCUTORY APPEALS OF COURT ORDERS RELATING TO CLASS ACTIONS.

(a) INTERLOCUTORY APPEALS- Section 1292(b) of title 28, United States Code, is amended--

(1) by inserting *`(1)'* after *`(b)'*; and

(2) by adding at the end the following:

`(2) A party to an action in which the district court has made a determination of whether the action may be maintained as a class action may make application for appeal of that determination to the court of appeals which would have jurisdiction of an appeal of that action. The court of appeals may, in its discretion, permit the appeal to be taken from such determination if the application is made within 10 days after the entry of the court's determination relating to the class action. Application for an appeal under this paragraph shall not stay proceedings in the district court unless the district judge or the court of appeals or a judge thereof shall so order.'.

(b) EFFECTIVE DATE- The amendment made by subsection (a) applies to any action commenced on or after the date of the enactment of this Act.

SECTION 4. PROCEEINGS ON COMPLAINTS AGAINST JUDICIAL CONDUCT.

(a) REFERRAL OF PROCEEDINGS TO ANOTHER JUDICIAL CIRCUIT OR COURT- Section 372(c) of title 28, United States Code, is amended--

(1) in paragraph (1)--

(A) by inserting *`(A)'* after *`(c)(1)'*; and

(B) by adding at the end the following: *`In the case of a complaint so identified, the chief judge shall notify the clerk of the court of appeals of the complaint, together with a brief statement of the facts underlying the complaint.*

`(B) Complaints filed under subparagraph (A) in one judicial circuit shall be referred to another judicial circuit for proceedings under this subsection, in accordance with a system established by rule by the Judicial Conference, which prescribes the circuits to which the complaints will be referred. The Judicial Conference shall establish and submit to the Congress the system described in the preceding sentence not later than 180 days after the date of the enactment of this subparagraph.';

(2) in paragraph (2)--

(A) by amending the first sentence to read as follows:

`Upon receipt of a complaint filed or notice of a complaint identified under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint or (in the case of a complaint identified under paragraph (1)) the statement of facts underlying the complaint to the chief judge of the circuit assigned to conduct proceedings on the complaint in accordance with the system

*established under paragraph (1)(B) (hereafter in this subsection referred to as the `**chief judge**').';* and

(B) in the second sentence by inserting *`or statement of acts underlying the complaint (as the case may be)'* after *`copy of the complaint'*;

(3) in paragraph (4)(A) by inserting *`(to which the complaint or statement of facts underlying the complaint is referred)'* after *`the circuit'*;

(4) in paragraph (5)--

(A) in the first sentence by inserting *`to which the complaint or statement of facts underlying the complaint is referred'* after *`the circuit'*; and

(B) in the second sentence by striking *`the circuit'* and inserting *`that circuit'*;

(5) in the first sentence of paragraph (15) by inserting before the period at the end the following: *`in which the complaint was filed or identified under paragraph (1)'*; and

(6) by amending paragraph (18) to read as follows:

`(18) The Judicial Conference shall prescribe rules, consistent with the preceding provisions of this subsection--

`(A) establishing procedures for the filing of complaints with respect to the conduct of any judge of the United States Court of Federal Claims, the Court of International Trade, or the Court of Appeals for the Federal Circuit, and for the investigation and resolution of such complaints; and

`(B) establishing a system for referring complaints filed with respect to the conduct of a judge of any such court to any of the first eleven judicial circuits or to another court for investigation and resolution. The Judicial Conference shall establish and submit to the Congress the system described in subparagraph (B) not later than 180 days after the date of the enactment of the Judicial Disciplinary Proceedings Act of 1996.'.

(b) DISCLOSURE OF INFORMATION- Section 372(c)(14) of title 2, United States Code, is amended--

(1) in subparagraph (B) by striking *`or'* after the semicolon;

(2) in subparagraph (C) by striking the period at the end and inserting *`; or'*; and

(3) by adding after subparagraph (C) the following:

`(D) such disclosure is made to another agency or instrumentality of any governmental jurisdiction within or under the control the United States for a civil or criminal law enforcement activity authorized by law.'.

(c) EFFECTIVE DATE- The amendments made by subsection (a) apply to complaints filed on or after the 180th day after the date of the enactment of this Act.

SECTION 5. LIMITATION ON COURT-IMPOSED TAXES.

(a) LIMITATION-

(1) IN GENERAL- Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

`Sec. 1369. Limitation on Federal court remedies `(a) LIMITATION ON COURT-IMPOSED TAXES- (1) No district court may enter any order or approve any settlement that requires any State, or political subdivision of a State, to impose, increase, levy, or assess any tax for the purpose of enforcing any Federal or State common law, statutory, or constitutional right or law, unless the court finds by clear and convincing evidence, that--

`(A)(i) there are no other means available to remedy the deprivation of rights or laws; and

`(ii) the proposed imposition, increase, levying, or assessment is narrowly tailored to remedy the specific deprivation at issue;

`(B) the tax will not contribute to or exacerbate the deprivation intended to be remedied;

`(C) the proposed tax will not result in a loss of revenue for the political subdivison in which it is assessed, levied, or collected;

`(D) the proposed tax will not result in the loss or depreciation of property values of the taxpayers who are affected;

`(E) the proposed tax will not conflict with the applicable laws with respect to the maximum rate of taxation as determined by the appropriate State or political subdivision thereof; and

`(F) plans submitted to the court by State and local authorities will not effectively redress the deprivations at issue.

`(2) A finding under paragraph (1) shall be subject to immediate interlocutory de novo review.

`(3)(A) Notwithstanding any law or rule of procedure, any aggrieved corporation, or unincorporated association or other person residing or present in the political subdivision in which a tax is imposed in accordance with paragraph (1) or other entity located within that political subdivision shall have the right to intervene in any proceeding concerning the imposition of the tax.

`(B) A person or entity that intervenes pursuant to subparagraph (A) shall have the right to--

`(i) present evidence and appear before the court to present oral and written testimony; and

`(ii) appeal any finding required to be made by this section, or any other related action taken to impose, increase, levy, or assess the tax that is the subject of the intervention.

`(b) TERMINATION OF ORDERS- Notwithstanding any law or rule of procedure, any order of a district court requiring the imposition, increase, levy, or assessment of a tax imposed pursuant to subsection (a)(1) shall automatically terminate or expire on the date that is--

`(1) 1 year after the date of the imposition of the tax;or

`(2) an earlier date, if the court determines that the deprivation of rights that is addressed by the order has been cured to the extent practicable.

`(c) PREEMPTION- This section shall not be construed to preempt any law of a State or political subdivision thereof that imposes limitations on, or otherwise restricts the imposition of, a tax, levy, or assessment that is imposed in response to a court order referred to in subsection (b).

`(d) ADDITIONAL RESTRICTIONS ON COURT ACTION- (1) Except as provided in subparagraph (B), nothing in this section may be construed to allow a Federal court to, for the purpose of funding the administration of an order referred to in subsection (b), use funds acquired by a State or political subdivision thereof from a tax imposed by the State or political subdivision thereof.

`(2) Paragraph (1) does not apply to any tax, levy, or assessment that may, in accordance with applicable State or local law, be used to fund the actions of a State or political subdivision thereof in meeting the requirements of an order referred to in subsection (b).

`(e) NOTICE TO STATES- The court shall provide written notice to a State or political subdivision thereof subject to an order referred to in subsection (b) with respect to any finding required to be made by the court under subsection (a). Such notice shall be provided before the beginning of the next fiscal year of that State or political subdivision occurring after the order is issued.

`(f) SPECIAL RULES- For purposes of this section--

`(1) the District of Columbia shall be considered to be a State; and

`(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute f the District of Columbia.'.

(b) CONFORMING AMENDMENT- The table of contents for chapter 85 of title 28, United States Code, is amended by adding after the item relating to section 1368 the following new item: *`1369. Limitation on Federal court remedies.'.*

(c) STATUTORY CONSTRUCTION- Nothing contained in this section or the amendments made by this section shall be construed to, beyond the scope of applicable law, make legal, validate, or approve the use of a judicial tax, levy, or assessment by a United States district court.

(d) EFFECTIVE DATE- This section and the amendments made by this section apply with respect to any action or other proceeding in any Federal court that is commenced on or after the date of the enactment of this Act.

SECTION 6. REASSIGNMENT OF CASE AS OF RIGHT.

(a) IN GENERAL- Chapter 21 of title 28, United States Code, is amended by adding at the end the following:

`Sec. 464. Reassignment of cases upon motion by a party `(a) UPON MOTION- (1) If all parties on one side of a civil case to be tried in a United States district court bring a motion to reassign the case, the case shall be reassigned to another appropriate judicial officer. Each side shall be entitled to one reassignment without cause as a matter of right.

`(2) If any question arises as to which parties should be grouped together as a side for purposes of this section, the chief judge of the court of appeals for the circuit in which the case is to be tried, or another judge of the court of appeals designated by the chief judge, shall determine that question.

`(b) REQUIREMENTS FOR BRINGING MOTION- (1) Subject to paragraph (2), a motion to reassign under this section shall not be entertained unless it is brought not later than 20 days after notice of the original assignment of the case, to the judicial officer to whom the case is assigned for the purpose of hearing or deciding any matter. Such motion shall be granted if--

`(A) it is presented before trial or hearing begins and before the judicial officer to whom it is presented has ruled on any substantial issue in the case, or

`(B) it is presented by consent of the parties on all sides.

`(2) Notwithstanding paragraph (1)--

`(A) a party joined in a civil action after the initial filing may, with the concurrence of the other parties on the same side, bring a motion under this section within 20 days after the service of the complaint on that party;

`(B) a party served with a supplemental or amended complaint or a third-party complaint in a civil action may, with the concurrence of the other parties on the same side, bring a motion under this section within 20 days after service on that party of the supplemental, amended, or third-party complaint; and

`(C) rulings in a case by the judicial officer on any substantial issue before a party who has not been found in default enters an appearance in the case shall not be grounds for denying an otherwise timely and appropriate motion brought by that party under this section.

`(3) No motion under this section may be brought by the party or parties on a side in a case

if any party or parties on that side have previously brought a motion to reassign under this section in that case.

`(c) COSTS OF TRAVEL TO NEW LOCATION- If a motion to reassign brought under this section requires a change in location for purposes of appearing before a newly assigned judicial oficer, the party or parties bringing the motion shall pay the reasonable costs incurred by the parties on different sides of the case in travelling to the new location for all matters associated with the case requiring an appearance at the new location.

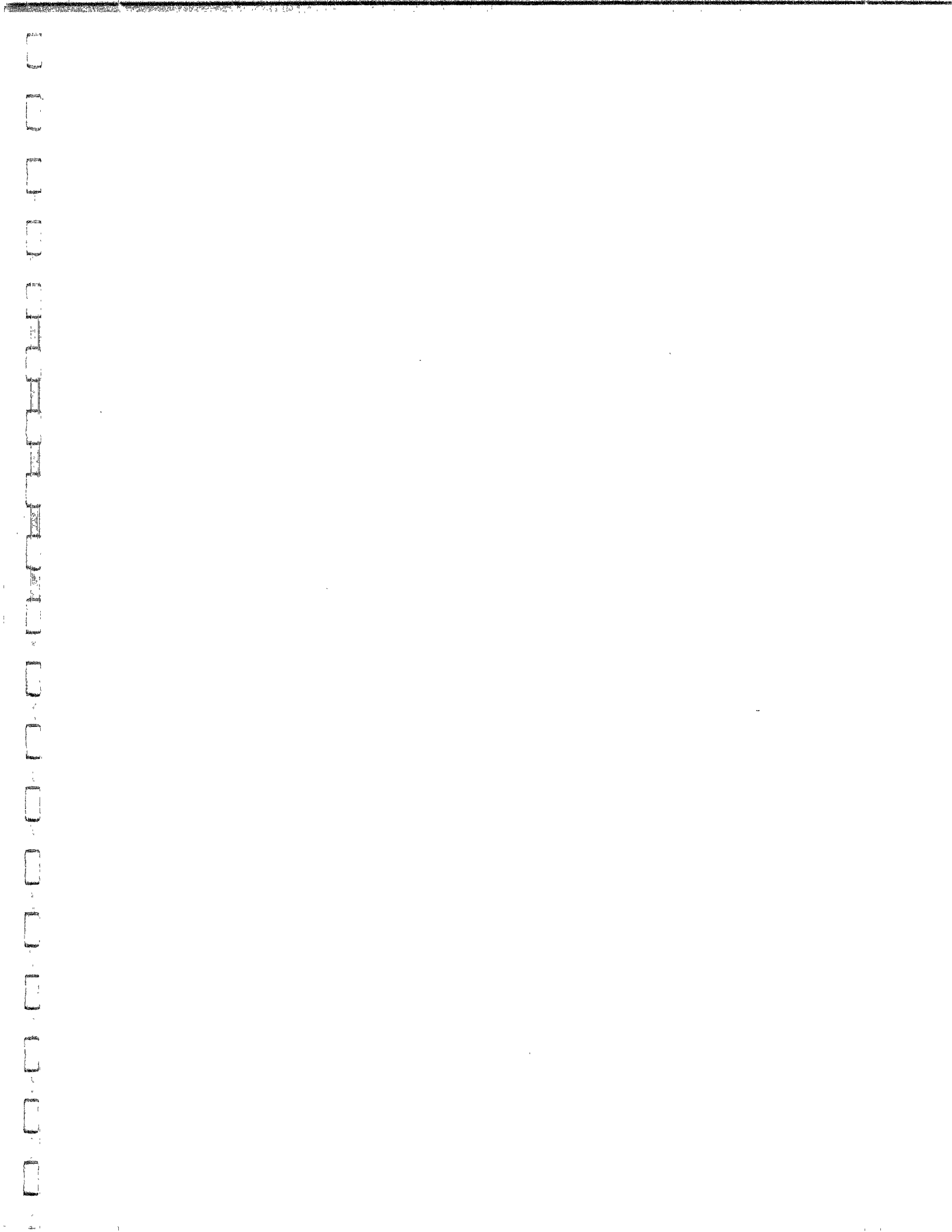
*`(d) DEFINITION- As used in this section, the term `**appropriate judicial officer'** means--*

`(1) a United States magistrate judge in a case referred to such a magistrate judge; and

`(2) a United States district court judge in any other case before a United States district court.'.

(b) CLERICAL AMENDMENT- The table of contents for chapter 21 of title 28, United States Code, is amended by adding at the end the following new item:

`464. Reassignment of cases upon motion by a party.'.



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

JAMES K. LOGAN
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

April 1, 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 to advise you of the concerns of the Judicial Conference's Standing Committee on Rules of Practice and Procedure regarding the *Sunshine in Litigation Act of 1997* (S. 225), which was introduced by Senator Herb Kohl on January 28, 1997. The bill would require a judge to make particularized findings of fact that information subject to a discovery request is not relevant to the protection of public health or safety before approving any protective order.

The Judicial Conference's Advisory Committee on Civil Rules has carefully studied various proposals addressing concerns over abuses involving protective orders, including earlier versions of the *Sunshine in Litigation Act*. In 1995 it crafted a proposal that it believed would meet the concerns of the competing interests, but the proposal was returned for further study. The advisory committee has now embarked on a study of the general scope and nature of discovery to identify and address its impact on litigation cost and delay. Protective orders will be examined as part of this important study.

The advisory committee continues to work on a solution to the use of protective orders that accommodates important competing interests. I urge you and your colleagues on the Committee on the Judiciary to allow the rulemaking process to proceed in accordance with the Rules Enabling Act and defer action on S. 225.

Judiciary's Response to Concerns Regarding Protective Orders

The Advisory Committee on Civil Rules began serious study of protective order practices in November 1992 in response to pending legislation. The committee sought to inform itself whether the problems suggested by the legislation existed, and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. It also asked the Federal Judicial Center to undertake a study of protective order practice to shed light on the frequency of protective orders, the kinds of litigation in which protective orders were entered, the frequency of stipulated protective orders, and the kinds of information protected. It considered lengthy law review articles and the recommendations of the Federal Courts Study Committee.

These studies all suggested that there is no need to make it more difficult to issue discovery protective orders. The studies generally showed:

- that there is no evidence that protective orders in fact create any significant problem in concealing information about public hazards or in impeding efficient sharing of discovery information;
- that much information can be gathered from parties and nonparties during discovery that no one would have a right to learn outside the needs of a particular lawsuit;
- that discovery would become more burdensome and costly if the parties can not reasonably rely on protective orders; and
- that administration of a rule creating broader rights of public access would impose great burdens on the court system.

The advisory committee also kept in mind the wide variety of interests that are involved with protective orders. Although it is common to focus on the often legitimate needs to protect trade-secret and other confidential commercial information, protective orders often protect intensely personal privacy interests. The Federal Judicial Center study, for example, found that the most frequent use of protective orders occurs in civil rights and employment discrimination litigation. The privacy interests protected often are those of nonparties, who have had no voice in the decision whether to initiate litigation and little or no interest in the outcome. An added concern is that discovery has been designed from the very beginning to function without need of judicial supervision. Courts are not equipped to supervise the details of discovery. Voluntary exchanges of information remain indispensable. It would be counterproductive to attempt to add hurdles that impede the efficient entry of protective orders.

The advisory committee found little reason to believe that protective orders prevent desirable sharing of information in related litigation or defeat public access to information about unsafe products. Federal courts are sensitive to these issues and respond to them effectively. Perhaps more important, the advisory committee concluded that there is a better way to ensure that all courts follow the best and common present practice. Rule 26(c) can expressly provide for modification or dissolution of protective orders, including provision for modification or dissolution on motion by a nonparty.

Proposed amendments to Rule 26(c) were published for public comment in 1993. Substantial comments were made. The draft was revised in light of those comments and was published in 1995 for a second round of comment. Extensive comments were received. The advisory committee reviewed all the comments and the testimony at the public hearings on proposed Rule 26(c). Comments supporting the proposal generally agreed that it would clarify and confirm the general and better current practice. Comments opposing the proposal, including written opposition from Senator Kohl, expressed concern about explicit recognition of the widespread use of stipulated protective orders and also continued to advocate a broad public "right to know." Many of the opposing comments suggested that it would be better to leave Rule 26(c) unchanged. Ultimately, the proposed amendments to Rule 26(c) were returned to the advisory committee by the Judicial Conference for further study.

Protective order practice is tied directly to the general scope and nature of discovery. At the suggestion of the American College of Trial Lawyers, the advisory committee has undertaken to study the general scope of discovery. After three decades of nearly continuous study and revision, discovery continues to raise procedural problems. Although discovery seems to work well in most cases, in a significant number of cases it continues to impose great, even extraordinary, burdens and expenses. If indeed the general scope of discovery is to be changed in some way, parallel changes in Rule 26(c) may well be appropriate.

The advisory committee began consideration of the scope of discovery at its October 1996 meeting. A Discovery Subcommittee, chaired by Judge David F. Levi, was formed. The subcommittee met with a large group of lawyers drawn from all branches of the profession and is planning a national symposium to be held in September at the Boston College School of Law. It has invited suggestions from the major national lawyer associations. The entire advisory committee participated in the American Bar Association's conference on the RAND report on the Civil Justice Reform Act and will continue to work with the Federal Judicial Center and others to glean the lessons to be learned from experience under the Act. All these activities will be combined with the information gathered during the advisory committee's earlier investigation of protective orders to help shape the agenda of discovery issues to be considered. Further study of Rule 26(c) is part of this broader process and should not be separated from it.

It is frustrating that responsible procedural reform takes so much time. Although there might be some instances when protective orders impede access to information that affects the public health or safety, the problem is not widespread. Some careful students of the subject have examined the commonly cited illustrations and have concluded that information sufficient to protect public health and safety has always been available from other sources. It is important to approach whatever problem there may be with care, lest discovery be made even more complex and costly. Attempts to increase access to discovery information may indeed backfire, as parties become less and less willing to exchange information without prolonged discovery litigation.

CONCLUSIONS

For these reasons, I urge you to defer action on the *Sunshine in Litigation Act of 1997*. I look forward to continuing this important dialogue with you and your colleagues on the Committee on the Judiciary. Thank you for your consideration.

Sincerely yours,

Alicemarie H. Stotler
United States District Judge

cc: Committee on the Judiciary,
United States Senate

Cong. Coble (Jurisdiction Sheet)
R. 68
Evid. 702 ltr

References to this bill in the Congressional Record	Digest and Status Information About this Bill.	Download this bill. (4,156 bytes).

Sunshine in Litigation Act of 1997 (Introduced in the Senate)

S 225 IS

105th CONGRESS

1st Session

S. 225

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 28, 1997

Mr. KOHL introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, 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 `Sunshine in Litigation Act of 1997'.

SEC. 2. PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS RELATING TO PUBLIC HEALTH OR SAFETY.

(a) IN GENERAL- Chapter 111 of title 28, United States Code, is amended by adding at the end thereof the following new section:

`Sec. 1659. Protective orders and sealing of cases and settlements relating to public health or safety

`(a)(1) A court shall enter an order under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery or an order restricting access to court records in a civil case

only after making particularized findings of fact that--

`(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

`(B)(i) the public interest in disclosure of potential health or safety hazards is clearly outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

`(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

`(2) No order entered in accordance with the provisions of paragraph (1) shall continue in effect after the entry of final judgment, unless at or after such entry the court makes a separate particularized finding of fact that the requirements of paragraph (1) (A) or (B) have been met.

`(b) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

`(c)(1) No agreement between or among parties in a civil action filed in a court of the United States may contain a provision that prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

`(2) Any disclosure of information to a Federal or State agency as described under paragraph (1) shall be confidential to the extent provided by law.'.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1658 the following:

`1659. Protective orders and sealing of cases and settlements relating to public health or safety.'.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall take effect 30 days after the date of the enactment of this Act and shall apply only to orders entered in civil actions or agreements entered into on or after such date.



















FRAD Doc 2083

Bill Summary & Status for the 105th Congress

PREVIOUS BILL | NEXT BILL
PREVIOUS BILL:ALL | NEXT BILL:ALL
NEW SEARCH | HOME | HELP

S.79

SPONSOR: Sen Hatch, (introduced 01/21/97)

TITLE(S):

- SHORT TITLE(S) AS INTRODUCED:

  Civil Justice Fairness Act of 1997

- OFFICIAL TITLE AS INTRODUCED:

  A bill to provide a fair and balanced resolution to the problem of multiple imposition of punitive damages, and for the reform of the civil justice system.

STATUS: Floor Actions

NONE

STATUS: Detailed Legislative History

Senate Action(s)

Jan 21, 97:
Read twice and referred to the Committee on Judiciary.

STATUS: Congressional Record Page References

01/21/97 Introductory remarks on Measure (CR S455-457)

COMMITTEE(S):

- COMMITTEE(S) OF REFERRAL:

  Senate Judiciary

AMENDMENT(S):

NONE

DIGEST:

(AS INTRODUCED)

TABLE OF CONTENTS:

Civil Justice Fairness Act of 1997 - **Title I: Punitive Damages Reform** - Prohibits punitive damages in a civil action in any State or Federal court in which such damages are sought based on the same act or course of conduct for which punitive damages have already been sought or awarded against the defendant, with exceptions where the court determines that the claimant will offer new and substantial evidence of previously undiscovered, additional wrongful behavior on the part of the defendant, subject to specified limitations.

(Sec. 103) Permits punitive damages, to the extent permitted by applicable Federal or State law, in any civil action in a Federal or State court against a defendant if the claimant establishes by clear and convincing evidence that the harm suffered was the result of conduct that is either specifically intended to cause harm or carried out with conscious, flagrant disregard for the rights or safety of other persons. Prohibits punitive damages in the absence of an award of compensatory damages exceeding nominal damages.

Sets forth provisions regarding: (1) limits on punitive damage awards involving certain drugs and medical devices; (2) pleading of punitive damages; (3) bifurcation of trial at the defendant's request; and (4) limits on awards.

Title II: Joint and Several Liability Reform - Provides that in any civil action for personal injury, wrongful death, or based upon principles of comparative fault, the liability of each defendant for noneconomic damages shall be several only and not joint. Makes each defendant liable only for the amount of noneconomic damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility. Directs that a separate judgment be rendered against such defendant for that amount.

Requires the trier of fact to determine the proportion of responsibility of each person for the claimant's harm whether or not such person is a party to the action.

Specifies that this title shall not preempt or supersede any Federal or State law to the extent that such law would further limit the application of joint liability to any kind of damages.

Title III: Civil Procedural Reform - Expresses the sense of the Congress that each State should require each attorney admitted to practice in such State to disclose in writing, to any client with whom such attorney has entered into a contingency fee agreement, the actual services performed, the precise number of hours expended, and whether a referral fee was paid.

Directs the Attorney General to: (1) study and evaluate contingent fee awards and their abuses; (2)

SUBJECT(S):

- INDEX TERMS:

Law
Actions and defenses
Budgets
Business
Civil procedure
Congress
Congressional reporting requirements
Consumers
Damages
Drug industry
Drug law and legislation
Drugs
Evidence (Law)
Exclusive and concurrent legislative powers
Expert witnesses
Grants-in-aid
Health policy
Hospitals
Legal ethics
Legal fees
Legislation
Liability (Law)
Limitation of actions
Managed care
Medical care
Medical instruments and apparatus
Medical malpractice
Medicine
Product safety
Products liability
Punitive damages
State and local government
State courts
State laws
Torts
Trial practice

2 COSPONSORS:

Sen Kyl - 01/21/97
Sen Thomas - 01/21/97

develop model State legislation; and (3) prepare and disseminate to State authorities the findings made and model legislation developed.

(Sec. 302) Amends: (1) rule 702 of the Federal Rules of Evidence regarding expert testimony; and (2) rule 68 of the Federal Rules of Civil Procedure regarding offers of judgment or settlement.

Title IV: Health Care Liability Reform - Provides that in any health care liability action, in addition to actual damages, punitive damages, or both, a claimant may be awarded noneconomic damages in an amount not to exceed $250,000, regardless of the number of parties against whom the action is brought or the number of claims or actions brought with respect to the health care injury. Prohibits an award for future noneconomic damages in such an action from being discounted to present value. Sets forth provisions regarding reductions in jury awards and applicability of this title.

(Sec. 403) Establishes a two-year statute of limitations for the initiation of a health care liability action, with an exception for MINORS.

(Sec. 404) Sets forth provisions regarding the periodic payment of future damages.

(Sec. 405) Directs the Secretary of Health and Human Services to award grants to one or more States to establish demonstration projects under which the State establishes a no-fault medical liability system, subject to specified requirements. Authorizes appropriations.

Title V: Miscellaneous Provisions - Specifies that this Act shall not provide a basis for Federal court jurisdiction under specified provisions.

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

References to this bill in the Congressional Record	Digest and Status Information About this Bill.	Download this bill. (55,235 bytes).

S.79

Civil Justice Fairness Act of 1997 (Introduced in the Senate)

Table of Contents:

THIS SEARCH	*THIS DOCUMENT*	*GO TO*
Next Hit	Forward	New Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

S.79

Civil Justice Fairness Act of 1997 (Introduced in the Senate)

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.

`(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.

THIS SEARCH	*THIS DOCUMENT*	*GO TO*
Next Hit	Forward	New Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

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 **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)	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 (96-CV-I)	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
[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**
[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**

Proposal	Source, Date, and Doc #	Status
[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	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 **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	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 **PENDING FURTHER ACTION**
[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)	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 **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**
[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**

Proposal	Source, Date, and Doc #	Status
[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**
[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**
[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**

Proposal	Source, Date, and Doc #	Status
[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**
[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(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**

Proposal	Source, Date, and Doc #	Status
[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)	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)
[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 **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H)	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-B)	2/97 — Referred to Reporter, Chair, and Agenda Subc. **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**

Proposal	Source, Date, and Doc #	Status
[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**