ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
March 12, 2001

AGENDA

COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE

MARCH 12, 2001

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TAB I

INTRODUCTION

TAB II

RULE 23(c)

M E M O R A N D U M

DATE: February 26, 2001

FROM: Lee H. Rosenthal
Ed Cooper
Rick Marcus

TO: Committee on the Federal Rules of Civil Procedure

SUBJECT: Meeting on March 12, 2001

Dear Committee Members:

The attached agenda materials will form the basis for our discussion on possible revisions to Rule 23. The attached drafts of proposed changes under consideration for Rule 23 cover the following areas: (1) a revised Rule 23(c)(1), affecting the timing of class certification decisions, addressing certification orders, and presenting a proposal for rule-based preclusion from an order denying class certification; (2) a new proposed Rule 23(c), expanding and making explicit the requirement for clear and plain language notices; (3) a revised Rule 23(e) settlement review proposal, including a proposal for an opportunity to opt-out after notice of settlement terms, and a proposal for rule-based preclusive effect from a court's refusal to approve a class settlement; (4) a proposal for a rule-based approach to overlapping and duplicative class litigation; (5) a revised proposed rule on class action attorney appointment; and (6) a revised proposed rule on class action attorney fee awards.

The proposals continue the subcommittee's focus on the process by which class actions are litigated, rather than on changing the standards for certifying cases as class actions. However, the proposals also include more focused and targeted attempts to address, by rule, the problems raised by overlapping and often competing class litigation. The decision to include these proposals in part reflects the subcommittee's belief that work on improving the rules governing class action litigation is simply incomplete without attempting a rule-based approach to addressing such problems. To determine whether there is a rule-based approach to improving this aspect of class action suits, we are putting it to the drafting test. In order to provide a principled basis for the proposals, we have included two reporter's memoranda from Professor Cooper, one on Rules Enabling Act issues and one on 28 U.S.C. § 2283 issues, that the proposals raise.

The drafts in the agenda book are the proposals presently identified as candidates for continued work. The criteria for such candidates are: (1) proposals for rule changes to respond to

problems identified either in the lengthy last round of class action rulemaking in the 1990s or in submissions to the Committee since then; (2) that do not essentially repeat approaches that did not succeed in the last round of class action rulemaking; and (3) that could feasibly survive the process for rule enactment. The goal for the March 12 meeting is to test our present drafts with critical comments and questions, in order to give the subcommittee a full opportunity to improve the proposals, and the Committee a full opportunity thoughtfully to consider them, before we meet again in April.

The agenda book includes the proposed drafts, with footnotes raising questions and comments for discussion and with draft Committee Notes. The agenda book also includes the reporter's notes from the last two subcommittee discussions, included to provide background information.

Rule 23(c)(1): "When" Practicable; Effect of Refusal To Certify

The 1996 published Rule 23 proposals included one to amend Rule 23(c)(1) by converting the requirement that a certification decision be made "as soon as practicable" into a "when practicable" requirement. The Advisory Committee then recommended this amendment for adoption. The Standing Committee returned the proposal to the Advisory Committee. The Standing Committee decision rested on two grounds. One was that it would be better to consider all Rule 23 changes in a single package, leaving apart as clearly separate the Rule 23(f) appeal provision that was adopted. The other was doubt as to the wisdom of the change. It was feared that courts would delay unnecessarily, and that discovery would expand to fill the vacuum. The "when practicable" proposal remains attractive, but has stirred conflicting reactions that are reflected in the annotated draft. One attraction is that the proposal reflects reality, as shown by the Federal Judicial Center Study figures on time from filing to certification decisions. A second, of diminishing importance, is that the Seventh Circuit has read the present rule to defeat the opportunity to seek dismissal or summary judgment before a certification decision — this view seems to be fading, and may no longer be a real problem. A third attraction may be reduction of any pressure toward "drive-by" certification. And a fourth may be support for the proposed attorney appointment rule. The concerns that are set against these attractions rest on the belief that "as soon as practicable" generates a desirable pressure to tend to the certification question — current practice has it about right.

The draft goes beyond the "when practicable" change. Among the other changes is one that allows amendment of an order granting or denying class certification at any time up to "final judgment"; the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment.

The draft also adds an entirely new provision that precludes any other court from certifying a class substantially the same as a class that has been denied certification by a federal court. Preclusion arises only if denial rests on failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or failure to satisfy the standards of Rule 23(b)(1), (2), or (3). The court that made the order can defeat the preclusion, either when making the order or later. This is one of the provisions aimed at the problems of competing class actions. It presents some of the most difficult problems in the package.

Rule 23(c): Notice

Class-action bills introduced in Congress regularly include "plain English" requirements. Draft Rule 23(c) adapts the language of one bill, requiring notice in "plain, easily understood language." This provision may be used to point to the ongoing Federal Judicial Center project to develop a model notice.

The notice draft takes on other issues as well. For the first time, it expressly requires notice in (b)(1) and (b)(2) class actions. Notice in these mandatory classes is addressed in an effort to find a functional substitute for the (b)(3) requirement of individual notice. The first draft expressly referred to the purpose underlying a notice requirement — to reach a sufficient number of class members to provide an effective opportunity to challenge class certification or representation and to monitor the performance of class representatives and class counsel. This version was thought to be too much of an invitation to reopen the certification decision. The current version seeks notice calculated to provide a reasonable number of class members an effective opportunity to participate in the action.

Other notice provisions drafted in the early years of the Rule 23 project were considered and set aside. It had been proposed that the requirement of individual notice in a (b)(3) class be relaxed by allowing notice 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 objection that seemed most effective in chilling this proposal was that it had the effect of discriminating among class members, offering some but not all the opportunity to opt out. Another abandoned effort would have allowed a court to direct a defendant to pay part or all of the cost of notice to a plaintiff class. This provision was tied to the proposal that allowed exploration of the merits as part of a (b)(3) certification determination. This provision was abandoned in light of the decision to abandon the independent occasion for examining the merits.

Rule 23(e): Settlement Review

Review of proposed class-action settlements has occupied the Advisory Committee throughout the ten-year Rule 23 study process. From the beginning, it has been urged that review is hampered by the fact that the class and its adversary join together in supporting approval, depriving the court of the adversary arguments needed to ensure well-informed review. This concern occasionally reflects the fear of collusive settlements, but is expressed as well by those who believe that most class actions are pursued by lawyers of the highest professional integrity. The need for improved judicial review is expressed in the RAND report and by such observers as George M. Cohen, "The 'Fair' is the Enemy of the Good: Ortiz v. Fibreboard Corporation and Class Action Settlements," 2000, 8 Sup.Ct.Econ.Rev. 23. The proposals published for comment in August 1996 would have amended Rule 23(e) by adding a hearing requirement.

The 1996 proposals also included a "settlement class" provision. That proposal was put aside in the belief that lower-court development of the *Amchem* and *Ortiz* rulings would show whether there is any need to adopt express rule provisions on this subject. The Subcommittee has continued to hold this subject to one side. The focus of its work has been on the review process.

Earlier versions of an expanded Rule 23(e) included a lengthy list of factors to consider in evaluating a proposed settlement and offered substantial support for objectors. These provisions have pretty much fallen by the way. The "laundry list" of review factors has been relegated to treatment in the draft Note, and may be reduced still further. At least three concerns led to this demotion: courts will likely discount or disregard factors not in the list despite express and emphatic statements that the list is not exclusive; the list may come to be treated as a check list, with routine findings that mark off each item without seriously considering the few that are most relevant to a particular settlement; and it is unseemly to include a long list of factors in a Rule. What remains is an explicit standard of review: the settlement must be "fair, reasonable, and adequate."

Successive Rule 23(e) drafts included continually diluted provisions designed to support objectors. The first versions included sweeping discovery that could extend even to the course of settlement negotiations. Expense and fee provisions would have required awards for successful objections and permitted awards for unsuccessful objections. The more expansive versions fell of their own weight. Discovery into the negotiation process is allowed now only on showing strong reason to suspect collusion, and that seems the right approach. Mandatory fees for successful objections encounter the problem that a successful objection may result not in a settlement that adds to the class recovery but instead may result in no settlement or even decertification. The reduced provisions that followed have disappeared in the face of concerns that the benefits from supporting

"good" objectors are apt to be outweighed by the costs of supporting "bad" objectors. What remains is a simple provision that a class member may object, and a restriction on settling objections made on behalf of a class. (The permission to object is not limited to a class that has been certified.)

Concern with the difficulties that confront objectors also led to a provision that in effect allowed the court to appoint and support a "good" objector by designating a magistrate judge or another person to investigate and report on the proposed settlement. This provision hung on for several years, but has been abandoned. Intrinsic concerns about the role of a court-appointed objector were supplemented by concerns about the form of communication with the court. The parties should have the same opportunities to inquire into the basis for the report and to respond as they have with any objector, but the tactical complexities could prove unsatisfactory.

The current draft carries forward, albeit in reduced form, a new provision that allows a class member to opt out of the class after notice of a proposed settlement. The current version is significantly reduced from earlier versions, which established an unconditional right to opt out of a settlement in mandatory (b)(1) and (b)(2) classes as well as (b)(3) opt-out classes. Now it applies only to a (b)(3) class, and the court can defeat the new opt-out right (although not the basic (b)(3) opt-out right) on finding that there is good reason not to allow an opportunity to request exclusion. [An alternative, described in a footnote to the annotated text, would provide for notice of a conditional opportunity to opt out of a (b)(3) class settlement: class members would be advised that they could request exclusion, and the court would then decide whether to permit exclusion. This approach would allow the court to evaluate the cogency of the reasons for seeking exclusion — if the requests are orchestrated by attorneys who have solicited class members to opt out, for example, the court might well deny any opportunity to opt out.] Although reduced, at least some subcommittee participants have found this settlement opt-out an important part of the revisions. It is viewed as a substitute for the provisions that would have enhanced support for objectors but that in the end were found undesirable. So long as class members can protect themselves against improvident settlement by requesting exclusion, there is less need to worry about supporting objectors.

Earlier drafts suggested alternative approaches to disclosure of "side agreements" made in connection with a proposed settlement. These approaches have been consolidated in a provision that authorizes the court to direct the parties seeking approval of a settlement to file "a copy or a summary of any agreement or understanding made in connection with" the settlement.

More detailed issues are caught up in draft Rule 23(e)(1). The draft requires court approval of a settlement, voluntary dismissal, or compromise even if the class is not certified. The detailed

notice, hearing, and review provisions of Rule 23(e), however, apply only if a class has been certified.

The final provision, Rule 23(e)(5), seeks to reduce "settlement shopping." This provision is a second component of the package that seeks to address the problems that arise from overlapping and competing class actions. A refusal to approve a settlement "precludes approval of substantially the same settlement by any other court unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement." As drafted, this provision applies only when a class has been certified; if a court considers certification in tandem with a proposed settlement and denies certification because the settlement is inadequate, there is no formal preclusion. Perhaps the preclusion should reach farther.

Overlapping Classes

Class actions seem to proliferate in some circumstances. It is not uncommon to find multiple, often overlapping, and at times competing class actions pending in different courts. One of the motives that led to creation of the Ad Hoc Working Group on Mass Torts was the belief that this phenomenon may yield more readily to legislation than to rulemaking. The Federal-State Jurisdiction Committee of the Judicial Conference is tracking legislative efforts, and the rules committees are maintaining liaisons with that Committee. Until Congress acts, however, it remains prudent to hold open the possibility of rulemaking.

This package includes three provisions aimed at overlapping and competing class actions. Two are noted above: Draft Rule 23(c)(1)(C) precludes other courts from certifying a class that a federal court has refused to certify. Draft Rule 23(e)(5) precludes another court from approving a class settlement that a federal court has refused to approve.

The third provision is a draft Rule 23(g). This draft seeks to give preemptive control to a federal court that is asked to certify a class. The exercise of control can take many forms. An order directed to any member of a proposed or certified class regulating litigation in other tribunals may enter when there is a prospect that effective pursuit of the federal action demands protection against overlapping and competing litigation. The order can preserve the opportunity to make a reasoned certification decision and to proceed toward orderly disposition of any class action that is certified. Such orders raise fundamental questions of comity and federalism, and call for sensitive balancing of the interests of class members as well as the interests of state courts. Enabling Act authority for this provision also will be questioned, although the need to make Rule 23 fully effective should supply ample authority.

A second response to overlapping or competing classes — or to the needs of other parallel litigation — may be to stay the federal action in an effort to coordinate with proceedings in another court. There may be circumstances in which a class action in another court, a set of class actions in other courts, or aggregated or even individual litigation may be superior to a proposed federal class. To support this mode of coordination, express authority is provided to defer the certification decision notwithstanding the "as soon as practicable" command of Rule 23(c)(1).

The decision whether to preempt, to defer, or to muddle along need not be made in lonely isolation. The draft includes express authority to "consult with other courts, state or federal," in deciding on the best course to pursue.

Class Member Appeal

The Rule 23 drafts in the October Advisory Committee agenda included a new Rule 23(g) that would allow a class member to appeal a class judgment. The draft permitted a class member to appeal a judgment approved under Rule 23(e), and also to appeal any other class judgment if no representative class member appealed. The purpose of the draft was to supersede the rule adopted by an increasing number of circuits that requires a class member to win intervention in the district court as the basis for "standing" to appeal. The concern was that the intervention requirement proves a trap for unsophisticated objectors. The subcommittee determined that this draft should be discarded. Intervention procedure has benefits — the district court can winnow out frivolous and ill-motivated objections. Adequate protection is provided by the opportunity to appeal a denial of intervention. And the concern with "bad" objectors returned to the discussion. The simple ability to take an appeal creates leverage, and often enormous leverage. The protection provided by the intervention procedure might not be necessary in a world that provides only "good" objectors, but in the real world we cannot afford unlimited appeal opportunities.

Appointment of Class Counsel

At the October, 2000, meeting of the full Committee, an initial draft of a rule provision on appointment of class counsel was discussed. Since then, the rule provision has been refined, and in these materials it appears as proposed Rule 23(h). After discussion of various options on rule language during the Subcommittee meetings on Dec. 4 and Jan. 28-29, a draft Committee Note was added which appears after the proposed rule language. Footnotes identify some questions that need to be addressed. No doubt Committee members will have others based on the proposed rule language or the draft Committee Note.

Any consideration of class action practice during recent years shows that class counsel play a highly prominent role. Despite that prominence, Rule 23 nowhere explicitly addresses their selection or their responsibilities. This proposal would fill that gap.

A brief comparison to the draft considered last October may help to set the scene. That draft emphasized relatively aggressive limitations on attorney actions on behalf of the class prior to appointment as class counsel. The proposal also emphasized the "fiduciary" responsibilities of class counsel to the class after appointment. In addition, it frowned on giving any favorable weight in selecting class counsel to the lawyer who filed the class action. These features have been softened or eliminated in the current proposal.

The current proposal essentially attempts to accomplish two objectives. First, it recognizes the need to appoint class counsel on certifying a class, and articulates the responsibility of class counsel to represent the best interests of the class as opposed to the preferences of individual class members. The word "fiduciary" is not used in the current draft. A bracketed provision characterizes the class as "the attorney's client." It remains to be decided whether inclusion of this language in the rule would be desirable; draft Committee Note language explores some of the pertinent issues.

The current draft does not attempt by rule to regulate pre-certification activities by the attorney who files a class action. The draft Committee Note points out that counsel may not legally bind the class until appointment, but it recognizes that counsel may take some actions prospectively on behalf of the class (such as settlement discussions) during that time. It also recognizes that the court may appoint an attorney as lead or liaison counsel during that pre-certification stage.

The second major feature of the draft is to set out an application procedure, hopefully in general consonant with best current practices in many courts. With such provisions in the rule, one could anticipate greater uniformity of handling of these matters. The proposal includes two options regarding the content of the application.

First, the short version (Option 1) invokes the purpose of the application -- demonstrating the applicant's ability to provide adequate representation for the class -- but does not detail most of the items one would ordinarily want to ensure an application addresses, although bracketed material invokes two matters that seem to be important but not usually included in such applications. A more complete provision (Option 2) supplies a nonexclusive "laundry list." Although this list of subjects is overtly nonexclusive, providing it by rule may assist counsel and the court. Either option permits the judge to direct inclusion of additional subjects.

One notable feature of the procedure is the possibility that the application process may produce competition for the class counsel position. Paragraph 2(A) therefore states that the court may defer the due date for applications a "reasonable period" so that others can apply, and the Note suggests that this would ordinarily be appropriate unless a pre-litigation settlement has been confected, thereby making prompt proceedings under Rule 23(e) important. In the same vein, the rule still tries to distinguish between free riders and lawyers who have furthered the class interests by focusing on the work the applicant has done "identifying or investigating potential claims."

In a related vein, both options intend that the application include "any proposed terms for attorney fees and nontaxable costs," and the rule later points out that the court may include provisions about that topic in the order appointing class counsel. This feature might foster competitive applications -- even bidding in some cases if invited by the court -- and might also serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact.

The Note addresses the possibility that lawyers might form a "consortium" to pursue a class action and seek collective appointment as class counsel. On the one hand, that sort of collaboration might undercut efforts to handle a case efficiently. On the other hand, it may often be true that individual lawyers could not effectively handle cases of this dimension. The rule does not try to favor or disfavor this sort of activity as an abstract matter, and the Note is intended to identify the pertinent considerations.

Another topic that has generated discussion is the appropriate handling of defendant class actions. Those are infrequent compared to plaintiff class actions, and have been left entirely out of some recent proposed legislation in Congress. To require an application for the class counsel position in defendant class actions might undercut the ability to use the device, and the proposal therefore limits the requirement that there be an application to plaintiff class actions. At the same time, it seems clear that class counsel must be appointed in a defendant class action, and desirable to declare that they owe the same obligation to the class as class counsel for a plaintiff class. Accordingly, the appointment requirement applies to both plaintiff and defendant class actions. Thus, the proposal calls for appointment of class counsel, with the attendant obligations to the class, be required in all class actions, but says that an application only be required in plaintiff class actions.

Finally, the court's authority to include provisions regarding fees in its order appointing class counsel, noted above, provides a bridge to the proposed attorney fees rule.

Attorney Fees Rule

Attorney fees play a prominent role in class action practice, and are the focus of much of the concern about class actions. The possibility of proposing a rule provision addressing class action attorney fees thus was also raised at the October, 2000, meeting of the full Committee. This proposal dovetails with the attorney-appointment proposal. The attorney appointment process may even produce information (and perhaps early directives) about attorney fees for class counsel. The proposed attorney fees rule is designated Rule 23(i) for purposes of discussion. It carries the fee oversight impulse further than the attorney appointment rule.

Currently the only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2). But that rule is not focused on the special features of class actions -- particularly settled class actions -- so the proposal addresses these issues in the context of Rule 23, while attempting parallelism where appropriate with Rule 54(d). More pertinent detail is offered, however, regarding the handling of the motion for an award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award. These matters -- particularly the question who can object, and the scope of discovery allowed objectors -- warrant consideration, as do the factors bearing on fee measurement.

The draft permits any class member, or party against whom an award is sought, to object. A background concern that also surfaced in discussions of the proposed amendments to Rule 23(e) is the problem of distinguishing "good" from "bad" objectors and calibrating the rights of objectors in a way that is appropriate given the possibility that some may have malign motives. In that vein, the draft includes a bracketed provision regarding discovery by objectors.

To acquaint class members with fee requests, the proposal calls for notice of a fee motion to all class members "in such reasonable manner as the court directs," with a bracketed provision limiting that notice requirement to applications by class counsel. It is hoped that this would not often result in an "extra" notice requirement; at least in settled cases sufficient notice should ordinarily be included in the notice sent out under Rule 23(e), on which the notice requirement is modeled. Limiting the notice to the class to class counsel's motion may be prudent to avoid waste effort.

The proposal also requires that the court hold a hearing, with bracketed language limiting that hearing requirement to objections made, and requires findings whether or not there is a hearing. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge.

The draft includes a "laundry list" (overtly nonexclusive) of factors the court may consider in determining the amount of an award. The expectation is that the Note will not "endorse" any

specific method of fee calculation, but rather provide elaboration on the listed factors. Providing a preference by rule for one method (e.g., percentage, lodestar) would therefore require a redirection of the rule. This laundry list provision is in brackets, because one could urge that all the rule really directs is the award of a "reasonable" fee, which does not require such an enumeration of the factors to be considered. The draft Committee Note reviews these factors; including such discussion in a Note (to paragraph (1) of the rule, which includes the "reasonable fee" language) might result in an enormous Note attached to a short rule. So one question is whether the laundry list provides value.

Another question (indicated by bracketed material in the proposal) is whether to require disclosure of "side agreements" regarding fees. The court may have limited tools for dealing with those agreements at the fee award stage even if aware of them, and footnoted material explores some of these issues.

Yet another question, to the extent that the obligation to hold a hearing, the right to seek discovery, or the like, depend upon the filing of an "objection," is what should constitute an objection. If all letters to the court condemning the amount counsel will receive in fees qualify, that might seem overbroad. The draft Note mentions but does not try to resolve the question.

Unlike the draft considered at the October, 2000, meeting, this proposal should apply to motions by attorneys who are not designated class counsel. Fees for objectors, for example, would be included, as well as fees for work done by lawyers not designated class counsel if there were a basis for such an award. But the goal is not to create new grounds for fee awards. The rule, therefore, deals with awards "authorized by law or by agreement of the parties."

Whether the proposal sufficiently deals with fees paid to objectors might merit discussion. If an objector were successful in reducing the amount paid to counsel from the award or settlement fund for the class, that would seem to provide a basis for an award to the objector for the effort, and there may be other occasions for such an award. On the other hand, it is worth noting that if the objector resolves the objection by some sort of agreement including payment for the attorney effort involved, that would not come within the proposed rule unless the court itself were directing the payment for the objector's attorney fees. (Proposed Rule 23(e) would, however, require court review of such settlements, which might sometimes include consideration of fee arrangements that attend such settlements.)

The subcommittee looks forward to receiving your insights and comments and to working with you to improve the proposals. Thank you.

L.H.R.

PROPOSED RULE 23(c)

(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 must when practicable[1] determine by order whether the action will be certified as a class action.

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[1] "[W]hen practicable" is used because that was the choice published in 1996. It seems to be agreed that some phrase should be used to indicate the need to move with deliberate speed to determine the certification question. Delay is undesirable because the certification determination has a profound effect on the conduct and outcome of the litigation. But some time is required to gather the information that bears on a wise certification determination. If a class is to be certified for trial, it is important to understand what issues the trial is likely to cover. In many cases, that requires some knowledge of the merits. The purpose is not to predict how the merits will be resolved, but only to predict what are the merits that must be resolved. The drafting question is to determine what words best point to this message.

"As soon as practicable," the current phrase, balances two competing forces. "As soon as" suggests some urgency. "[P]racticable" suggests taking the time necessary to sort through preliminary issues and to gain the firm understanding of the dispute needed for a wise class certification decision. Most often, courts emphasize the practicability aspect. But there is a danger that some courts may feel pressure to act with unwise speed, or even to refuse to consider preliminary motions on the merits before determining whether to certify a class.

"When practicable," the substitute published in 1996, was meant to emphasize practicability. It has met some recent resistance on the theory that it might be read to imply that a court can refuse any determination of the class certification question because it is never practicable to decide. Even if there is little risk of that interpretation, the phrase may relax the pressure to act promptly.

The choice between "when" and "as soon as" practicable, if we do not find a better alternative, may be affected by other decisions that remain open. If we were to adopt a rule authorizing pre-certification control of competing actions, for example, it might be desirable to emphasize the need for orderly progress toward a certification decision by retaining "as soon as."

It would be good to find a simple phrase that says this: "The court should ensure that the parties act with reasonable dispatch to gather and present the information required to support a well-informed determination whether to certify a class, and must make the determination promptly after the question is submitted."

(A) An order certifying a class action must define[2] the class and the class claims, issues, or defenses. When a class is certified under Rule 23(b)(3), the order must state when and how members may elect[3] to be excluded from the class.

(B) An order under this subdivision ~~may be~~ is conditional,[4] and may be ~~altered or~~[5] amended before ~~the decision on the merits~~ final judgment ~~but an order denying class certification with prejudice[6] precludes certification of substantially the same class by any other court unless a difference of law[7] or change of fact creates a new certification issue~~.

(C) An order that refuses to certify — or decertifies — a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards

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[2] Should this be "describe," following the (c)(3) provision that the judgment must "describe those whom the court finds to be members of the class"?

[3] "Elect" is used because it more accurately describes the unconditional nature of the right to opt out of the class. Rule (c)(2) now creates the right to opt out by requiring notice to advise class members that a member will be excluded "if the member so requests by a specified date." "Request" could be used here too.

[4] There is some support for deleting "may be conditional and," so the rule would say only that the order may be amended. That seems more efficient. And there is a risk that the emphasis on the conditional nature of a certification order may encourage some courts to certify first and consider later. But the reference to the conditional nature of the order is likely to have subtle effects by emphasizing the need to treat a certification determination as less final than many pretrial orders.

[5] "[A]ltered or" has been challenged as redundant. It is difficult to understand what "altered" adds — "amended" covers any changes that redefine the class originally certified, and neither word fully captures the power to decertify or to order certification after an initial refusal. But there is a long tradition, captured in the Rule 59(e) motion to alter or amend a judgment (never mind that many lawyers persistently characterize Rule 59(e) motions as motions to "reconsider").

[6] ~~This draft was rejected for two reasons. One is that it does not point to the distinctions adopted in subparagraph (C). Another is the confusion that might arise from using "with prejudice" as a shorthand way of indicating that the court should determine whether denial of certification should have a preclusive effect. There is a risk that it may be confused with a decision with prejudice to the merits of the claim. More awkward phrasings might reduce the problem. The final clause could be rendered: "unless (i) a [difference of law or] change of fact creates a new certification issue or (ii) the order denying certification is entered without prejudice to certification by another court."~~

[7] ~~The "change of law" phrase was intended to permit a state court to certify the same class on the ground that state certification standards are different, whether or not the state rule is a verbatim adoption of Federal Rule 23. That may be a bad idea; it opens the door to state-court certification of a nationwide class rejected by a federal court. One of the more distressing prospects is that the federal court might find disabling choice-of-law problems that are blithely disregarded by a later state determination. No attempt has been made to build this concept into the alternative drafted as subparagraph (C).~~

of Rule 23(b)(1), (2), or (3), precludes any other[8] court from certifying a substantially similar class to pursue substantially similar claims, issues, or defenses. The court that made the order may defeat this preclusion by direction in the order or by later order.

[8] An earlier draft precluded any court from later certifying the same class. Limiting the preclusion to other courts seems more consistent with the "conditional" nature of an order denying certification. Changed circumstances, or even improved argument in support of certification, may persuade the court that certification is proper. This emphasis on the primary responsibility of the first court reflects the themes of the draft that would allow the first court to control related proceedings in other courts.

Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring a decision "when practicable". The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes. A denial of class certification is made binding on other courts unless this preclusion is released by the court that denied certification.

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. But the "as soon as practicable" exaction may divert attention from the many practical reasons that may justify deferring the initial certification decision. The period immediately following filing may support free exploration of settlement opportunities without encountering the pressures that flow from class certification or from the knowledge that only appeal can change a denial of certification. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(h).

Time also may be needed for discovery to support the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct discovery into the "merits" of the dispute. A court must understand the nature of the disputes that will be presented on the merits in order to evaluate the presence of common issues; to know whether the claims or defenses of the class representatives are typical of class claims or defenses; to measure the ability of class representatives adequately to represent the class; and particularly to determine for purposes of a (b)(3) class whether common questions predominate and whether a class action is superior to other methods of adjudication. Some courts now require a party requesting class certification to present a "trial plan" that describes the issues that likely will be presented at trial, a step that often requires better knowledge of the facts and available evidence than can be gleaned from the pleadings and argument alone. Wise management of the discovery needed to support the certification decision recognizes that it may be most efficient to frame the discovery so as to reduce wasteful duplication if the class is certified or if the litigation continues despite a refusal to certify a class. See the Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Quite different reasons for deferring the decision whether to certify a class appear if related litigation is approaching maturity. Actual developments in other cases may provide invaluable information on the desirability of class proceedings and on class definition. If the related litigation involves an overlapping or competing class, indeed, there may be compelling reasons to defer to it.

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not delayed beyond the needs that justify delay. Class litigation must not become the occasion for long-delayed justice. Class members often need prompt relief, and orderly relationships between the class action and possible individual or other parallel actions require speedy proceedings in the class action.

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 under Rule 23(e) when the notice of certification is combined with a notice of settlement.

Subparagraph (B), which permits alteration or amendment of an order granting or denying class certification, is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids any possible ambiguity in referring 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 determination of liability might seem a decision on the merits, but it is not a final judgment that should prevent further consideration of the class certification and definition. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible in the same way as the concept used in defining appealability, 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.

Subparagraph (C) is new. It takes one step toward addressing the problems that arise then duplicating, overlapping, or competing class actions are filed in different courts. It is difficult to obtain firm data on the frequency of multiple related filings. Some information is provided by Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules*, 14-16, 23-24, 78-79, 118-119 (Federal Judicial Center 1996). But less rigorous evidence demonstrates that some types of claims may generate two or more attempts to seize control of a dispute by filing competing class actions in different courts. This competition is regulated in three ways by these amendments. New subdivision (g) protects the power of a federal court to make an orderly determination whether to certify a class, and to protect orderly control of a class once certified. Subdivision (e)(5) limits the ability of other courts to approve a class-action settlement that has been once rejected. Subparagraph (C) deals with events after a federal court has refused to certify a class.

The central provision of subparagraph (C) precludes any other court from certifying a substantially similar class to pursue a substantially similar claim after the federal court has refused to certify a class. Class decertification commands the same effect. This provision protects the potential class adversary and other courts against the burden of relitigating the same certification dispute. But the protection is qualified by applying it only to other courts, by intrinsic limits, and by the court's discretion.

Applying preclusion only to other courts leaves the court that first denied class certification free to reconsider within ordinary law-of-the-case principles. That court is in a better position than any other court to understand the reasons for the denial and to determine whether new circumstances or new arguments justify reconsideration.

The intrinsic limits relate to the grounds for denying certification. Preclusion attaches only if certification is denied for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3). A refusal to certify because the would-be class representative's claims or defenses are not typical of class claims or defenses, or because the would-be representative will not fairly and adequately protect the interests of the class, does not preclude another representative from seeking class certification.

The court is given discretion to defeat the preclusion, either in the order that denies certification or by later order. In effect, the denial of certification can be ordered without prejudice to the right of others — or perhaps even the once-rejected suitor — to seek certification. One reason for this action may be a belief that the certification question has not been presented with as much force as might be. Inadequate presentation of the certification issue by one would-be representative should not bar a more effective representative from making a second attempt if the first court believes that appropriate. Another reason — more likely to arise after the initial denial — may be differences of law or changes of fact. Refusal to certify may rest on requirements of federal law that should not bar certification under the law of a state that takes a markedly different approach to class actions. Or developing fact information may show, for example, that a class action is indeed superior to other available methods for adjudicating the controversy within the meaning of Rule 23(b)(3).

RULE 23(C) NOTICE PROVISION

(2) (A) When ordering certification[9] of a class action under this rule, the court must direct ~~that~~ appropriate notice ~~be given~~ to the class. The notice must concisely and clearly describe in plain, easily understood language[10]:

- the nature of the action,
- the claims, issues, or defenses with respect to which the class has been certified,
- the right of a class member to enter an appearance through counsel if the member so desires,
- the right to elect to be excluded from a class certified under Rule 23 (b)(3),
- the potential consequences of class membership,[11] and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(i) In any class action certified under Rule 23 (b)(1) or (2), the court must direct a means of notice calculated to ~~reach a sufficient number of class members to provide an effective opportunity to challenge class certification or representation and[12] to monitor the performance of class representatives and class counsel.~~ provide a reasonable number

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[9] "or decertification" could be added. It seems better, however, to add that to Rule 23(d)(2) if we want to put it into the text of the rule. The question of who is to pay for notice of decertification is daunting, particularly in a (b)(3) class.

[10] The "plain, easily understood language" is borrowed from recent class-action reform bills. See, e.g., S. 353, 106th Cong., 2d Sess., adding new 28 U.S.C. § 1713(c)(1).

[11] This is new. Does it suggest too much? Is the court obliged to describe such "consequences" as tolling statutes of limitations, stay of independent actions, fee rights of class counsel, opportunity to object to settlement, and so on?

[12] It has been objected that the overstricken words go too far toward encouraging challenges to the recently considered certification order. The objection has been directed to the explicit invitation to challenge certification and representation, but the reference to monitoring class representatives and class counsel can easily include challenges to class certification and definition without the open invitation. The substitute reference to participation seems less threatening.

of class members an effective opportunity to participate in the action.[13]

(ii) In any class action ~~maintained~~ certified under ~~subdivision~~ Rule 23(b)(3), the court ~~shall~~ must direct to class ~~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.]~~[14] ~~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.~~

[13] This version adopts the suggestion that notice should be designed to provide an effective opportunity to participate. But it would go too far to require notice to every class member who can be identified with reasonable effort; the (b)(3) notice requirement reflects the opportunity to opt out, and the cost of requiring like notice in (b)(1) and (b)(2) classes might cripple desirable litigation. Focus on a reasonable number of class members opens the way for notice by publication, regular mailings that reach a substantial portion of the class for other purposes, and more inventive means. The difficulty is that there is no indication of the criterion for measuring a reasonable number. Another approach would focus directly on the prospect that the representatives before the court may not in fact be "typical." One expression that is marred by the risk of confusion over "representative" would be: "notice calculated to reach a representative [{statistically} significant?] number of class members."

[14] This provision for "sampling" notice has won support as a desirable support for worthy actions that cannot survive the cost of individual notice. But it has foundered on at least two concerns. One is that the due process references in the *Eisen* opinion suggest at the minimum that the Supreme Court believes that individual notice is very important. The second is that there are equal protection concerns in affording the right to request exclusion to some class members but not others.

Committee Note

The first change made in Rule 23(c)(2) is to expand the requirement of notice to all class actions. The former rule expressly required notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) cannot request exclusion, but have interests that should be protected by notice. As described in Rule 23(c)(2)(A)(i), these interests often can be protected without requiring the exacting efforts to effect individual notice to identifiable class members that stem from the right to elect exclusion from a (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is added as a reminder of the need to work unremittingly at the enormously difficult task of communicating with class members. The brutal fact is that it is virtually impossible to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure itself raise the barriers high. In some cases these barriers may be reduced by providing an introductory summary that briefly expresses the most salient points, leaving full expression to the body of the notice. The Federal Judicial Center has undertaken to create sample models of clear notices that provide a helpful starting point, but the responsibility to "fill in the blanks" remains challenging. The challenge will be increased in cases involving classes that justify notice in a language other than "plain English" because significant numbers of members are more likely to understand notice in a different language.

Extension of the notice requirement to Rule 23(b)(1) and (b)(2) classes justifies applying to those classes, as well as to (b)(3) classes, the right to enter an appearance through counsel. Members of (b)(1) and (b)(2) classes may in fact have greater need of this right since they lack the protective alternative of requesting exclusion.

Item (i) describes the goal of providing notice of a Rule 23(b)(1) or (b)(2) class. Notice should be calculated to provide an effective opportunity to participate in the action to a reasonable number of class members. The opportunity to participate can be important for many purposes. Although notice is sent after certification, class members continue to have an interest in certification, the class definition, and the adequacy of representation. Notice supports the opportunity to challenge the certification on such grounds. Notice also supports the opportunity to monitor the continuing performance of class representatives and class counsel to ensure that the predictions of adequate representation made at the time of certification are fulfilled. These goals justify notice to all identifiable class members when circumstances 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. But when individual notice would be burdensome, the reasons for giving notice often can be satisfied without attempting personal notice to each class member even when many individual class members can be identified. Published

notice, perhaps supplemented by direct notice to a significant number of class members, will often suffice. In determining the means and extent of notice, the court should attempt to ensure that notice costs do not defeat worthy class actions. The burden imposed by notice costs is particularly troublesome in actions that seek only declaratory or injunctive relief.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the item (ii) notice requirements must be satisfied as to the (b)(3) class.

TAB III

PROPOSED RULE 23(e)

Proposed Rule 23(e)

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

(1) A class ~~or subclass~~ representative in an action in which a member of a class sues or is sued as ~~a~~ representative of a class may, with the court's approval, settle, voluntarily dismiss, or compromise[15] the action or all or part of the class ~~or subclass~~ claims, issues, or defenses.

(A) Notice of a proposed settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class ~~that would bind a class~~ must be given to all members of the class in such reasonable manner as the court directs.[16]

(B) The court may approve a settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class ~~that would bind a class~~ only after a hearing and on finding[17] that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The court may direct the parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a copy or a summary of any agreement or understanding made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) (A) Unless excused under Rule 23(e)(3)(B), in an action certified [as a class action] under Rule 23(b)(3), the Rule 23(e)(1)(A) notice must state terms on which class members may elect to be excluded[18] from the class.

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[15] "Compromise" has provoked much discussion. It has an antique air about it. "Settle" seems more modern and useful. But there is a lingering uncertainty whether the concepts of settlement and voluntary dismissal are sufficiently capacious to embrace all means of walking away from an action.

[16] Perhaps this should be restyled: "The court must direct notice in a reasonable manner to all members of a certified class of a proposed settlement, voluntary dismissal, or compromise of the class claims, issues, or defenses."

[17] "[O]n finding is a tame version of several alternatives. Is it sufficient to indicate the intent to require findings that will support effective appellate review?

[18] "Elect to be excluded" is a more positive version of the current "request exclusion." Need we be consistent throughout Rule 23?

(B) The court may refuse to allow an opportunity to request exclusion under Rule 23(e)(3)(A) if class members have had an earlier opportunity to request exclusion from the class and there is good reason not to allow[19] a second opportunity to request exclusion.[20]

(4) **(A)** Any class ~~or subclass~~ member may object to a proposed settlement.[21]

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[19] The basic concern is that settlement may be reached in circumstances that provide ample information to support well-informed review of the settlement and that support a confident determination that the settlement is eminently fair, reasonable, and adequate. The information may emerge from extensive pretrial preparation in the class action, from actual litigation of several parallel actions (particularly in mass torts), or even from partial trial of the class action. It would be good to find a statement more affirmative than "good reason not to allow." But it is difficult to speak directly to the concerns that emerge at this point. One concern is that class members may be opted out en masse by an "inventory" lawyer or an "opt-out farmer" who seeks a better deal that builds on the floor of the settlement, seizing the strategic advantage of separateness. Another is that an individually retained lawyer may advise a client to opt out in order to avoid the regulation of fees that may attach to the class settlement.

[20] It has been suggested that this limit on the settlement opt-out could be made provisional. The idea would be to advise class members that they will be allowed to opt out of the settlement if they tell the court that they want to opt out and the court decides that they should be allowed to do so. The theory is that the number who wish to opt out, and the cogency of the reasons advanced for wishing to opt out, will help the court in evaluating the settlement itself and also help determine whether class members should be allowed to opt out of the settlement. Objections to this suggestion rest on at least two grounds. One is that the suffering public repute of class actions will suffer still further if class members are told that perhaps they can opt out and then are told in the end that they cannot even though they want to. Another is that settlement negotiations are complicated enough when a settlement opt-out is added. There is a further complication if the parties are free to argue that the opt-out should not be provided but do not know how the court will decide. It is too much to add the further complications that would arise from a provisional right to opt out.

Many versions are possible. One that gives considerable discretion might be:

> **(3)** In reviewing a proposed settlement, voluntary dismissal, or compromise of an action certified [as a class action] under Rule 23(b)(3), the court may set terms on which class members may request exclusion from the class if the settlement, voluntary dismissal, or compromise is approved. The terms must be included in the Rule 23(e)(1)(A) notice. If the settlement, voluntary dismissal, or compromise is approved, the court may in its discretion permit some or all of the requested exclusions.

[21] It has been suggested that we should sharpen the implicit distinction between an objector who only asks for distinctive personal treatment and an objector who seeks to represent the class. The underlying concern is that objections may be advanced on behalf of the class for the purpose of exerting improper leverage. The suggestion is that some threshold should be set for objecting on behalf of the class. It would be possible to invoke the Rule 23(a) standards for a class representative, but the threshold might well be set lower. One possible version would be:

(4)(A) Any class member may object to a proposed settlement:

> **(i)** as it applies to the objector, or
> **(ii)** on behalf of the class if the court grants intervention for this purpose.

(B) An objector who objects on behalf of a class may settle, voluntarily dismiss, or compromise the objections ~~in the trial court or on appeal~~ only with the ~~trial~~ court's approval. The court may approve a settlement or compromise that affords the objector terms more favorable than the objector would receive under the class settlement only if the objector's terms are reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members.[22]

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

The note would suggest that intervention standards be tailored to the circumstances.

[22] There is a general desire to make this provision less complicated, but no concrete suggestions have been presented.

Committee Note

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. It applies to all classes, whether certified only for settlement; certified as an adjudicative class and then settled; or presented to the court as a settlement class but found to meet the requirements for certification for trial as well.

Paragraph (1). Paragraph (1) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. The reference to settlement is added as a term more congenial to the modern eye than "compromise." The requirement of court approval is made explicit for pre-certification dispositions. The new language introduces a distinction between voluntary dismissal and a court-ordered dismissal that has been recognized in the cases. Court approval is an intrinsic element of an involuntary dismissal. Involuntary dismissal often results from summary judgment or a motion to dismiss for failure to state a claim upon which relief can be granted. It may result from other circumstances, such as discovery sanctions. The distinction is useful as well in determining the need for notice as addressed by paragraph 1(A).

Paragraph (1)(A) carries forward the notice requirement of present Rule 23(e), but makes it mandatory only for settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court may order notice to the class of a disposition made before a certification decision, and may wish to do so if there is reason to suppose that other class members may have relied on the pending action to defer their own litigation. Notice also may be ordered if there is an involuntary dismissal after certification; one likely reason would be concern that the class representative may not have provided adequate representation.

Paragraph (1)(B) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise of a class action. The factors to be considered in determining whether to approve a settlement are complex, and should not be presented simply by stipulation of the parties. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared.

But if there are no factual disputes that require consideration of oral testimony, the hearing requirement can be satisfied by written submissions. Paragraph 1(B) also states the standard for approving a proposed settlement. The proposed settlement must be fair, reasonable, and adequate. The court, further, must make findings that support the conclusion that the settlement meets this standard.

The seemingly simple standard for approving a settlement may be easily applied in some cases. A settlement that accords all or nearly all of the requested relief, for example, is likely to fall short only if there is good reason to fear that the request was significantly inadequate.

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable

outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

(J) whether class or subclass members are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Paragraph (2). Paragraph (2) authorizes the court to direct that settlement proponents file copies or summaries of any agreement or understanding made in connection with the settlement. This provision does not change the basic requirement that all terms of the settlement or compromise must be filed. It aims instead at related undertakings. Class settlements at times have been accompanied

by separate agreements or understandings that involve such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, the freedom to bring related actions in the future, discovery cooperation, or still other matters. The reference to "agreements or understandings made in connection with" the proposed settlement is necessarily open-ended. An agreement or understanding need not be an explicit part of the settlement negotiations to be connected to the settlement agreement. Explicit agreements or unspoken understandings may be reached outside the settlement negotiations. Particularly in substantive areas that have generated frequent class actions, or in litigation involving counsel that have tried other class actions, there may be accepted conventions that tie agreements reached after the settlement agreement to the settlement. The functional concern is that the seemingly separate agreement may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. This functional concern should guide counsel for the settling parties in disclosing to the court the existence of agreements that the court may wish to inquire into. The same concern will guide the court in determining what agreements should be revealed and whether to require filing complete copies or only summaries. Filing will enable the court to review the agreements as part of the review process. In some circumstances it may be desirable to include a brief summary of a particularly salient separate agreement in the notice sent to class members.

The direction to file copies or summaries of agreements or understandings made in connection with a proposed settlement should consider the need for some measure of confidentiality. Some agreements may involve work-product or related interests that may deserve protection against general disclosure. [One example frequently urged relates to "back-end opt-out" agreements. A defendant who agrees to a settlement in circumstances that permit class members to opt out of the class may condition its agreement on a limit on the number or value of opt-outs. It is common practice to reveal the existence of the agreement to the court, but not to make public the threshold of class-member opt-outs that will entitle the defendant to back out of the agreement. This practice arises from the fear that knowledge of the full back-out terms may encourage third parties to solicit class members to opt out.]

Paragraph (3). Paragraph (3) creates an opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced, subject to the court's power to defeat the opportunity on finding good reason not to allow exclusion. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. Paragraph (3) creates a second opportunity for cases in which there has been an earlier opportunity to request exclusion that has expired by the time of the settlement notice. This second opportunity to request exclusion reduces the forces of inertia and ignorance that may undermine the value of a pre-settlement opportunity to

request exclusion. A decision to remain in the class is apt to be more carefully considered and is better informed when settlement terms are known.

The second opportunity to request exclusion also recognizes the essential difference between disposition of a class member's rights through a court's adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how careful the inquiry into the settlement terms, a settlement does not carry the same reassurance of justice as an adjudicated resolution. Objectors may provide important support for the court's inquiry, but attempts to encourage and support good-faith objectors may prove difficult. An opportunity to request exclusion after the terms of a proposed settlement are known provides a valuable protection against improvident settlement that is not provided by an earlier opportunity to request exclusion and that is not reliably provided by the opportunity to object. The opportunity to opt out of a proposed settlement may afford scant protection to individual class members when there is little realistic alternative to class litigation, other than by providing an incentive to negotiate a settlement that encourages class members to remain in the class. The protection is quite meaningful as to class members whose individual claims will support litigation by individual action, or by aggregation on some other basis — including another class action; in such actions, the decision of most class members to remain in the class may provide some assurance that the settlement is reasonable. The settlement agreement can be negotiated on terms that allow any party to withdraw from the agreement if a specified number of class members request exclusion. The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Members of a (b)(1) or (b)(2) class may seek protection by objecting to certification, the definition of the class, or the terms of the settlement.

Although the opportunity to request exclusion from the class after settlement terms are announced should apply to most settlements, paragraph (3)(B) allows the court to deny this opportunity if there has been an earlier opportunity to request exclusion and there is good reason not to allow a second opportunity. Because the settlement opt-out is a valuable protection for class members, the court should be especially confident about the quality of the settlement before denying the second opt-out opportunity. Faith in the quality and motives of class representatives and counsel is not alone enough. But the circumstances may provide particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. Such circumstances may provide strong reassurances of reasonableness that justify

denial of an opportunity to request exclusion. Denial of this opportunity may increase the prospect that the settlement will become effective, establishing final disposition of the class claims.

The parties may negotiate settlement terms conditioned on waiver of the second opportunity to request exclusion, but the court should be wary of accepting such provisions.

Paragraph (4). Paragraph (4) confirms the right of class members to object to a proposed settlement. Objections may be made as an individual matter, arguing that the objecting class member should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Individually based objections almost inevitably must come from individual class members, but are not likely to provide much information about the overall reasonableness of the settlement unless there are many individual objectors. Objections also may be made that in terms that effectively rely on class interests; the objector then is acting in a role akin to the role played by a court-approved class representative. Class-based objections may be the only means available to provide strong adversary challenges to the reasonableness of the settlement — the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts.

A class member may appear and object without seeking intervention. Many courts of appeals, however, have adopted a rule that recognizes standing to appeal only if the objector has won intervention in the district court. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997). An objector who wishes to preserve the opportunity to appeal is well advised to seek intervention.

The important role played by objectors may justify substantial procedural support. The parties to the settlement agreement may provide access to the results of all discovery in the class action as a means of facilitating appraisal of the strengths of the class positions on the merits. If settlement is reached early in the progress of the class action, however, there may be little discovery. Discovery in — and even the actual dispositions of — parallel litigation may provide alternative sources of information, but may not. If an objector shows reason to doubt the reasonableness of the proposed settlement, the court may allow discovery reasonably necessary to support the objections. Discovery into the settlement negotiation process should be allowed, however, only if the objector makes a strong preliminary showing of collusion or other improper behavior. An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory.

The important role that is played by some objectors must be balanced against the risk that objections are made for strategic purposes. Class-action practitioners often assert that a group of "professional objectors" has emerged, appearing to present objections for strategic purposes unrelated to any desire to win significant improvements in the settlement. An objection may be ill-founded, yet exert a powerful strategic force. Litigation of an objection can be costly, and even a

weak objection may have a potential influence beyond what its merits would justify in light of the inherent difficulties that surround review and approval of a class settlement. Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries. It has not been possible to craft rule language that distinguishes between "good" and "bad" objectors, nor that balances rewards for good objectors with sanctions for bad objectors. Courts should be vigilant to avoid practices that may encourage bad objectors, recognizing that much should turn on the apparent cogency of the objections and a realistic appraisal of any changes won in the settlement. [The provisions of Rule 11 apply to objectors, and courts should not hesitate to invoke Rule 11 in appropriate cases.]

Paragraph (4)(B) responds to a problem illustrated in one form by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 1st Cir.1999, 183 F.3d 1. An objector may remain a class member, make objections on behalf of the class, and then settle the objections without seeking court approval. Settlement may involve modification of the settlement as it applies to other class members; the modified settlement is subject to court approval, and approval ends further special concern. Settlement may instead involve abandonment of the objections and acceptance of the settlement terms as they apply to all other class members. In some situations the court may fear that other potential objectors have relied on the objections already made and seek some means to replace the defaulting objector. In most circumstances, however, an objector should be free to abandon the objections at any time without further review or court permission.

Quite different problems arise if the settlement provides the objector alone terms that are more favorable than the terms generally available to other class members. The different terms may reflect genuine distinctions between the objector's position and the positions of other class members, and make up for an imperfection in the class or subclass definition that lumped all together. Different terms, however, may reflect the strategic value that objections may have. So long as an objector is objecting on behalf of the class, it is appropriate to impose on the objector the same fiduciary duty to the class as a named class representative assumes. The objector may not seize for private advantage the strategic power of objecting. To avoid this risk, the rule expressly provides that an objector may settle only with court approval and that the court may approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from the position of other class members.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Paragraph (5). Paragraph (5) deals with the preclusion consequences of refusal to approve a proposed settlement. The refusal to approve precludes any other court, state or federal, from approving substantially the same settlement unless changed circumstances change the reasonableness calculation. Substantial sameness is shown by close similarity of terms and class definition; closely similar terms applied to a substantially different class do not fall within the rule. The preclusion applies only when a class has been certified. Absent the protection of class interests that arises from the certification decision, the class should not be bound. A court that is not prepared to certify a litigation class thus may find that preclusion is denied because the inadequacy of a proposed settlement forces it to deny certification of a class for that settlement. Other courts, however, should remain reluctant to approve the rejected settlement without showings of changed circumstances that would defeat preclusion when it applies under this rule.

Preclusion is defeated when changed circumstances present new issues as to the reasonableness, fairness, and adequacy of a proposed settlement. Disapproval of a settlement may be followed by improved information about the facts, intervening changes of law, results in individual adjudications that undermine the class position, or other events that enhance the apparent fairness of a settlement that earlier seemed inadequate. Discretion to reconsider and approve should be recognized. A second court asked to consider a changed circumstances argument should approach the settlement review responsibility much as it would approach a request that it reconsider its own earlier disapproval, demanding a strong showing to overcome the presumption that the earlier refusal to approve should be honored.

This federal rule does not speak directly to the freedom of a federal court to consider a settlement that has been rejected by a state court. A state that prefers to allow more or less freedom to reconsider should be able to control the consequences of its own proceedings. But even if applicable state rules allow free reconsideration, a federal court should be reluctant to encourage the "shopping" of a rejected settlement by de novo reconsideration. There should be a strong presumption against approval of the same settlement without a showing of changed circumstances.

TAB IV

PROPOSED RULE 23(g)

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(g) **(1)** When a member of a class sues or is sued as a representative party on behalf of all, the court may — before deciding whether to certify a class or after certifying a class — enter an order directed to any member of the proposed or certified class respecting [the conduct of] litigation in any other court [tribunal?] that involves the class claims, issues, or defenses.

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

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

Committee Note

Class actions exist to address disputes that involve too many parties to support resolution by means of ordinary joinder rules. The purpose is to frame a single proceeding that can achieve a uniform, just, and efficient determination of the entire controversy. The involvement of multiple parties, however, threatens fulfillment of this purpose. Whether from different visions of class interests or from less lofty motives, recent experience has shown many instances of duplicating, overlapping, competing, and successive class actions addressed to the same underlying controversy. Literally dozens of class actions may be filed in the wake of well-publicized mass torts involving large numbers of potential victims and staggering potential recoveries. To the extent that these actions are filed in federal court, great help is found in the pretrial consolidation procedures directed by the Judicial Panel on Multidistrict Litigation. Rationalization of the competing actions has proved more difficult, however, when some are filed in state courts.

Subdivision (g) addresses the need to establish the authority of a federal class-action court to maintain the integrity of federal class-action procedure. Integrity of the procedure demands that the court have the opportunity to determine whether to certify the class in the orderly way contemplated by Rule 23(c)(1)(A), free from competing proceedings in other tribunals that may undermine the opportunity for certification. Another court, for example, may certify a class and approve a settlement on terms that do not protect class interests as effectively as the federal class action might have done. Once a class has been certified, the federal court can protect class interests only if it can regulate related litigation by class members. The distractions, burdens, and conflicting orders that may be imposed by parallel actions can impede or even block effective preparation and ultimate disposition of the federal class action.

The power to direct orders to class members respecting the conduct of related litigation is limited during the pre-certification stage to members of the proposed class. After certification the

power is limited to members of the certified class; a former member who has opted out of a Rule 23(b)(3) class is no longer subject to this power.

The power to regulate related litigation by class members should be exercised with care. Special occasions to protect the federal action may arise when a (b)(1) or (b)(2) class presents pressing needs to achieve uniformity of obligation and to ensure equality among class members. Special reasons to allow other litigation to proceed, on the other hand, may be equally pressing. A state court, for example, may be well on the way to determination of a class action that will resolve part or all of the dispute brought in federal court. Or individual class members may be parties to actions that are well advanced toward decision, or may have urgent needs for prompt relief that cannot be met in the framework of the federal class action. Pragmatic judgment is required, informed by careful appraisal of the actual challenges in managing the federal class action and full knowledge of the opportunities and dangers created by parallel litigation. There is no room for any simplistic assumptions that the federal class action must always come first.

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

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

Subdivision (g)(2) confirms the balancing weight of deference to other courts. The decision whether to certify a class is heavily influenced by the existence of parallel litigation involving class members. Particularly when there are numerous other actions, or when one or more aggregated actions embrace many potential class members, it may be better to put aside the ordinary Rule 23(c)(1)(A) direction that a class certification decision be made [as soon as possible]. The question is not one of abstention, nor shirking the obligation to exercise established subject-matter jurisdiction. The problem is to define the best use to be made of federal class-action litigation in the particular setting. Class disposition is properly deferred — and ultimately denied — if better disposition is promised by proceedings in other federal courts or the courts of the states or another country.

Subdivision (g)(3) confirms the propriety of a tactic that has often worked well. Judges confronted with parallel litigation have resorted to the most obvious and direct means of working out effective coordination by talking to each other. There has been some uneasiness, however, arising from the lack of any official authorization for communications that frequently are unofficial and ex parte. This rule authorizes this means of rationalizing overlapping and perhaps competitive

litigation in two or more courts. When feasible, the cooperating judges should provide a means for the parties to be heard on the best means of coordination. Ordinary adversary procedures may not always be feasible, however, and the actual process of decision can properly be as confidential as the deliberations of any multi-member court.

TAB V

RULE 23(h)

APPOINTMENT OF CLASS COUNSEL

RULE 23(h)

APPOINTMENT OF CLASS COUNSEL

(h) **Class Counsel.**[23]

(1) Appointment of Class Counsel.

(A) Unless a statute provides otherwise, when members of a class sue or are sued as representative parties on behalf of all, the court must appoint class counsel in any order granting class action certification.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class [as the attorney's client].[24]

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[23] For purposes of discussion, this proposal has been designated a new subdivision of Rule 23 -- Rule 23(h). This designation depends on whether some form of overlapping actions subdivision is also proposed, and is designated Rule 23(g).

[24] The desirability of adding the bracketed phrase has been discussed, but the question has not been fully resolved. Adding it might strengthen the proposition that the duties of class counsel to the class are not controlled by state professional responsibility law. It seems that the present attitudes of state professional responsibility law are uncertain about the pertinent questions, such as application of a conflict of interest standard to situations in which counsel determine that the desires of their "clients" the class representatives are incompatible with the interests of their "client" the class. Including the provision might afford a vehicle for the federal courts to define those responsibilities more vigorously than has been true in the past (when federal courts have essayed to declare the obligations of class counsel to some extent). It should at least be clear that, by becoming class counsel, an attorney does not become the individual lawyer of each member of the class. Some lawyers have said that this provision simply recognizes what they took to be the case anyway.

In addition, the phrase might be a suitable way of recognizing something that may have become true -- that the class itself is akin to a legal entity. The Subcommittee was told that classes sometimes act like entities by owning assets and doing other things that entities do. That seems consistent with attaching importance to the act of the court in certifying the class. At the same time, it may raise some difficult questions about existing doctrine that does not seem to treat the class as an existing entity, such as mootness cases.

But there may be difficulties in adding the phrase to the rule, and there has been strong opposition from experienced counsel to including this phrase. Considering the situation in which some class members have their own lawyers, it may seem odd to say that the class is the client should that seem to intrude into their existing attorney-client relationships. If one uses the corporate analogy to assess the relationship between class counsel and class members (likening them to employees of the corporate client), one may think that the resulting complications could be daunting. In addition, by saying that this is an attorney-client relationship, one may be subjecting it to regulation by state professional responsibility regimes where it would not be so subject if this phrase were not included.

Assuming that the goal is that the federal court and class counsel not be unduly hamstrung by state professional responsibility guidelines, which may be vague in this area anyway, it is therefore unclear whether the inclusion of this phrase would be helpful. Without it, as the draft Note

(2) **Appointment procedure.**

(A) The court may allow a reasonable period after the commencement of the action for filing of applications to serve as class counsel, and may appoint as counsel for a plaintiff class only an attorney who has filed an application.

Option 1:[25]

(B) An application for appointment as class counsel must include information about all pertinent matters bearing on the ability of the applicant to fairly and adequately represent the interests of the class, including any matters the court directs be included. [Among matters covered must be (i) any proposed terms for attorney fees and nontaxable costs [including any agreements or understandings made by counsel with respect to or affecting the attorney fees or nontaxable costs], and (ii) whether the applicant represents parties or a class in parallel litigation that might be coordinated or consolidated with the action before the court.][26]

Option 2:

(B) An application for appointment as class counsel must include information about all pertinent matters, including:

(i) counsel's experience in handling class actions and other complex litigation;

(ii) counsel's experience in litigating claims of the type asserted in this case;

(iii) the work counsel has done in identifying or investigating potential claims;

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material tries to explain, there may be a sufficient basis for the court to regulate the activities of class counsel. With it, the Committee may be thrusting the rules into the difficult question of defining exactly what a "class" is in terms of being a separate legal entity. Although that question is very intriguing theoretically, raising it as part of the class counsel appointment rule may prove something of a distraction.

[25] Two options of proposed Rule 23(h)(2)(B) are presented. The first is "bare bones," with an added invocation of new features of our proposal presented as options. The second is a full "laundry list" rule provision.

[26] The bracketed matters proposed for inclusion in Option 1 because they are features not routinely included in such applications, as we understand things. The first is important to permit the court to regulate fee matters ex ante. The second may be a valuable device to deal with overlapping actions.

(iv) the resources counsel will commit to representing the class;

(v) any proposed terms for attorney fees and nontaxable costs [including any agreements or understandings made by counsel with respect to or affecting the attorney fees or nontaxable costs];

(vi) whether the applicant represents parties or a class in parallel litigation that might be coordinated or consolidated with the action before the court; and

(vii) any additional matters the court directs be included.

(C) The order appointing class counsel may include provisions regarding the award of attorney fees or nontaxable costs under Rule 23(i).

Committee Note

[Reporter's note: The following Note material attempts in many instances, but not all, to take account of alternative language in the current proposed rule. Depending on resolution questions about rule language, the Note will be adapted.]

Subdivision (h). Subdivision (h) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Yet until now the rule has said nothing about either the selection or responsibilities of class counsel. This subdivision recognizes the importance of class counsel, states their obligation to represent the interests of the class, and provides a framework for selection of class counsel. It also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the individual interests of members of the class.

Paragraph (1)(A) sets forth the basic requirement that the court appoint class counsel to represent the class at the time it certifies a class. Class counsel must be appointed for all classes, whether they are plaintiff or defendant classes. Although paragraph (2)(A) provides that there need not be an application to serve as class counsel for a defendant class, the basic appointment requirement applies for all classes. Similarly, this requirement exists for each subclass if the court certifies subclasses.

Ordinarily, the court would appoint class counsel at the same time that it certifies the class. As a matter of effective management of the action, however, it may be important for the court to designate attorneys to undertake some responsibilities during the period before class certification. This need may be particularly apparent in cases in which there is parallel individual litigation, or more than one class action on file. In these circumstances, it may be desirable for the court to designate lead or liaison counsel during the pre-certification period.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that pertinent provisions of the Private Securities Litigation Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain specific directives about selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The class comes into being due to the action of the court in granting class certification, and class counsel are appointed by the court to represent the class. The rule thus defines the scope and nature of the obligation of class counsel, an obligation resulting from the court's appointment and one that may be different from the customary obligations of counsel to individual clients. See American Law Institute, Restatement of the Law Governing Lawyers, § 209 comment d(iii).

At the same time class counsel are appointed, class representatives are also appointed to protect the interests of the class. These individuals may or may not have a preexisting attorney-client relationship with class counsel, but appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. For that reason, the class representatives do not have an unfettered right to "fire" class counsel, who is appointed by the court. See Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072 (2d Cir. 1995). In the same vein, the class representatives cannot command class counsel to accept or reject of a settlement proposal. To the contrary, class counsel has the obligation to determine whether settlement would be in the best interests of the class as a whole. Approval of such a settlement, of course, depends on the court's review under Rule 23(e).

For these reasons, the customary rules that govern conflicts of interest for attorneys must sometimes operate in a modified manner in class actions; individual class members cannot insist on the complete loyalty from counsel that may be appropriate outside the class action context. See Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 161 (7th Cir. 1988); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 164 (3d Cir. 1984) (Adams, J., concurring).

[The rule describes this obligation of class counsel as representing the class "as the attorney's client." This phrase emphasizes the relevance of class counsel's appointment for evaluation of counsel's representational duties. It does not seek to incorporate any state's specific professional

responsibility directives, but to recognize that the duty created by appointment runs to the class and is subject to review and supervision by the court. Because the class, as an "entity," becomes class counsel's client upon certification and appointment of class counsel, this provision makes it clear that individual class members -- even the class representatives -- may not insist that class counsel owes them a primary duty of professional loyalty. **Can this be usefully expanded?**]

Until appointment as class counsel, an attorney does not represent the class in a way that makes the attorney's actions legally binding on class members. Counsel who have established an attorney-client relationship with certain class members, and those who have been appointed lead or liaison counsel as noted above, may have authority to take certain actions on behalf of some class members. But until class counsel is appointed no lawyer has authority to act officially in a way that will bind the class.

Before certification, however, counsel may undertake actions tentatively on behalf of the class. One frequent example is discussion of possible settlement of the action by counsel before the class is certified. Such pre-certification activities anticipate later appointment as class counsel, and by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interests of the class. By presenting such a pre-certification settlement for approval under Rule 23(e) and seeking appointment as class counsel, for example, counsel represents that the settlement provisions are reasonable, fair, and adequate for the class.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it is intended to provide a framework for applications in all class actions.

Paragraph (2)(A) provides that there must be an application to serve as class counsel in every plaintiff class action. Ordinarily this requirement will arise in an action initially filed by members of a class seeking to sue as class representatives, but the application requirement will also apply in other circumstances in which class members seek affirmative judicial relief **(is there a better way to put this?)** on behalf of a class. An example would be a counterclaim on behalf of a class by a party initially sued as a defendant, seeking affirmative judicial relief against the original plaintiff.

The application requirement does not apply in a defendant class action. The authority of the court to certify a defendant class cannot be made dependent on the willingness of counsel to apply to serve as class counsel representing such a class. Despite the absence of a formal application, the court may appoint appropriate class counsel, and elicit needed information from candidates to inform the court's determination whom to appoint.

The rule provides that the court may allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The purpose is to permit the filing of competing applications to afford the best possible representation for the class, but in some instances

deferring appointment would not be justified. The principal example would be actions in which a proposed settlement has been negotiated before filing of the class action, with the result that there is reason to proceed promptly to review the proposed settlement under Rule 23(e). Except in such unusual situations, the court should ordinarily defer the appointment a sufficient period of time to permit competing counsel to apply. This should not often present difficulties; recent reports indicate that ordinarily considerable time elapses between commencement of the action and ruling on certification. See T. Willging, L. Hooper & R. Nimiec, Empirical Study of Class Actions in Four Federal District Courts 122 (Fed. Jud. Ctr. 1996) (median time from filing of complaint to ruling on class certification ranged from 7 months to 12.8 months in four districts studied).

The rule states that "an attorney" must file an application to serve as class counsel for a plaintiff class. In many instances, this will be an individual attorney. In other cases, however, an application will be filed on behalf an entire firm, or perhaps of numerous attorneys who are not otherwise affiliated but are collaborating on the action. No rule of thumb exists to determine when such arrangements are appropriate; the objective is to ensure adequate representation of the class. In evaluating such applications, the court should therefore be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure. One possibility that may sometimes be relevant to whether the court approves a coalition application is the alternative of competition for the position of class counsel. If potentially competing counsel have joined forces to avoid competition rather than provide needed staffing for the case, the court might properly direct that they apply separately. See In re Oracle Securities Litigation, 131 F.R.D. 688 (N.D. Cal. 1990) (counsel who initially vied for appointment as lead counsel resisted bidding against each other rather than submitting a combined application, and submitted competing bids only under pressure from the court).

[Reporter's note: The following Note material is keyed to the Option 2 rather than the "short form" Option 1 for Paragraph (2)(B). If the Committee elects to use Option 1, the Note would be adjusted accordingly.]

Paragraph (1)(B) provides a nonexclusive list of matters that should be included in the application. The guiding principle is that the application should include information on all pertinent matters. Counsel should endeavor to include all properly pertinent information, whether or not the rule or the court so direct. The court is authorized to direct inclusion of certain additional matters. One example of such a direction from the court would be that separate applications should be filed rather than a single application on behalf of a consortium of attorneys. In some instances, it may be that the court may direct further that competing counsel bid for the position of class counsel. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 202 n.6 (3d Cir. 2000) ("This device [bidding for class counsel] appears to have worked well, and we commend it to district judges within this circuit for their consideration.").

Full information on a number of the subjects that are to be covered on the application may often reveal confidential information that should not be available to the class opponent or to other parties. Examples include factor (iii), the work counsel has done in identifying potential claims, factor (iv), the resources counsel will commit to representing the class, and factor (v), proposed terms for attorney fees. In order to safeguard this confidential information, the court may direct that these disclosures be made under seal and not revealed to the class opponent.

In evaluating the applicant or applicants, the court should weigh all pertinent factors. No single factor should necessarily determinative in a given case. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims; the court would properly be concerned about free riding in such a situation. The resources counsel will commit to the case need to be appropriate to its needs, of course, but the court should be careful not to limit consideration to lawyers with the greatest resources. The prospect that appointing a certain lawyer would facilitate coordination with other pending litigation (factor (vi)) may prove quite important in certain cases but not in others. To the extent orders entered under Rule 23(g) can ameliorate difficulties resulting from overlapping or simultaneous litigation, this factor may have reduced importance.

If, after review of submitted applications for class counsel appointment, the court concludes that no applicant is satisfactory, it may reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

One matter that deserves emphasis is the possibility that the appointment process may yield either criteria or directives regarding a possible later award of attorney fees to class counsel. Factor (v) should provide an initial referent for the court in approaching this question. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or a method of monitoring class counsel's performance throughout the litigation. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 201-02 n.6 (3d Cir. 2000).

Paragraph (1)(C) therefore authorizes the court to include such provisions regarding attorney fees in the order appointing class counsel. Ordinarily these provisions would be limited to tentative directions regarding the potential award of attorney fees to class counsel. In some instances, however, they might affect potential motions for attorney fees by other attorneys. For example, if other competitors for the position of class counsel had done work preparing the case that would likely inure to the benefit of the class in the event of a judgment or settlement in the favor of the class, that could be addressed in the order appointing class counsel even though these attorneys were not selected for that position. Any such award would ultimately have to be sought in a motion under Rule 23(h), but the order appointing class counsel could provide an initial framework for such later consideration of attorney fees.

Another possibility that the court might find helpful is to direct class counsel to report to the court at regular intervals on the efforts undertaken to date in the action. Courts that employ this method have found it an effective way to assess the performance of class counsel. It may also facilitate later determination of a reasonable attorney fee, for the alternative might then be to absorb and evaluate a mountain of records about conduct of the case that would have been more digestible in smaller doses. Because such reports may reveal confidential information, however, it may be appropriate that they be filed under seal.

The rule does not set forth any hearing or finding requirements regarding appointment of class counsel. Because appointment of class counsel is ordinarily a feature of class certification, and therefore may be subject to an immediate appeal under Rule 23(f), district courts should ensure an adequate record of the basis for their decisions regarding selection of class counsel.

TAB VI

PROPOSED RULE 23(i)

RULE 23(i)

ATTORNEY FEE AWARDS

(i) **Award of Attorney Fees.** In an action certified as a class action, the court may award reasonable attorney fees and related nontaxable costs authorized by law, or by agreement of the parties, as follows:

(1) **Motion for Award of Attorney Fees.** Claims for an award of attorney fees and related nontaxable costs must be made by motion [in accordance with Rule 54(d)(2)(B)] {as directed by the court}.[27] [The motion must disclose all agreements or understandings made {by class counsel}[28] with respect to or affecting the attorney fees or nontaxable costs for which the claim is made]. Notice of a motion must be served on all parties and[, regarding motions by class counsel,][29] given to all members of the class in such reasonable manner as the court directs.

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[27] Two options are presented here due to concern about whether the time limitations of Rule 54(d)(2)(B) -- the motion must be filed within 14 days of "entry of judgment" -- would cause problems. Determining exactly what that time limit means in some instances might prove difficult, but that rule clearly authorizes the court to set a different time limit and the possibility that absent court action there would be no schedule for filing the motion could cause more difficulties. For further discussion, see the draft Committee Note below.

[28] It is not clear whether there would be a benefit to having counsel other than class counsel disclose such agreements. For objectors, for example, it would not seem ordinarily to be pertinent. Perhaps it would be useful for the court if other counsel who applied for the position as class counsel but were not appointed make such a disclosure, but usually the requirement of Rule 23(b)(2)(B)(v) (if that form -- Option 2 -- is adopted) would cover such agreements, so a separate disclosure would not be required here.

[29] This additional requirement of notice to the class creates a potential for additional cost and delay. It may be sensible to limit that requirement to situations involving class counsel. To require that this be done with regard to objectors, for instance, could generate considerable expense and delay.

(2) **Objections to Motion.** A class member or party from whom payment is sought[30] may object to the motion for a fee award. [The court may allow an objector discovery relevant to [the objector's] {any} objections.][31]

(3) **Hearing and Findings on Fee Motion.** The court must hold a hearing and find the facts and state its conclusions of law on the motion under Rule 52(a).[32]

[(4) **Determination of fee amount.** In determining the amount of the award, the court may consider, among other factors, the following:

(A) the results actually achieved for class members;

(B) the time reasonably devoted to the action, given its nature, complexity, and duration;

(C) the presence, extent, and weight of objections to the fee motion;

(D) the terms proposed by counsel in seeking appointment;

(E) any directions or orders regarding fees or costs made by the court in appointing class counsel;

(F) the contingency of the representation, or other financial risks borne by class counsel;

(G) the professional quality of the representation;

(H) any agreements among the parties with respect to the fee application;

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[30] Previous drafts permitted objections by any party. There seems little reason for permitting such objections from parties not called upon to pay such awards, and may be some mischief in allowing that. Suppose, for example, that a nonsettling defendant wanted to challenge a fee award that would be paid by a settling defendant because the nonsettling defendant was concerned about the creation of a resulting war chest for the class. That might motivate objections, but does not seem a ground for allowing them.

[31] The question whether to say anything about discovery in the rule remains open. No rule provisions regarding discovery by objectors remain in Rule 23(e), and one could argue that they are at least as important there as in this rule. The former bracketed provision assuring discovery of any factor in Rule 23(h)(4) has been removed, and the question whether discovery should be limited to this objector's objections is also presented by bracketed material.

[32] The question whether to require a hearing might be handled various other ways. The findings requirement is built into Rule 54(d)(2), and it would be odd to have a lesser requirement in this context. The hearing could be made contingent on filing of an "objection," and could be limited to the matters raised by that objection. Because there might be some uncertainty about what exactly qualifies as an objection, it seemed simpler to call for a "hearing" in every instance. The exact nature and extent of such a hearing should afford some latitude to the court.

(I) any agreements or understandings by class counsel with respect to or affecting the attorney fees or nontaxable costs for which claim is made;

(J) any fees to be charged by class counsel or others for representing individual claimants or objectors in this or related litigation;

(K) fee awards in similar cases; and

(L) the reasonableness of any nontaxable costs for which class counsel seeks reimbursement.][33]

(5) Reference to special master or magistrate judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Committee Note

[Reporter's note: The following Note material attempts in many instances, but not all, to take account of alternative language in the current proposed rule. Depending on resolution questions about rule language, the Note will be adapted.]

Subdivision (i). Subdivision (i) is new. It responds to the reality that fee awards are a powerful factor in class actions, and that judges have an important role to play in connection with fee awards that has broad implications for the handling of class actions. See RAND Institute for Civil Justice, Class Action Dilemmas, Executive Summary 24 (1999) (stating that "what judges do is the key to determining the benefit-cost ratio" in class actions, and that salutary results followed when judges "took responsibility for determining attorney fees"). Previously, class action attorney fees awards have been handled, along with all other attorney fees awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision provides a framework for fee awards in class actions. It is designed to work in tandem with new subdivision (h) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

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[33] Proposed Rule 23(i)(4) is in brackets because it may be that the Committee will decide that this sort of "laundry list" enumeration of matters relevant to the fee award determination is not helpful to courts or litigants. If it is deleted, it is not clear that alternative rule language, perhaps trying to summarize, would be helpful. The initial sentence of Rule 23(h) authorizes the court to award "reasonable" attorney fees, and it would be difficult to elaborate briefly on that in a way that avoids some sort of laundry list. Note material about the various factors listed could be included to elaborate on what is "reasonable." In comparison to the length of the rule, however, that would likely be a very long Note.

This subdivision does not undertake to create any new grounds for award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law, or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In given situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who sought appointment as class counsel but were not appointed, or attorneys who represented objectors to either a proposed settlement under Rule 23(e) or to the fee motion of class counsel, as provided under paragraph (2) of this subdivision. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards. See, e.g., 28 U.S.C. § 1988. Depending on the circumstances, courts have approached the determination what is reasonable in different ways. See generally A. Hirsch & D. Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation (Fed. Jud. Ctr. 1994).

In particular, there is some variation among courts about whether in "common fund" cases, a category in which class actions often fall, the court should use the lodestar or a percentage method of determining what fee is reasonable. See Goldenberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) (in common fund cases the district court may use either the lodestar or the percentage approach); In re Washington Public Power Supply System Securities Litigation, 19 F.3d 1291 (9th Cir. 1994) (district court has discretion to select either percentage or lodestar approach); Camden I Condominium Ass'n, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991) (percentage approach is supported by "better reasoned" authority). The rule does not attempt to resolve the question whether the lodestar or percentage approach, or some blending of the two, should be viewed as preferable, leaving that evolving determination of the courts. Paragraph (4), however, does set forth a series of factors that should be considered in determining the amount of a fee award in a given case.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion. As noted above, this includes awards not only to class counsel, but to any other attorney who seeks an award for work in connection with the class action.

[Reporter's note: The following assumes the Rule 54(d)(2)(B) version is adopted. If it is not, the Note material will have to be adapted.]

The motion must be filed in accord with the timing requirements of Rule 54(d)(2)(B), which requires that it be made within 14 days of entry of judgment unless otherwise provided by court order. In many cases -- particularly those that are subject to settlement review proceedings under Rule 23(e) -- these timing requirements should not pose a problem. There may be cases, however, in which more time is needed. For example, if fees are sought by an objector to the proposed settlement, or by an objector to a fee motion, there may be insufficient time after the ruling on the

objection for the fee motion to be filed. If counsel have concerns about timing, it would ordinarily be wise to ask the court to set a suitable time for the motion.

Besides service of the motion on all parties, notice to the class is required regarding motions for attorney fees by class counsel. *[Reporter's note: If the rule provision is changed to require notice with regard to motions by other counsel, the Note will have to be modified.]* Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), ordinarily the notice regarding class counsel's fee motion could be combined with notice of the proposed settlement. As with Rule 23(e) notices, the court has latitude in determining the most appropriate method of giving notice to class members.

Paragraph (2). Besides class members, any party from whom payment is sought may object to the fee motion. Other parties -- for example, nonsettling defendants -- may not object because they have no legitimate interest in the amount the court awards. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting. For those purposes, an objection would ordinarily have to be made formally by filing in court, rather than by letter to counsel or the court.

The court may allow an objector discovery relevant to the objections that have been filed with the court. In determining whether to allow such discovery, the court should weigh the need for the information sought through discovery against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery would be the completeness of the material submitted in support of the fee motion. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information. *[Reporter's note: Depending on what the rule ultimately says (if anything) about discovery, this provision will need to be revised.]*

Paragraph (3). Whether or not there are formal objections, the court is to hold a hearing on the fee motion, but that hearing might in some instances be on the submitted papers. In order to permit adequate appellate review, the court must make findings and conclusions under Rule 52(a). **Cite appropriate case authority.** This requirement parallels the findings requirement for other fee motions under Rule 54(d)(2)(C).

Paragraph (4). As noted above, this subdivision does not attempt to alter existing and evolving caselaw about the best standard for measuring a "reasonable" fee award. That evolution should continue. It may turn out, for example, that a combination of methods -- lodestar and percentage -- both should be employed in a blended manner to provide the best possible assessment of a reasonable fee.

The rule does provide guidance for counsel and the court on the factors that ordinarily merit attention. Although this listing is overtly nonexclusive, it should provide counsel with guidance about matters to address in a fee motion. As noted above, the court might consider the completeness of the fee motion if asked to order discovery in the event of an objection. More generally, the court will need an adequate basis for making the findings required by paragraph (3), so counsel should endeavor to provide the necessary information in the motion. Some individual factors deserve mention.

Factor (A), the results actually achieved for class members, reflects a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. See RAND, Class Action Dilemmas, supra, at 34-35. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, this is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. "Coupon" settlements may call for careful scrutiny to verify the actual value to class members of the resulting coupons. If there is no secondary market for coupons, and if there are significant limitations on using them, a substantial discount may be appropriate. It may be that only unusual circumstances would make it appropriate to value the settlement as the sum of the face value of all coupons. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. See Blanchard v. Bergeron, 489 U.S. 87, 95 (1989) (cautioning against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief"). When important injunctive or similar relief is granted in class actions in which a fee-shifting statute applies, that can provide a basis for a substantial fee award even if damages are small or nonexistent. In some statutory fee cases, even when only monetary relief is obtained, there is a justification for a fee award that exceeds -- perhaps substantially -- the aggregate amount of the monetary relief to the class. See generally City of Riverside v. Rivera, 477 U.S. 561 (1986) (award of $245,000 for attorney fees in civil rights individual litigation in which awards totalled $33,000).

Factor (B) invokes the usual lodestar analysis. Even a court that initially uses a percentage approach might well choose to "cross-check" that initial determination with consideration of the time needed for the action. Similarly, a court that begins with a lodestar approach may also emphasize the results obtained in deciding whether the resulting lodestar figure would be a reasonable award. The attorney work to be considered under this factor would include pre-appointment efforts of attorneys appointed as class counsel. This analysis would ordinarily also take account of factor (G), the professional quality of the representation.

Factor (C) calls for consideration of objections submitted pursuant to paragraph (2). Often these objections would shed light on topics addressed by the other factors. Sometimes they would provide additional information to the court, possibly obtained through discovery the court had authorized.

In some instances, successful objections themselves may provide a basis for a fee award to the objectors. Should those objections prompt the court to make a substantial reduction in the fee award below that requested, it may be that the objector is entitled to an award of fees for thus reducing the amount paid to class counsel from a class fund. In the same vein, it may be that objectors during the Rule 23(e) process are eligible for an award if their objections result in modifications of the settlement that produce significant improvements in net return for class members.

Factors (D) and (E) invite recollection of the class counsel appointment process under Rule 23(h). That process should include consideration of proposed terms for attorney fees, which could often be the starting point for analysis of an eventual fee award. In the same way, any guidelines established by the court in its order appointing class counsel should be given significant weight in the eventual fee award.

Factors (H) and (I) call for examination of pertinent agreements about the fees. The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the responsibility to determine a reasonable fee remains the court's duty. The "side agreements" regarding fees described in factor (I) provide at least perspective pertinent to other factors such as the contingency of the representation and financial risks borne by class counsel. These agreements may sometimes indicate that others are reaping a windfall due to a substantial award while class counsel are not significantly compensated for their efforts. If that appears to be true, the court may have authority to adjust these provisions, or the fee award, in an appropriate way.[34]

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[34] There remains the question, discussed on Dec. 4, of how the court should react to such agreements. The above draft Note material is relatively opaque on the subject. Should the court reduce the fee award it would make to class counsel because that lawyer has agreed to share it with another lawyer? Could that alter the contractual obligation of class counsel to that other lawyer?

Factor (J) recognizes that the court needs to concern itself with the reality that it sometimes does not act in a vacuum regarding fees because actual payment of fees may be the subject of agreements between counsel and individual class members. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments were necessary as a result. In other circumstances, the court might determine that fees called for by contracts between class members and other lawyers would either deplete the funds remaining to pay class counsel, or deplete the net proceeds for class members, in ways that call for adjustment.[35]

(If that lawyer was to receive a fixed amount, say 200% of what the lawyer put up to underwrite the case, could the court's order relieve class counsel from the "interest" charge?) If the agreement is that defendant will pay class counsel's fee, and class counsel has agreed to split it 50/50 with another lawyer who did no work, can the court take some of the other lawyer's share and direct that it be paid to the class instead?

If there are no answers forthcoming to these questions, one might argue for removing this criterion from the list. If that were done, one might consider removing it from consideration in the attorneys' fee motion context altogether, and therefore also from the disclosure requirements of paragraph (1). But those removals might not justify removing the disclosure provision from the attorney appointment rule, if the court could at least do something about this kind of thing from the outset. And, in any event, advising the court of these provisions may prove of value even if the court has limited ways of responding.

[35] Here again, there remain difficult questions that have been discussed but not perhaps entirely resolved in the past. The draft Note material therefore tiptoes around these problems. Some further exploration may be in order, as explored in connection with previous meetings:

There remains the question how the court is to approach the fee provisions of contracts between class members and individually retained counsel (sometimes called IRPAs -- individually retained plaintiff attorneys). At least in mass tort class actions, this can be a very contentious question.

One aspect is the amount that class counsel will receive pursuant to those contracts. Should the court reduce the award to class counsel if counsel will collect a lot from her own clients? Can the court direct that class counsel accept the fee awarded by the court and forgive any additional amounts owed by her clients? (Perhaps the latter could be a term for appointment of class counsel.)

Should the court have any authority to alter the arrangements between class members and IRPAs who are not class counsel? Perhaps so if they object, on the theory that they have "submitted" to the authority of the court, but that may deter objections. If not, their clients may have to pay their full share to class counsel (through the reduction of the amount distributed to the class) and also pay the full share they agreed to pay the IRPA. (Could it happen that the contract with an IRPA would require that this be calculated as a percentage of the gross amount, before deduction of the amount paid to class counsel?)

Ed Cooper has suggested some ways of analyzing these questions. First, one could recognize that the benefits class counsel have obtained might be reduced (from the perspective of the class member) by the amount the class member must pay to an IRPA. Thus, if class counsel gets one-third of the pie, and the IRPA gets one-third of the amount received by the class member, the class member ends up with less than 50%. The second is that the class-action court can control the terms

Finally, factor (L) points up the need to scrutinize separately the application for an award covering nontaxable costs. These charges can sometimes be considerable. They may often be suitable for initial prospective regulation through the order appointing class counsel. See Rule 23(h)(2)(C). If so, those directives should be a presumptive starting point in determining what is an appropriate award. In any event, the court ought only authorize payment of nontaxable costs that are reasonable. The court need not insist that counsel exist in the most barebones of manners, but should avoid underwriting a luxury enterprise.

Paragraph (5). This provision gives the court broad authority to obtain assistance in determining the appropriate amount for an award, but not for resolving the basic question whether an award should be made to certain moving parties. Thus, if there is a motion for an award to counsel other than class counsel, or if there is a question about whether the class should be considered the prevailing party, that is not to be referred to a special master or magistrate judge. But if the court needs assistance in compiling or analyzing detailed data to determine a reasonable award using the criteria identified in paragraph (4) or other pertinent criteria, this option is available. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process would entail.

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on which individual awards are made under the class judgment; perhaps an IRPA can insist on applying the individual contract only if the class member opts out. These approaches may present some problems of their own. For one thing, the court needs a lot of information to adjust its determination under factor (A) in light of amounts due to IRPAs. For another, to treat payment to IRPAs as dependent on opting out may unduly increase the amount of opting out, and also suggests that all IRPAs have to apply for fee awards or get nothing.

These are likely to be difficult and contentious issues. All the provision seems to say is that the court should be made aware of the information needed to address these issues. But if the court is not supposed to do these things, what is it to do with this knowledge?

VII-A

TAB VII
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REPORTER'S MEMORANDA

TAB VII
A
RULES ENABLING ACT QUESTIONS

MEMORANDUM

ENABLING ACT AUTHORITY FOR ADDRESSING OVERLAPPING CLASS ACTIONS

Introduction

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

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

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

One response to these concerns is reflected in various bills framing federal legislation to deal with class actions in state courts. Legislative approaches to these problems are welcome. Great care will be required, however, to avoid the temptation to legislate in terms that sweep too much into federal courts without adequate opportunity for case-specific adjustment of the relationships between federal and state courts. Some problems will be better addressed by state courts than by federal courts. Care also is required to remember that addressing state-court class actions is not alone sufficient. All forms of litigation, in both federal courts and state courts, must be considered.

Rule 23 Drafts

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

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

Enabling Act — General Supreme Court Interpretation

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

The Rule 23 drafts present several issues along these dimensions. The most pressing issues arise from the Rule 23(g) authority to control the litigating behavior of class members outside the federal class-action court. One simple illustration can be used to frame the questions. Rule 23(g) would authorize a federal court to restrain members of a proposed or certified class from pursuing litigation in another court on a claim involved in the class proceeding. It must be asked whether this

authority is a rule of procedure; whether, although a rule of procedure, it abridges or modifies a "substantive right"; and whether it effects an impermissible expansion of federal subject-matter jurisdiction.

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

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

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

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carried with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

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

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

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

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

Enabling Act — Rule 23

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

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

Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999), provides similar references to the Enabling Act. The limit that bars abridgment of substantive rights by Rule was said to "underscore[] the need

for caution" in interpreting Rule 23. The Court noted the argument that the settlement, by compromising full individual recoveries, abrogated state law rights. The argument was seen to present "difficult choice-of-law and substantive state-law questions" that need not be resolved, apart from noting the tension between the settlement "and the rights of individual tort victims at law." This observation was followed immediately by suggesting that it is best to keep "limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption, "[e]ven if we assume that some such tension is acceptable under the Rules Enabling Act." 119 S.Ct. at 2314. The Court went on to notice further implications for the Seventh Amendment right to jury trial and the due process right of each individual to have his own day in court. 119 S.Ct. 2314-2315. The jury trial concern focused on the nature of a mandatory settlement class, which by avoiding any trial necessarily avoids jury trial. The day-in-court concern, if pushed very far, would undermine any mandatory class, a result the Court clearly did not intend. These concerns nonetheless stand as a warning that enthusiasm for the advantages of class litigation must be tempered by recognition of the sacrifices it may entail. Finally, toward the close of the opinion the Court relied on the Enabling Act in a manner similar to the Amchem opinion — courts are bound to honor Rule 23 as adopted, and should seek to change it through the orderly processes of the Enabling Act rather than by de facto amendment by interpretation. 119 S.Ct. at 2322.

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

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

Finally, an Enabling Act challenge to the very institution of class-action settlement has been summarily rejected in recent federal litigation. *In re: The Prudential Ins. Co. of America Sales Practices Litigation*, 962 F.Supp. 450, 561-562 (D.N.J.1997), affirmed 148 F.3d 283, 324 (3d Cir.1998). The argument that the settlement necessarily abridged or modified state-law rights was transformed by the district court into the response that Rule 23(e) approval of a settlement "merely

recognizes the parties' voluntary compromise of their rights." The court of appeals affirmed "for the reasons outlined by the district court."

Application to Draft Rules

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

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

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

Similar considerations support the other Rule 23 proposals. If another court can certify a class that has been denied certification by a federal court, the authority to make a wise certification decision is undermined. The prospect that another court may certify the class may impel a federal court to grant a certification that otherwise would be withheld, believing that it is better to maintain control of a dubious class than to stand by helpless while another court pursues the same class to judgment. Even more obviously, the federal court's effective power to reject a proposed class-action settlement as inadequate or unfair is held hostage to the prospect that the parties can simply shop the country for a court willing to bless the same settlement.

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

VII-B

TAB VII
B
SECTION 2283 QUESTIONS

PRELIMINARY NOTES: § 2283 - RULE 23

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

I. The Statutes

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

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

II Rule 23 Injunctions in General

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

These views rest on the present form of Rule 23. They do not address the question whether Rule 23 can be cast in a form that provides greater support for invoking both the general § 1651

authority to issue injunctions necessary or appropriate in aid of the jurisdiction that supports a class action and also the specific § 2283 exception that permits an injunction necessary in aid of the federal court's jurisdiction.

III In Aid of a Revised Rule 23 Jurisdiction

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

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

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

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

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

The in-rem analogy is most persuasive if a federal class is viewed as something akin to a thing in the jurisdiction of the federal court. This "entity" view of a federal class is developed in the memorandum on Enabling Act authority. To the extent that Rule 23 revisions clarify the practical concept of a class that has evolved with the startling transformation of class-action practice since 1966, the very act of making rules amendments provides added support for the in-rem analogy.

Very slight added support may be found in Battle v. Liberty National Life Ins. Co., 11th Cir.1989, 877 F.2d 877, 882. The circumstances do not permit much reliance on the court's use of

in-rem concepts. The district court entered a class-action judgment in 1978, involving a class of about 1,000,000 burial insurance policyholders, and retained jurisdiction to implement the decree. In 1985 it enjoined state-court class actions that sought to win added relief on the theory that the federal judgment was not valid to bind class members. Affirming the injunction, the court of appeals relied in part on the rule that state proceedings may be enjoined to protect or effectuate a federal judgment. But it also relied on the rule that an injunction may be issued when necessary in aid of federal jurisdiction. Distinguishing the rule that parallel in personam proceedings are not to be enjoined, it said that "it makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered." This statement was immediately followed by quoting the district court's observations about the need to protect the federal settlement and judgment, but it does offer a sound description of the in-rem analogy.

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

Rather greater support can be found in a case that moves beyond the in-rem analogy to announce a general principle that a federal court can enjoin state proceedings that threaten the federal court's control of its own orderly procedure. Many of the things said in Winkler v. Eli Lilly & Co., 7th Cir.1996, 101 F.3d 1196, 1201-1203, are clear and helpful. The district court had managed consolidated pretrial proceedings involving claims arising from the use of Prozac. The lead counsel appointed in the consolidated proceedings settled a Kentucky state-court action where he also was lead counsel. The settlement was reached shortly before submission to the jury, and the parties initially denied having reached any settlement. The state judge became suspicious and launched an inquiry that was barred by prohibition from the intermediate court of appeals. Meanwhile lead counsel withdrew from the federal proceedings. After most of the consolidated actions were remanded, plaintiffs who had been involved in the federal consolidation sought discovery in various state courts of the settlement arrangements in the Kentucky action. The federal court enjoined the discovery. In the end the injunction was reversed because the federal court had not inquired into the nature of the settlement agreement — without learning at least in camera about the nature of the settlement, there was no basis for the injunction. But the court said in clear terms — characterized as a holding — that § 2283 did not prohibit the injunction. "[T]he question is whether a federal court has the authority to issue an injunction to protect the integrity of a discovery order." In rem jurisdiction is not necessary to support an injunction as one necessary in aid of federal jurisdiction. The in-aid-of-jurisdiction principle has been "extended * * * to consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." More generally, the court approved a suggestion by Professor Redish that a federal court should have power to enjoin a concurrent state proceeding that might render nugatory the exercise of federal jurisdiction. Indeed, the policies of federalism and comity embodied in

§ 2283 "include a strong and long-established policy against forum-shopping." Section 1407, by authorizing pretrial consolidation, creates a policy of control that is intended to prevent predatory discovery and "to conserve judicial resources by avoiding duplicative rulings." There is more in this vein; the summary statement is this:

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

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

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

IV Expressly Authorized by Act of Congress

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

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

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

The more difficult question addressed by this brief statement is whether a Civil Rule can ever qualify as expressly authorized by Act of Congress. This is the point at which the question of Enabling Act authority returns. In some ways the question may seem almost circular. The Enabling

Act is an Act of Congress. It provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." A Civil Rule provision that legitimately implements Enabling Act authority may seem to fit. It is the Enabling Act that expressly authorizes the rule that expressly authorizes stays and like orders addressed to members of a federal class. The supersession provision simply underscores the status of Enabling Act rules as the equivalent of Acts of Congress. In some sense, a rule becomes s if part of the Enabling Act itself.

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

VIII-A

TAB VIII
REPORTER'S NOTES

TAB VIII
A
REPORTER'S NOTES
DECEMBER 4, 2000

Reporter's Notes
RULE 23 SUBCOMMITTEE: DECEMBER 4, 2000

[These Notes are an unofficial rendition of notes made at the December 4, 2000 meeting of the Rule 23 Subcommittee at the Administrative Office of the United States Courts.]

The meeting was attended by all subcommittee members: Judge Lee H. Rosenthal, Chair; Sheila L. Birnbaum, Esq.; Judge Richard H. Kyle; Assistant Attorney General David W. Ogden; and Andrew M. Scherffius, Esq. Judge David F. Levi and Judge Anthony J. Scirica also attended. Christine Kohl, from the Department of Justice, attended with David Ogden. Reporters Edward H. Cooper and Richard L. Marcus were present. Peter G. McCabe and John K. Rabiej represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center.

The meeting began with a reminder of the long period of Rule 23 groundwork that has occupied the Advisory Committee for several years. Attention has turned away from "substantive" changes in Rule 23 to improvements in the "procedures" for administering class actions. The leading contenders for reform promise to improve the outcome of class litigation, and to improve confidence in the outcomes. They also should offer strong prospects for surviving the Enabling Act process; if possible, we should hope to advance proposals that will survive in higher proportion than the proposals that were published for comment in 1996. The need to consider probable survival of the proposals does not mean that the Subcommittee should limit itself to proposals that are certain to survive. One indication of success will be survival in a rigorous subcommittee process of consideration, reconsideration, and painstaking drafting.

The focus today should be on the text of as many rules drafts as can be considered. The Note provisions can be deferred until we have well-advanced drafts. And if time allows, it will be useful to consider whether the present drafts include all of the most promising candidates for revision.

One source of information has emerged from the Reporter's circulation of the August drafts to a small subset of the rather large group of people who have demonstrated sustained interest in Rule 23 revisions. These "phans" were asked to comment, and to share the drafts with others who might want to comment. Several responses have come in, and have been summarized in detailed "annotated" drafts that bring the comments together with each of the subjects of comment.

It was suggested that a preliminary question is whether we want to facilitate or hamper reasonable class-action settlements. Too much rulemaking will impede settlements, at a time when courts are encouraging settlements. Another preliminary question is what is practical: it is easy to allow theoretical "niceness" to interfere with useful practices developed in the crucible of real-world needs.

The need for practical concern is important. This is not just an intellectual exercise. Any change that tightens standards will be perceived as making things harder, more complicated, more expensive. It is important to look to the reasons for change, practical as well as theoretical. Revisions that increase the level of guidance to courts and litigants actually may ease things, making them less difficult, less complicated, and less expensive. As to settlements, the goal is not to make settlement harder or easier, but to increase scrutiny.

In earlier years, defendants kept telling the committee that certification is the critical event: improvident certification forces settlement. At the end of the first phase, Rule 23(f) was the only change that could be adopted. Now concern is focused on the fear of unfair settlements, and the belief that some settlements involve so little adversariness as to amount to "collusion." The FJC study gave a good snap-shot of several aspects of class-action practice as of 1996. That work has been supplemented by studies of mass-tort cases, and studies of settlement classes by Professor Tidmarsh and of limited fund and bankruptcy cases by Professor Gibson. The RAND study gives settlement a lot of play, but by its nature as an in-depth study of ten specific class actions cannot provide an empirical foundation for strong generalizations. The academic community seems to believe that there are many unfair settlements. There are gleanings from the many conferences and hearings addressed to Rule 23 and mass torts. Thus the challenge: can we do anything to improve outcomes for class members? It would be good to be on stronger empirical ground, but it seems impossible to devise any study that can tell us whether any significant number of class-action settlements are, in some relevant sense, "unfair." We have to be very careful, and to be prepared for the "brutal" debates that will greet any reform proposal. But proposals that change the process of Rule 23 management may be supportable with less rigorous empirical information than proposals that would affect the substantive grounds for class certification.

The comments from the class-action "phans" react to the August drafts in terms that carry forward to the current drafts. It is suggested that the drafts seem to work from the premise that settlements are made in bad faith. The response offered in the letters is that most settlements are made in good faith, and that is probably accurate. It is important to say at the beginning of the process that we recognize the good faith of most settlements, and to continue to say that.

Rule 23(e): Settlement Review

The draft Rule 23(e) prepared for this meeting has been revised to reflect the discussion at the October Advisory Committee meeting. It expressly states a standard to approve a settlement — the settlement must be "reasonable, fair, and adequate." (This phrase inverts the common reference to "fair, reasonable, and adequate. The inversion is deliberate, from a belief that reasonableness is the central concern. The more common phrase may well come to be substituted in future drafts.) The long "laundry list" of review factors has been deleted; it survives for the moment in Note provisions that may be reduced much further. The provisions for discovery by objectors have been pared back; the provision for fee awards to objectors were pared back in earlier discussions. The provision for opting out of a proposed settlement has been limited to (b)(3) classes.

In addressing the Rule 23(e) draft, as well as the others, it is important to bear in mind that this draft, in common with all Rule 23 provisions, addresses the full universe of class actions. Class actions vary enormously, however, along many dimensions. Mass torts present distinctive problems, consumer class actions that accumulate large numbers of individually small claims present different problems, employment discrimination class actions that begin with the genuine grievance of one or a small number of "real" individual clients are still different, securities class actions may be unique unto themselves even apart from the Private Securities Reform Act provisions, and so on. Discussion of settlement-review provisions tends to treat all of these quite different situations as common. That may be unavoidable, but it bears importantly on the compromises made to achieve a single rule.

Draft Rule (e)(2) as revised would allow a member of a (b)(3) class to request exclusion after the terms of settlement are announced. This form is narrower and simpler than the prior draft. It is narrower because it applies only to (b)(3) classes, not to the mandatory (b)(1) or (b)(2) classes. It is simpler because it no longer defeats the right to request exclusion if there was an earlier opportunity to request exclusion from a settlement less favorable to the class. At the same time, it has been made more complicated by introducing a distinction that allows a class member to request exclusion from the settlement without being excluded from the class. The purpose of requesting exclusion from the settlement only is to preserve the opportunity to benefit from class-action enforcement if the court rejects the proposed settlement. If the settlement is rejected, the class member can continue to be a class member, participating in a procedure that may be the only effective means for vindicating the rights asserted. But if the settlement is approved, the request to be excluded from the settlement ripens into exclusion from the class.

Discussion of the opt-out feature began with a rather different phenomenon: settlements of mass tort actions often provide multiple opportunities to opt out. One opportunity is for the defendant to opt out of the settlement if more than a specified number of class members opt out. Another is for class members who are not yet injured to opt out after injury becomes manifest. These provisions accomplish good things. It is easier for the defendant to agree to terms attractive to the class if the result is to achieve peace with respect to most class members, knowing that it can back out of the agreement if it remains exposed to too many remaining claims. It is only fair to allow uninjured people to exercise the right of exclusion after injury becomes apparent; when there is no perceived injury, it is difficult to think seriously about exclusion from the class. These agreements commonly are revealed to the court, but not always to class members. It is difficult to walk away from a settlement, however, and a defendant who could opt out may well choose to abide by the settlement even if the threshold of plaintiff opt-outs is surpassed. The 1996 FJC class-action study showed that a range of 33% to 40% of classes are first certified for settlement. It does not show how many settlements fail because there is an opt-out right built into the settlement. But it was urged that experience shows that once negotiated, opt-outs do not defeat settlements even when there is a reserved right to withdraw in light of the number of opt-outs. The breast-implant settlement failed in part because of the large number of opt-outs, although another problem was presented by the very large number of claims presented without opting out.

In contrast to these special situations, why should there be a right to opt out of the settlement if there was an earlier right to opt out of the class? A class member who does not opt out is bound by a judgment; why not also by a settlement that wins court approval? The right to request exclusion will have a chilling effect on many settlements because the defendant does not know how much peace the settlement will bring. It is enough to allow dissatisfied class members to object to the fairness of the settlement.

On the other hand, it was observed that many settlements are reached now in circumstances in which class members have an opportunity to request exclusion because there has not been an earlier certification and opportunity to opt out. The fear that the opportunity to request exclusion will defeat settlements may be overstated. And the right to opt out reduces concern with collusive or bad settlements. If there is a right to request exclusion, we may be much less worried about the need to enhance the role of objectors in the settlement-review process.

The core question may be whether we trust settlements as much as we trust judgments. If not, an opportunity to opt out provides a test of the settlement that may prove invaluable. One way to accomplish this goal may be not to provide an absolute right to request exclusion, but to provide a right that is subject to defeat by the court for good reason.

There is no added expense in providing a second right to opt out, since notice of the right can be combined with the required notice of the proposed settlement. It even may be possible to build on the fact that most class actions that survive pre-certification motions and win certification settle to simplify the initial notice. If certification precedes settlement, the first notice may be relatively simple, providing a second and more detailed notice when it is known whether the action is likely to settle before trial.

Recognizing that the bar will be able to adjust to almost any rule, it was urged that settlement may occur after a case has been fully prepared. Settlements occur after trial has started, or even on appeal. Even in a mass tort case, settlement was reached just before closing arguments to the jury. Settlement in those advanced stages may be easier to achieve because the parties know how many opt-outs there are. And the settlement will be informed by all of the work done to prepare for trial, as well — in the cases that actually have entered trial — by knowledge of the actual trial experience.

If there is not an absolute right to opt out of a settlement, it must be decided whether the presumption should be for or against the right. An opt-out opportunity may increase uncertainty to a point that makes trial seem a more attractive alternative, particularly if settlement is explored after most trial preparation work has been done. It is important to consider the variable nature of class actions. Opt-outs seem most likely in mass torts and a few other settings that involve a high probability of claims that will sustain individual litigation, or settlement terms that may encourage opting out in hopes of mounting a second class action.

It was urged that the presumption should favor the opt-out right. The settlement is likely to present the first occasion for serious consideration of the class action by many class members. Opting out is easier than objecting. If so many opt out as to defeat the settlement, that may be a good thing. Even if the action is one in which rival lawyers will advertise to encourage opt outs, that is not necessarily a bad thing. In mass torts, lawyers who have large inventories of clients will have enormous leverage in the settlement negotiations, by threatening to opt out all of their clients. But that too may not be so bad. An individual client in individual litigation is greatly protected because the lawyer cannot settle without the client's consent; depriving individual class members of the right to consent, substituting only court approval, is perhaps not protection enough.

The effect of revising Federal Rule 23 on state courts was touched upon briefly. The perceived current "exodus" to state courts is not likely to be much affected, particularly if state courts continue the process of cleaning up the occasional pockets of loose practice and if state rules adopt Rule 23 revisions.

It was agreed that the next draft should provide a right to opt out of a (b)(3) class settlement, subject to defeat on finding that there are good reasons to defeat a right to opt out. The Note could offer illustrations based on the progress of the action toward trial. If the case has proceeded as an adjudication class through extensive pretrial preparation, with highly developed knowledge of the

parties and judicial attention, settlement close to trial, or after trial has begun, is apt to occur in circumstances that provide the strongest assurances that the settlement is well-informed and that the court can effectively review the settlement terms.

It was noted that this approach will help to protect against unfairness, but does not respond directly to the more abstract concern with preserving the autonomy of individual class members. That the settlement may be a wise compromise does not defeat its character as a compromise — some part of the asserted right is surrendered in return for certainty and to avoid the costs of further proceedings. Focus on this concern would suggest that the better-developed pretrial record should be viewed as a resource that will support individual litigation by the opted-out class members, not as a reason to deny exclusion. Opting out even on the eve of trial, or during trial, remains feasible because it will be necessary to give notice of the proposed settlement and to allow time for objections before it is approved. On the other hand, a settlement is likely to be approved only when the judge is confident that most class members would find it attractive. The judge may be convinced that the settlement is so generous that rejection is irrational, or that a seemingly small settlement is generous because the developed record shows that the claim is nearly frivolous.

It also was suggested that providing a presumptive opportunity to opt out of (b)(3) class settlement may encourage early settlements. The FJC study shows that commonly there is a lag between the time of class certification and the time of notice. This period can be used to promote settlement. Plaintiffs hope to settle so the defendant will agree to pay notice costs. Defendants may be encouraged to settle so as to avoid the cost of a second notice.

The opt-out provision leaves a question when the terms of the settlement are improved after some class members have opted out. Should there be yet another notice to advise them to reconsider? Should they have a right to reconsider? What happens if the settlement fails, going back to the question of opting out of the settlement but not the class? Experience does not tell us much about actions in which a class settlement fails and the proceeding continues on to a second settlement or trial. What usually happens is that the court expresses "problems" with the settlement before finally deciding on rejection, and the parties then revise the settlement to meet approval. Most often this process occurs not at the time of preliminary approval for purposes of notice to the class, but at the time of considering final approval — that is when the judge considers the settlement more carefully. Final rejection is more likely to be because it was a "bad class" rather than because it was a bad settlement. But if there is final rejection of a proposed settlement, the most likely aftermath may be that the settlement is shopped for approval by another court, as has happened in some recent prominent cases. As a practical matter, those who want to come back into the class after a settlement is revised — or after a settlement is first announced, following an earlier exclusion from the class — are welcomed. The defendant wants to embrace as many class members as possible in the judgment.

The conclusion was that the wrinkle that would allow a class member to request exclusion from a proposed settlement but not from the class should be deleted. The Note may refer to the opportunity to request re-inclusion at a later stage.

A particular drafting question was noted: the draft refers to a right to request exclusion, drawing from present Rule 23(c)(2)(A), but lacks the "will exclude" assurance of that rule. Perhaps other terms should be found to make it clear that the "request" effects exclusion without more.

The draft (e)(1)(A) requirement of notice in a "reasonable manner" was noted, and accepted. Plain English requirements can be considered in connection with the more general notice questions that remain on the Subcommittee agenda.

The issues of objectors' rights presented by draft (e)(3) was the next subject of discussion. The decision to preserve a presumptive right to opt out of a (b)(3) settlement does not protect members of (b)(1) or (b)(2) classes, but establishes such a broad alternative basis for protection against improvident settlements that the effort to support objectors may not be well-advised. The difficulty with supporting objectors is that practitioners representing all perspectives other than the objector perspective join in decrying the frequent practice of making objections for self-serving reasons. The responses to the "phans" letter included many vehement protests about the frequency of bad-faith objections.

It was stated that a group of professional objectors have emerged. They trade on the opportunity to force delay on the settlement process. Too often the parties do not have the courage to endure the delay. There is very little cost to the objector. Astonishingly large fees have been won for securing cosmetic improvements in proposed settlements. Many of the objectors are lawyers "who never had a case." Objection practice "is the soft underbelly of Rule 23." There is a "smell" problem, and outright extortion. But we cannot act to regulate it because regulation will seem to be closing down objections. And there are genuinely public-spirited objectors whose aim is to protect absent class members against ill-advised settlements. These objectors "do it on their own," occasionally winning relatively modest fees. The problem is that it is difficult to imagine rule terms that effectively distinguish between "good" and "bad" objectors.

Simply revealing what objectors are asking in fees does not provide protection. Courts are asked to review and approve objector fees. Commonly the fees are paid by defendants, not out of class recovery; courts are not much concerned when there is no apparent diminution on class recovery. (Of course defendants will recognize the risk that objectors will appear and demand payment, and will create mental reserves that affect the terms of the settlement, but that cannot be regulated.) Most protests from class members address fee awards to class counsel, not awards to protestors.

In practice, good lawyers make available to objectors all the fruits of discovery taken in the action that is being settled. But objectors want to depose the lawyers about the settlement process; courts deny this discovery unless there is a prima facie showing of collusion. The draft that would allow "reasonably necessary" discovery to support objections on showing "reason to doubt the reasonableness, fairness, or adequacy of a proposed settlement" allows too much discovery.

Many of these objector problems could be addressed in the Manual for Complex Litigation.

The value of good objectors remains a concern. The draft rule seeks to provide economic incentives to support good objectors by providing for attorney fees for successful objections. A good

objector is a valuable ally of the court. The present rule does not speak to objection practice. Why not allow a bounty to an objector who has materially assisted the court? And impose a corresponding penalty on an objector who has only delayed proceedings? Is it that this is fee shifting, and for purposes beyond the Enabling Act? Or is misuse of this procedure as much subject to sanctions as misuse of discovery? But who is to pay the fees for an objection that is "successful" in winning rejection of a proposed settlement? Can a charge be made on the proponents of the settlement — class counsel? Class members who have been saved from an undesirable settlement — even if the final result is that the class proceeding is abandoned, or fails on the merits?

It was observed that in some circumstances successful objectors have won fees from the global award for a plaintiffs' legal committee fund. Or agreements may be made among plaintiffs and defendants may pay fees to buy off objectors. "There is no one watching" when the objector comes in.

One possible control would be to provide for discovery directed to the objector. Settlement proponents seek such discovery now, but seldom get much. A rule provision might encourage it.

Another approach would be to require disclosure and court approval of objector fees, as often happens now.

Discovery to support objections would be provided by the (e)(3)(A) draft. This draft is narrower than earlier drafts. The earlier approach would have provided for discovery "reasonably calculated to aid the court in appraising the apparent merits of the class claims, issues, or defenses." This is narrowed in the current draft by requiring a showing of "reason to doubt the reasonableness, fairness, or adequacy of a proposed settlement" and focusing the discovery on what is "reasonably necessary to support the objections."

There is a substantial body of case law on discovery of settlement negotiations. It uniformly requires a prima facie showing of collusion before discovery will be allowed.

Settling parties routinely allow objectors access to the discovery materials in the class action. But when there has been extensive discovery, objectors do not have time to study these materials — the time for framing and defending objections is too short, and it would be a mistake to increase the objection period for this purpose. Matters stand different if the case is settled without extensive discovery — and one motive to settle, as the "phans" letters remind us, is to avoid extensive discovery. Should discovery on the merits then be directed to the defendants? To the plaintiffs, to measure the strength of the class claims? This will be expensive, and thereby another tool for extortion. Courts are not allowing this to happen. We should not provide for it by rule.

It was responded that "the reality for a pure-heart objector is that it is a difficult up-hill fight." The judge knows the present parties. Time is limited. It would be good to have some empirical measure of the number of good objectors in the real world.

The fee question returned in this dimension. It has been frequently suggested that any provision allowing fees for successful objectors should be matched by a provision allowing an award of fees against unsuccessful objectors. The difficulty of accomplishing that has been offered as one

reason to go slow about emphasizing the possibility of awards to objectors. But even if provision were made for an award of fees against objectors, fees incurred to respond to objections are only part of the costs. Delay is the central problem, and a fee award does not redress delay.

This discussion led to the proposal that draft (e)(3)(A) should be limited to the first sentence, stating that a class member may object to a proposed settlement. The discovery and fee-shifting provisions would be dropped. What is now (e)(3)(B) would be integrated into a single provision, and simplified if possible to reduce the complication of the "terms more favorable" part.

This approach was supported on the ground that the right to opt out preserved in (e)(2) reduces the need to further bolster the position of objectors. The opt-out will not protect (b)(1) or (b)(2) classes, but the nature of those classes again reduces our concern with any need to further support objectors. As a practical matter, "when there's no money, there are no objectors."

It was recognized that observers of this early process will be disappointed that, after consideration, proposals to bolster objectors are being scaled back. Perhaps the Note could point to the possibility of limited discovery.

The (e)(3)(B) language limiting the right of an objector to "settle, dismiss, or compromise the objections" was questioned. The "compromise" term is an antique word, drawn from present Rule 23(e). The style drafts of Bryan Garner, as revised by Judge Pointer, continue to use the term. This usage may reflect the lack of any technical definition of "settlement," and the bewildering variety of means that have been used over time to effect binding disposition without final adjudication. "Dismissal," however, may be obscure in relation to the fate of most "objections." It is common for class members to write letters of protest. We do not want to burden this right by requiring any form of subsequent act. To require the class member to do something further about the protest or to win court approval to rest on the protest without further activity would be foolish. There is little reason even to require formal withdrawal, or to treat the initial protest as somehow abandoned when there is no subsequent action. The actual object of concern is the objector who purports to advance objections on behalf of the class, and who ought to be treated as assuming responsibilities to the class comparable to those assumed by a class representative. Objectors who undertake active pursuit of objections may be well motivated. The danger addressed by requiring court approval, however, is the danger that the protest will be made for the purpose of borrowing leverage from the need to conclude the settlement.

A different problem may appear in the prospect that other class members may rely on an objector, refraining from making their own objections. Perhaps it is unwise to frame a rule around this concern — other class members should know that it is risky to rely on any particular objector to stay the course.

Further discussion divided the question into separate categories. To the extent that an objector seeks and wins changes in the settlement terms for the class, court approval of the actual settlement terms is essential. A fee award for the objector's role may be fully as appropriate as a fee award to anyone else who has represented the class in winning the settlement. To the extent that the objector seeks personal terms that are outside the class judgment and more favorable to the objector than the terms provided for the objector as a class member, on the other hand, there is a problem.

The objector who has won a change in the class judgment still may deserve special recognition, just as settlement terms often provide special recognition to class representatives for undertaking representation responsibilities. But if the objector is simply seeking a private reward, without winning any improvement in class terms, there is a fear of extortion. This is the fear that has been expressed by many observers. It is reflected in the problem presented by Duhaime v. John Hancock Mut. Life Ins. Co., 1st Cir.1999, 183 F.3d 1. Class members in that case sought discovery of the terms of a settlement made with an objector who had appealed, arguing that the objector may have capitalized on the leverage of the appeal to win benefits that properly ought to be distributed to class members. The court found no theory that would support the proposed discovery; the settlement stood without any inquiry.

This discussion suggested that it is important to consider settlement on appeal separately from settlement in the trial court. In both situations, however, the problem remains: how do we discourage unseemly pay-offs to objectors but recognize that there may be solid objections by class members who really do deserve distinctive individual treatment. Judicial scrutiny of the proposed differences may be necessary, as the draft would provide.

But it remains to decide whether the effort is worth the probable pay-off. The number of cases that are obvious pay-offs may be small. Otherwise defendants will support the argument that the objector does in fact deserve different treatment. Perhaps something could be said in the Note. The problem of settlement on appeal is particularly difficult, because many circuits have appeal settlement procedures: how should that be integrated with the desire to involve the district judge who is familiar with the litigation and the settlement?

It was asked again what the court is asked to approve. Objections are made. Some objectors have lawyers. There is a hearing. There can be negotiation among objectors, class lawyers, and the defendant. They agree to adjust the settlement, and to a fee award to the objector. The objection is withdrawn. "This happens all the time." But it is unseemly to give better terms to objectors who have not opted out of the class. Or the objection may be rejected by the trial court, and then settled on appeal. One device is for a lawyer to opt most clients out of the class, leaving one or two in the class to maintain standing to appeal; and then to settle the opt-out claims on favorable terms in return for dismissing the appeal and working out some form of protection for the clients who remained in the class. This is a strategy that really cannot be confined by a court rule. "There is a limit to how many things we can control."

It was observed that a settlement may include a "most-favored-nations" clause the requires the defendant to increase payments under the settlement to match any more favorable terms made available in settlement with anyone else. This strategy could serve to deter objectors, who know that the price of providing better terms is magnified to a point that will stiffen the defendants' resolve.

It was asked whether all of these problems can be addressed by providing court review and approval of fees paid to objectors? So in (e)(3) we would require that findings to approve a settlement require submission to the court of terms for objectors? Or should this be in the Note? How does all of this tie to the problem of "side agreements"?

It was agreed that the first sentence of draft (e)(3)(A) would be preserved, and combined with draft (e)(3)(B) "with changes." The scope of the changes remained uncertain; the next draft will present alternatives for consideration.

Discussion turned back to the opening parts of the Rule 23(e) draft. The draft is expressly limited to a class that has been certified. Present Rule 23(e) is not so limited. It is important to address voluntary dismissal before certification — court approval is required, but notice is optional. At least once upon a time, it was standard lore that the constraints that arise immediately upon filing a class action should be avoided by sending an advance draft of the complaint to the intended defendant with an invitation to negotiate.

It was agreed that the provisions of rule 23(e)(1) would apply not to certified classes, but to an action in which members of a class sue or are sued as representative parties on behalf of all.

The problem of dismissal also was addressed. The problem is not involuntary dismissal, but voluntary dismissal. Voluntary dismissal before certification may prove a trap for class members who have relied on the action to toll the statute of limitations. Voluntary dismissal after certification may be an indistinct means of effecting settlement. The draft will be revised to refer to "voluntary" dismissal. Continued use of "compromise" will be held for continuing discussion.

The draft also provides alternative approaches to "side agreements." One alternative requires disclosure in the notice of settlement of "the terms of all agreements or understandings made in connection with the proposed settlement, dismissal, or compromise." The other alternative, abandoned in the discussion of objectors' discovery, would have provided for discovery in the objection process of "any incidental agreements or understandings." Neither alternative directly provided disclosure to the court.

It was noted that these provisions sound disarmingly simple. Only "sunshine" is required. Pending class-action reform bills include similar provisions. The RAND study recommends disclosure to the court and to the class of fee amounts, who gets fees, payments by lawyers to others, and payments to intervening or objecting lawyers.

But the "all agreements" language may be too broad. Such agreements as who is to pay travel expenses may be too much detail, although Professor Resnik would argue for it. And in any event, the notice of proposed settlement should not be freighted with too much detail. It is important to distinguish between what must be disclosed to the court and what must be included in the notice.

It was observed that usually notice goes to the class before fee agreements are reached. Fees are resolved after the notice, and often the fee hearing comes after the settlement hearing. The most prominent problems seem to arise from the allocation of fees among the lawyers. The initial arrangement is likely to be "up to" a stated amount to a pool for plaintiffs' lawyers. The division comes later. So it is hard to include this in notice to the class; still another round of notice would be an unjustifiable expense. Usually the lead lawyer wants court approval of the division as a matter of self-protection. Approval also is sought for agreements to pay objectors' counsel, for similar reasons. At the same time, courts do not really have the time or ability to undertake meaningful review.

It also was observed, on the other hand, that agreements by plaintiffs' lawyers to pay off one who threatens to object may not come before the court.

Apart from fee agreements, it is quite unclear what practices are to be found. Earlier hearings and discussions have produced many references to "side agreements," but the details are seldom articulated. There is one clear and prominent set of issues, reflected in the Amchem and Ortiz cases. Those litigations sought to reap the manifest advantages of drawing into settlement negotiations lawyers with great experience in asbestos litigation. These lawyers had achieved great experience by attracting large numbers of clients. Dispositions were achieved by settling the claims of the present clients separately from the class claims. Deliberate efforts were made to achieve maximum separation of the resolutions. But complete separation, and the appearance of complete separation, are difficult to achieve. Other possibilities include agreements with respect to the disposition of discovery materials, including document depositories. Although in many states there would be significant problems of professional responsibility, there may be efforts to fence class counsel out of future related litigation. It has been said by experienced practitioners that it is common the tell the court, but not the class, that a defendant has reserved the right to opt out of a proposed settlement if more than a defined number of class members opt out.

One approach would be to add a new independent paragraph in subdivision (e), requiring disclosure to the court of every agreement that is made in connection with settlement. The language would be deliberately broad, exerting pressure for maximum disclosure. One possibility would be to require only a summary identification of the agreements by subject — what will be said to the press, what discovery materials will be sealed or returned to the producing party, how fees will be divided, and so on. Any class member who wants more information could demand production of the complete agreement.

It was observed that good practice now commonly includes all of these agreements into the settlement agreement itself. The complete settlement agreement of course must be filed with the court. Putting information about similar matters covered by "incidental" or "connected" agreements should not be an undue burden. There is a protection against efforts to conceal information in separate agreements that are vaguely described, because the separate agreements are not part of the settlement and are not binding on the class.

Draft 23(e)(1)(B) requires a hearing. There may be some protests about class actions filed on behalf of prisoners, but it does not seem likely that there will be substantial logistical burdens. The hearing requirement will apply only to settlement or voluntary dismissal. Commonly it will not be necessary to have an "evidentiary" hearing with witnesses. Oral argument is not required to constitute a hearing — an opportunity to submit legal arguments in writing is sufficient when there are no fact issues.

The hearing requirement is supplemented by requiring findings that show that the settlement is reasonable, fair, and adequate. It was agreed that this is an awkward expression. Present practice is that parties submit findings that support the conclusion to approval; the finding requirement is not an onerous burden on the judge, once the intellectual work of review has been performed. Further drafting work will be done — alternatives include a simple requirement that approval come "after making findings that the settlement is reasonable," etc.; a still simpler requirement that approval

come "after finding that," etc.; or borrowing from the interlocutory injunction provision of Rule 52(a) — "only after making findings of fact and conclusions of law that constitute the grounds of finding that the settlement is reasonable," etc. Still other formulas may be found.

Finally, discussion turned to the long-enduring proposed subdivision (e)(4). This provision would authorize appointment of a magistrate judge or other person to conduct an independent investigation into a proposed settlement, in much the manner of an investigation by a public-spirited and well-supported objector. The motive is to supply the need for adversary presentation. Courts rely on adversary presentation, and are particularly dependent on the parties in complex factual and legal disputes. The parties who join together in requesting approval of the settlement they have negotiated may not be able to present an objectively adversarial view of the possible shortcomings of the settlement. The attempt is to find an adversary to respond to the court's needs, without directly involving the court as adversary. Alternatives are possible outside court rule: legislation could create an office of ombuds-investigator, some bills pending in Congress would require notice to state attorneys general in hopes of stimulating like inquiry, and still other devices could be developed.

The first decision was that the draft should not undertake to specify the time allowed for responding to the investigator's report.

The broader questions were raised by objecting that is dangerous to encourage delegation to a person who is not an Article III judicial officer and not acting in the explicit role of magistrate judge. And the independent court-appointed investigator seems more inquisitorial than adversarial; the rights and opportunities of the parties to challenge the report are unclear.

These questions were expanded by asking whether a "report" is the proper means of communication from investigator to the court. This device may entail a confusion of roles, seeking to combine an adversary investigation with a mode of presentation that resembles the report of a judicial officer acting as master or magistrate judge. Perhaps it would be better to require the investigator to present evidence in open court at an adversary hearing, to be met by the adversaries who have joined in proposing the settlement. Presumably there would be a need for advance notice, akin to disclosure or discovery. The procedure would resemble objections more closely then.

It was concluded that the draft accomplishes nothing if it simply reflects the power to appoint a special master or magistrate judge to assist the court in its role as neutral evaluator of a proposed settlement. And to the extent that it is intended to go beyond that, to create the court's own objector, it is a bad idea. Proposed paragraph (e)(4) will be abandoned.

Attorney Appointment

Discussion of the draft attorney-appointment rule began with the suggestion that the provision in subdivision (a) barring settlement negotiations before appointment will not work. There is always "a lot of talk between filing and certification." The terms open for discussion are much different during this phase; the decision whether to certify has a big impact on settlement demands. It is proper to consider the time when negotiations began in determining whether the settlement should be approved, but that is as far as this concern should go. Courts are told in the approval

process when settlement talks started; how often the parties met; what was done in some detail. The parties seek to provide, and to inform the court about, the "structural assurances of fairness." The court even may be informed about who initiated the settlement discussions. The provision for pre-appointment preliminary designation by the court authorizing settlement discussions also will not work. A defendant who asks for this is sending a signal that settlement is open, and that signal will invite lots of actions filed by other lawyers.

The subcommittee was reminded that the proposal to limit pre-appointment activities on behalf of the class was considered and rejected at the February 2000 meeting, and had been resurrected only to make sure that it had been thoroughly considered. There have been vigorous champions for this proposal, arising from concerns about "reverse-auction" settlements that sell out class interests and from more philosophical concerns about the source of authority to represent a class before a court has certified the class. But the constant advice from practicing lawyers has been that pre-certification discussions are inevitable and desirable. In the mass-tort setting, there often are many actions actually pending. Some of them may be class actions, whether comprehensive or limited on a state-by-state or similar basis. The lawyers involved begin to discuss the best means of resolving all of the present actions and the foreseeable future actions. These discussions may lead to actual settlement agreements, or may lead instead to agreement on a class-action vehicle to pursue the claims further.

It was agreed that the draft subdivision (a) limitation on pre-certification settlement discussions should be abandoned.

The next question asked about the purpose of requiring appointment of class counsel as such. One purpose may be simply to reduce the tendency to certify on a first-to-file basis. Important disputes commonly have several filings. When the filings are in federal court, they usually are consolidated; with luck the lawyers can work out among themselves the means of allocating lead counsel responsibilities, positions on steering committees, and the like. If the lawyers do not work it out, the court does — and because MDL judges frequently have prior experience with complex litigation, there is a tendency to designate counsel who are familiar and who have worked effectively with the judge in earlier actions. (One concern may be to get a few individual plaintiff lawyers on the steering committee in a mass tort consolidation; but even then, they generally opt their clients out of the class.)

It was predicted that a formal attorney appointment rule will not produce better class counsel. In a securities case, it is possible to predict recovery: the number of shares involved, the likely damages, and like information can be figured readily. Bidding is possible in that setting. In other litigation matters are too uncertain to support bidding. It also was asked whether class interests are well served by going with a low bidder — a firm that bids $100 an hour may not provide adequate representation. And it was noted that many classes may not attract any competing bidders. But if there is a competition, it is good to have a means to sort it out, and good to have a means that does not require contenders to file their own parallel actions.

Discussion, thus spurred, turned to the question of bidding. The draft is calculated to permit bidding, but not designed to encourage it. In pre-Private Securities Litigation Reform Act days, the bidding process worked, at least in the eyes of judges who invoked it. The judge will consider only

applicants who will provide good, competent representation. Discussion of fee terms in advance often is better than postponing any consideration to the conclusion of the litigation.

It was observed that in many actions today, there is up-front discussion of fee arrangements. One question that has attracted attention from commentators on the present draft is whether a percentage-of-recovery formula should allow a greater or lesser percentage as the recovery increases. There is an argument that it takes greater skill to extract the marginal top dollar, but a corresponding response that this extraction does not warrant a larger share of the easily extracted amount. Suppose any counsel could extract $400,000,000, and would cheerfully accept a 15% fee for this nearly sure thing, yielding a $60,000,000 fee. Counsel who extracts an added $100,000,000, should not be able to claim 25% of the total, for a fee of $125,000,000. At most, 25% of the marginal $100,000,000 might be appropriate, for a fee of $85,000,000 rather than $75,000,000 at a straight 15%. For a time, at least, the tendency seemed to be to scale the percentage figure back as the total award increased. Outside the securities field, however, it may be difficult to guess where this is going.

The brief reference in draft (b)(3)(G) to terms proposed for fees and nontaxable costs does not of itself shed much light on these questions.

It was observed that the problem collapses on itself when certification and approval of a proposed settlement are sought at the same time.

And it was suggested, as it had been in earlier discussions, that the PSLRA model is not likely to work for most types of litigation. Securities law violations are likely to affect large institutional investors, who can provide sophisticated clients, in most instances. Such clients may appear episodically in other types of litigation, but cannot be counted upon in framing a general rule.

It is not certain how much the draft rule would add to the level of scrutiny of counsel that occurs now in applying the Rule 23(a)(4) adequate-representation requirement. At least it would make things more general and open. And it may help in settings in which there are competing simultaneous actions. There is a strong desire to structure and regularize the work that is being done. There is a concern that in the present system, lawyers form consortiums that involve too many lawyers, doing too much redundant work. Deals are made, with present patronage and the expectation of future reciprocity. Occasionally the featherbedding is so flagrant as to draw judicial attention and response. At the same time, some lawyers are concerned that the "old-lawyers" network includes judges as well: judges who are repeat players in the complex litigation world tend to favor designation of lawyers they know from prior experience. A formal rule requiring appointment of class counsel may encourage greater judicial involvement and supervision at the outset. Of course the cases that do generate competitions for appointment may degenerate into efforts of the applicants not only to praise themselves but also to belittle their competitors. Some past contests seem to have degenerated to mud-slinging.

Returning to the desire for initial consideration of fee arrangements, it was observed repeatedly, and in varying ways, that it is very difficult to regulate fees after the fact. An attempt by the judge to find out who really did what — and with what justification, skill, and effect — is incredibly time-consuming and still of doubtful effect. So long as lodestar methods are used to

determine fee awards, there is an incentive to engage in unnecessary work to "run up the clock." But it was suggested that the draft rule will not reduce featherbedding.

Discussion then turned to the question whether an explicit requirement that class counsel be appointed by the court, rather than subsumed in the process of designating "adequate" class representatives may serve purposes apart from fee regulation. It was observed that the draft arose out of concerns with the "no-client" characterization that many observers have applied to many class actions. It is widely believed that some forms of class actions are attorney-driven, with mere figurehead individual plaintiffs who have been recruited by counsel. Even when the litigation begins with a real client who has a real sense of grievance and desire for relief, the client may have no real measure of the qualities needed to serve as a foil for the attorney. The best efforts to assess the typicality and adequacy of the representatives, moreover, cannot ferret out all risks of conflicting interests. A client driven by a desire for vindication or revenge, for example, may resist a settlement that is overwhelmingly in the best interests of the class. Formal appointment as counsel for the class serves the purpose of making it clear that the primary client is the class, not the representative class members. This is a central part of the conception of what Rule 23 does when it creates a class action.

Discussion turned to alternative drafts. Footnote 1 in the draft consolidated subdivision (a) with the opening parts of subdivision (b), abandoning the effort to regulate activity by would-be class counsel before appointment. In effect, the lawyer who files a class-action complaint is allowed to develop the litigation up to the point of the certification decision, if only for want of a better means of regulation. (It might be desirable to add a provision for removing a plainly incompetent lawyer, but that is probably better left to judicial development within any appointment rule that may emerge.) This version drew support as a starting point. Footnote 2 in the draft greatly shortened the "laundry list" of draft paragraph (b)(3) factors to be considered in making an appointment, and also drew strong support.

Paragraph (a)(2) of the footnote 1 version would provide that an attorney seeking to act as class counsel lacks authority to bind the class until appointed to represent the class. It was asked what does this mean in relation to the necessary pre-certification activities. The apparent meaning is that the class is not bound by anything done before certification, but are there complications? The lawyer must be able to engage in discovery bearing on certification, pursue the class certification itself, fend off any motions to dismiss or for summary judgment addressed to the individual claims, and so on. What does it mean to say that the class is not "bound" by the discovery or attempt to win certification?

Attention then focused on the draft provision that class counsel "is a fiduciary responsible to represent the best interests of the class." Although the "fiduciary" term has been included in a long succession of drafts, it began with making both class representative and class counsel fiduciaries. When class representatives were included, there may have been special point in designating them as fiduciaries. But when the focus is on class counsel alone, the term seems redundant — the attorney-client relationship is a special kind of fiduciary relationship in itself. Adding the term may create confusion by implying that there are additional and different aspects of the fiduciary relationship. The implication will in turn encourage efforts to found malpractice claims on the term. These problems will lead to the further question whether federal courts should imply

a private remedy for violation of the argued-for expanded fiduciary duties. There will be vigorous resistance to this term. It was agreed that in the framework of the present drafts, the term serves no purpose and should be deleted.

The relationship between federal Rule 23 law and state law also provoked some concern. One problem that has occurred is that the named class representative objects to a settlement, but class counsel persists in presenting it for approval on the theory that there is an obligation to represent the interests of the class. This is exactly the sort of issue that must be governed by federal law as an integral part of the conception created by the Rule 23 class action. More esoteric questions may arise — class counsel, for example, may have entered the litigation as counsel for representatives who come to be designated to represent a specific subclass; federal law should be able to control the question whether emerging conflicts of interests among subclasses should force disqualification of this lawyer as class counsel.

The original source of concern came back to the discussion with the observation that court appointment of class counsel does not really satisfy the concern that there is no "real client." Designation of the class as client does not of itself produce a person to speak with sophistication for the class as a guide to, and check upon, class counsel. So what good is accomplished by making it clear that the disembodied class is the client, to whom professional responsibility flows? Perhaps there is some good in ensuring that federal courts can control the central incidents of a federal procedural device — the class action — without being defeated by variable notions of state professional responsibility requirements. There also may be advantages in managing the circumstances that generate competing attempts to represent the class. When the competing attempts take the form of duplicating and competing actions, appointment may prove one means of effecting coordination by inviting several courts to appoint the same class counsel. And there is an opportunity, whether or not seized, for more aggressive in-advance monitoring of fee applications. Possibly there will be a restraint on collusive settlements, although this may be difficult when the requests for certification and counsel appointment coincide with a request for approval of a worked-out settlement.

The focus on the need for a federal rule that defines the role of counsel for a class action created under the aegis of Rule 23 necessarily creates sensitive interactions between federal law and the continuing primary responsibility of state courts to regulate the professional responsibility of state-licensed attorneys. State law remains the basic source that identifies the nature of an attorney's duties to a client. It will not do to relegate these issues to the crazy-quilt of local rules that have spurred the activities of the Standing Committee Subcommittee on Rules of Attorney Conduct. The federal rule can say that the class comes first, and that must be the foundation for state regulation. But that foundation will not directly answer the problems that arise from potential conflicts between the individual class representative client and the class client. Nor will there be a direct answer to the nature of the duty owed to the class client: the most that can be asserted is that state regulation may not be allowed to impose requirements that subvert the purposes of federal class litigation.

Articulation of the duty owed to the class also remains open. The present form, stripped of the reference to "a fiduciary," is "responsible to represent the best interests of the class." It was suggested that perhaps the formula of Rule 23(a)(4) should be used, looking to "fairly and adequately

represent the best interests of the class." Adoption of the same formula for class representative and class counsel, on the other hand, may invite confusion with respect to both.

The attorney fee draft entered the discussion of the attorney-appointment draft. It was observed that fee awards remain a problem. Huge fee awards "look grotesque to the public. They are grotesque." It is not in the public interest to divert such large sums to private attorneys who seek to become private attorneys-general at rates that would support entire divisions of many public attorney general offices, or for that matter might entirely support some of the smaller public offices. Reviewing attorney fees, on the other hand, is very difficult. The idea that competition may make it easier is very attractive.

It was noted that it is not unreasonable to ask an attorney to tell the court in advance of the method proposed for addressing fees. The method will provide at least a base line. Lawyers are asked to do this in many settings. Many MDL judges require advance statements, and often require monthly or quarterly statements.

But it was observed that the advance proposals may create interesting management problems, and actually work to increase fees. At the back end, the lodestar can be used at least as a point of reference and a check. In settlements, it is possible to resist percentage-of-recovery fee terms. Prospectively, a court might sign off on a percentage formula that in the event results in an unreasonably high fee. Involving the court from the beginning, moreover, imposes on the court responsibilities to the class that may be difficult to manage.

One response is that there are some direct things that can be done to reduce total fees. A judge can set limits on such things as the number of lawyers who can claim fees for attending a deposition, attending a hearing, or the like. Such limits may not make much sense if the award is going to be a percentage of a very large fund, but in the time-spent setting the court can tell the lawyers at the beginning what will be regarded as reasonable. This may even be touched in the draft rule provisions that seek information about what "resources" would-be class counsel proposes to devote to the action. And it is possible to address "nontaxable costs," including such matters as deluxe hotels, expensive restaurants, or first-class travel. An explicit rule, moreover, may help to create a market — applicants will undertake to manage routine work with legal assistants or less expensive associates, and the like.

The charms of advance description of fee and expense arrangements were reduced in some measure by the observation that the court is not to become a general contract supervisor, examining individual hotel and restaurant charges. It is important to have a mechanism for policing fees both at the beginning and at the end. Unsupervised attorney fees present perverse incentives. "We can do some good."

A different question is presented by paragraph (b)(5) of the draft appointment rule. This provision would say that in designating class counsel the court should not consider, or alternatively would say that the court should not give significant weight to, the question whether any of the applicants had filed the action before the court. This factor is intended to reduce the incentives to race to the courthouse that arise when courts avoid difficult questions by simply preferring the first action filed and the lawyer who filed it. It is intended to work in tandem with the (b)(3)(E) factor

that asks whether an applicant "has done independent work in identifying and investigating potential class claims, issues, or defenses." The first filing may skirt the edges of Civil Rule 11 violation, rushing to follow on government regulatory announcements or litigation, representing very little (if any) independent investigation. That sort of filing deserves little recognition. If the lawyer who filed first has done significant independent work, on the other hand, the work must be protected — and particularly deserves to be protected against later lawyers who were prompted to make a show of their own independent work after learning of the first filing. Some version of this provision also may encourage lawyers to apply for appointment — they will know that they have not lost the competition for appointment simply by having lost the race to file. Discussion of this point left off with recognition that we do not have any meaningful information on how often competing lawyers seek to represent the same class, much less on how many might seek appointment if some version of the draft rule were adopted.

Discussion turned briefly to the "laundry list" of appointment factors in draft paragraph (b)(3). Although affection was frequently spoken for the collapsed version of this list in footnote 2, attraction also was voiced for the long version. This version will provide greater guidance, and help to frame any innovations beyond common present practice. The focus on using appointment of class counsel to coordinate or even consolidate parallel actions is one of these innovations.

One new feature of the current appointment draft, presented in brackets to emphasize uncertainty, would require the court to allow a reasonable period after commencement of the action for filing applications for appointment as class counsel. The provision may not be necessary, particularly in light of the pragmatic predictions that commonly there will be a sufficient interval between filing and the certification decision, and that usually there will not be competing applicants. The FJC class-action study, for example, showed that in the four districts studied the median intervals between filing and certification ranged from 6.5 months in the fastest district to 16.5 months in the most deliberate. The study, however, did not focus on information about the frequency of contests for appointment as class counsel. On the other hand, there might not be any interval in cases that begin with simultaneous filing, unopposed motion for certification, application for appointment as class counsel, and preliminary approval of a worked-out settlement.

The question of an interval for competing applications may be affected by hearing practice. Recognizing that a "hearing" may constitute consideration of arguments presented in writing, we do not know how common it is to have a hearing on class certification now. Presumably any contested motion will be "heard" in this expansive sense. Many judges, at least, afford opportunity for oral argument as well; if there are fact disputes, presumably an evidentiary hearing would be the ordinary response. Since a hearing is provided for certification, and appointment of class counsel is tied to certification, there is no sufficient need to require a hearing in the attorney-appointment rule.

It was asked whether there is any need for the draft (b)(7) provision, which explicitly provides for rejection of all applications for appointment, recommendations by the court to modify an application, or the like. One elaboration of this rule would be to recognize the opportunity to look for new class counsel if all applications are rejected, just as an opportunity may be given to look for a new class representative if the proposed representative is found inadequate. And there may be some value in responding to the risk that the party opposing the class may prefer not to oppose an application by a very weak lawyer, hoping to "mop up" after the appointment is made.

One question that has beset the appointment rule has been application to defendant classes. Defendant classes seem to be uncommon. But when defendant class certification is sought, it is not uncommon to find that no defendant wants to assume the mantle of class representative. Representing the class entails additional expense, and may impose representational obligations that interfere with determinedly self-serving behavior. A defendant who volunteers to represent the class may indeed provoke suspicions that there are conflicting interests that should defeat representative status. If an application is required for appointment as class counsel, any wish to certify a defendant class could be easily defeated — unless the court were given authority to compel application by an unwilling attorney. This question has to be faced: it will not do to simply state in the Note that some parts of the rule — most obviously the application part — do not apply to defendant classes. It would be possible to modify the draft so that the court could excuse the application requirement, and to suggest in the Note that ordinarily the requirement should be excused in defendant class actions, and might also be excused when there is no competition for appointment. (The no-competition case still may warrant an application to address such issues as attorney fees at the beginning.) This discussion concluded with the continuing compromise — the draft will flag the issue in its present form: "when members of a class sue [or are sued] as representative parties on behalf of all * * *." An effort will be made to find out what can be learned about responses to the problem of drafting unwilling defendants and counsel to serve as class representatives.

Attorney Fee Rule

The first question asked about the draft attorney fee rule was whether it should be modified to address the question of fees for objectors, since all references to that question have been expunged from the draft Rule 23(e).

The current draft descends from the draft considered by the Advisory Committee in October. It presents several broad questions: (1) Should an attempt be made to change the grounds on which a fee award may be made? (2) Should an attempt be made to restate the standards for measuring fees? (3) Should Rule 54(d)(2) be supplanted by providing a separate fee application procedure?

Earlier drafts seemed to suggest that a class-action fee award could be made outside of any fee-shifting statute and beyond the well-established "common-fund" theory. The question of Enabling Act authority to undertake anything of the sort is obvious; the answer may be so clear that the question is not even troubling. Before this morning, the Rule 23(e) draft provided for a fee award to a settlement objector: where did authority for that come from? Simply an elaboration of the common-fund theory — so that an award would be possible only if the objection enhanced the size of the fund recovered by the class? Or is there an implicit broader authority to regulate the incidents of class procedure that justifies more ambitious proposals? Certainly courts have undertaken to regulate some of the monetary incidents of complex litigation — in MDL proceedings, for example, courts have ordered "taxes" on other parties to compensate lead counsel and steering committee members for efforts undertaken for the benefit of all. When rules create independent procedural obligations, fee sanctions are commonplace — the discovery rules and Rule 11, as well as Appellate Rule 38, are familiar examples. The creation of class actions and regulation of the procedural obligations and opportunities that flow from them may similarly justify fee provisions as integral and necessary supports for the procedure. The problem of defendant classes may be the most compelling illustration: if a defendant is drafted to represent other defendants, fairness requires developing some

means to defray the added costs forced by the obligations of class representation. At the least, it is not ground for surrender that someone might assert that this cannot possibly be done by rule. But that does not answer the question whether it is now appropriate to undertake to draft a rule for this purpose. Any rule will be challenged with vigorous enthusiasm.

There was little further discussion of the grounds for making fee awards, but the conclusion was that the topic should not be approached now. All of subdivision (a) of the draft rule will be abandoned.

The second question simply takes it as given that fee awards are made in class actions, both under statutes and under the judicially developed common-fund theory. The rule can seek to regulate the approaches used to measure fees. A brief or detailed set of standards can be articulated to generalize and perhaps improve current best practices.

In approaching the standards for measuring fee awards, it would invite trouble to attempt to choose between the "lodestar" and common-fund approaches. Different circuits have articulated different approaches. Whichever approach is used, the same factors come to be considered; what varies is the perspective from which they are viewed. A clear statement of the common factors may be of some help.

One illustration of the overlap is provided by factor draft (e)(1), "the results achieved for class members." The RAND study suggests that this might better be articulated as "the results *actually* achieved for class members." A percentage-of-recovery approach manifestly considers this element. But lodestar analysis properly considers it as well, and can properly consider the amounts actually distributed rather than the amounts theoretically available for distribution. The focus on amounts actually distributed will, under either approach, provide an incentive to class counsel to devise means that will ensure actual distribution.

It was recognized that any proposal to articulate standards for measuring fees, or to expand on common present practice, will draw intense criticism. But there also will be strong support for increased scrutiny. The FJC study found that attorney fees were the most common ground of objections made in class-action proceedings. The RAND study entrenches the observation that enhanced judicial supervision will improve the public repute of class actions. And it may be desirable to develop a uniform national standard that reduces the differences that appear at least in the ways used by different courts to articulate present standards. Something may depend on the actual level of current differences — if they are more matters of expression than implementation, it may be relatively easy to achieve a few extra degrees of uniformity than it would be to bring substantial uniformity to widely disparate practices. Pending legislation, moreover, would ask the Judicial Conference to report to Congress on means for measuring class-action attorney fees: if nothing else, it is desirable to continue work now as a basis for responding as well as can be within whatever time limits may be suggested should such legislation be enacted.

One question goes to the relationship between any court rule and fee-shifting statutes. If the rule departs from decisions interpreting the statute, which governs? The Supreme Court has adopted the lodestar as the starting point for determining statutory fees. But it has not dealt directly with the combination of fee statutes and class-action practice. By its nature, lodestar analysis permits

multiple adjustments. As compared to the common-fund approach, the lodestar method may justify a fee award that is greater — and perhaps substantially greater — than a money recovery on the merits. At the same time, value achieved is one of the factors that enters into the lodestar calculation. The draft rule asks for clarity about the value achieved.

The hypothesized tension between statute and court rule may be less troubling than first appears. It is necessary to integrate the statute with class-action procedure; the question calls for interpretation of the statute in light of class-action practice. There are manifest reasons why the distinctive responsibilities and opportunities of representing a class should be reflected in measuring fees for the representation. This need is particularly apparent when the class judgment would support a fee award on a common-fund theory as well as a statutory theory. In different circumstances, either theory might simply supplant the other; in still different circumstances, they might work together, particularly when the class judgment awards both specific and monetary relief.

It was further noted that the operation of a fee-shifting statute is necessarily affected by the special nature of class actions. An individual client can assign the statutory fee right to counsel, or can contract to pay a contingent percentage-of-recovery fee. It is difficult for class counsel to negotiate similar terms with the class representative, particularly if class counsel is dominant in the relationship. Interpretation of the fee statute is justifiably affected by the fact that the class is the client in a very real sense, even apart from any explicit rule that may be adopted to define the class as client.

Fee issues may be affected by "side agreements." These agreements commonly involve allocation of fees among counsel. One of the concerns the allocation may spur is that there is somehow collusion or improper trading in class interests. If that is the main concern of fee regulation, perhaps it should be addressed through the Rule 23(e) provisions for reviewing settlements rather than an independent fee rule. Or perhaps it is enough to require disclosure of fee sharing arrangements, as draft rule (e)(9) would do. With disclosure in the application, the court can decide early in the litigation whether the allocation is appropriate. But there may be remaining difficulties. What happens, for example, if at the end of the day the court concludes that the representation provided by class counsel was outstanding and merits a $50,000,000 award, but also knows that under a referral agreement 40% of the fee award is to be paid to a lawyer who did virtually nothing to represent the class. If the $20,000,000 referral fee seems outrageous, is there anything the court can or should do about the private agreement between counsel? Would it be proper to interpret a fee statute to mean that class counsel cannot make a binding assignment of the class fee right in this way — and implement the conclusion by ruling that the defendant must pay the full fee, but that a stated portion of the referral fee belongs to the class rather than counsel? Would it be proper — and perhaps easier — to allocate an award based on a common-fund theory by allotting $30,000,000 to class counsel and most — perhaps all — of the referral fee to the class by not taking it out of the common fund? These issues are best identified and resolved in the appointment process — an argument that strengthens the case for adopting an application process and identifying fee criteria.

A similar question may arise with the proposed (e)(10), which suggests measuring a fee award in light of "any fees to be charged by class counsel or others for representing individual claimants or objectors." This provision may seem to intrude on the private contracts between

individual clients and their own attorneys. But the impact of the class judgment may justify this intrusion. To the extent that a fee award can properly reflect actual benefits to class members, the actual benefit from the common representation is affected by the fees that they may remain obliged to pay individual lawyers for completing recovery of benefits under the class judgment. If the class judgment provides for resolving individual claims in the class-action framework, it seems proper for the court to regulate the "little work, no risk" fee claims of individual counsel as part of the terms of the class judgment. If the class judgment simply forms the basis for separate litigation — a theory often recognized in abstract discussions of "issues classes" but not often encountered in practice — it may still be proper to regulate the preclusion incidents of the class judgment by allowing use of the class judgment only on terms specified for individual client fee responsibility.

The separate reference in (e)(10) to fee awards to objectors also was noted. Deletion of objector-fee provisions from draft Rule 23(e) highlights the question whether the attorney fee rule should address this question. Objector fees seem proper at least in common-fund situations, when the objector enhances the size of a common fund by winning improvements in the judgment or by successfully challenging the amount of fees awarded out of the common fund. The question of statutory entitlement at least seems open, and a rule that reflects common-fund practice may properly assume that similar criteria should apply if a statute is interpreted to allow objector fees.

As a preliminary decision, it was concluded that it remains desirable to "go beyond Rule 54 at least to the extent of presenting criteria to measure the amount of a fee award, similar to the list in draft subdivision (e)." This seems a useful approach.

The decision to delete the subdivision (a) provisions enumerating the persons who may be directed to pay a fee award carries with it deletion of the subdivision (f) provisions that grow out of subdivision (a); there is so little remaining use for subdivision (f) that it too will be abandoned.

The subdivision (g) provision for reference to a master or magistrate judge seems redundant with present Rule 54(d)(2)(D), but will be preserved as a source of direction and comfort to judges who confront the complex chores entailed in working through the criteria for measuring a fee award.

These discussions helped to resolve earlier discussion of the question whether to rely entirely on Rule 54(d)(2) as the procedure for awarding class attorney fees. Rule 54(d)(2) addresses class actions, but does not consider many of the topics that have come to the fore in the broader Rule 23 inquiries. It does not require disclosure of fee-allocation agreements unless the court directs disclosure. It speaks of adversary submissions, and in the Committee Note suggests that discovery should occur only in rare cases. It does not require a hearing. The timing requirement — an application must be filed no later than 14 days after entry of judgment — may be too rigid. It does not require notice. And of course it does not speak to the criteria for measuring fees.

Rule 54(d)(2)(D), further, invites adoption of local rules for resolving attorney-fee issues "without extensive evidentiary hearings." The three districts in Georgia, for example, each have different local rules on this subject. An explicit class-action fee rule may help reduce inconsistencies in this particular corner of fee practice.

The meeting concluded with the promise of redrafted rules to reflect the views expressed about the current drafts. There was no discussion of the drafts dealing with appeal standing, notice, or overlapping classes. An effort will be made to schedule a conference call for mid-December, perhaps on the 15th, to give direction for future drafts on these topics.

It was tentatively concluded that the subcommittee should attempt to meet again on January 29, in conjunction with the scheduled public hearings on the proposals published for comment in August 2000. The new drafts should be available well in advance of the meeting, recognizing that this recent in-depth exploration will reduce the time needed for advance study before the meeting.

TAB VIII
B
REPORTER'S NOTES
JANUARY 228-29, 20001

REPORTER'S NOTES
RULE 23 SUBCOMMITTEE: JANUARY 28-29, 2001

[These Notes are an unofficial rendition of notes made at the January 28-29 Rule 23 Subcommittee meeting in San Francisco. They have not been reviewed by the Subcommittee. They record the themes that seemed dominant. The errors clearly include omission of many useful things that were said, and no doubt include inaccurate renditions of some of the things that were said.]

The meeting was attended by all subcommittee members: Judge Lee H. Rosenthal, Chair; Sheila L. Birnbaum, Esq.; Judge Richard H. Kyle; Bonnie Osler, Esq., for Assistant Attorney General David W. Ogden; and Andrew M. Scherffius, Esq. Judge David F. Levi also attended. The January 29 portion of the meeting also was attended by David Bernick, Esq.; Allen D. Black, Esq.; Elizabeth Cabraser, Esq.; Robert Heim, Esq.; and Dean Mary Kay Kane. Judge Anthony J. Scirica attended by telephone. Edward H. Cooper and Richard L. Marcus were present. John K. Rabiej represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center.

Judge Rosenthal opened the meeting by stating that the purpose is to seize what seems to be a realistic opportunity to create a package of Rule 23 reforms that can be presented to the Advisory Committee this spring. If that is not possible, a full year of the rulemaking cycle will be missed. Success would mean requesting Standing Committee approval for publication this summer, aiming for further review and action at the Advisory Committee's Spring 2002 meeting.

Earlier drafts have been dramatically improved and refined for this meeting. Significant proposals have been abandoned. Other proposals have been brought back to the active agenda; it must be determined whether these more recent topics can be developed in time for consideration in April.

The purpose of the first day's discussion is to prepare to take the best possible advantage of the five class-action experts who will attend the Monday meeting. They bring enormous experience, and a variety of perspectives, with them. We should seek to frame the most important issues for discussion. Are the issues reflected in the drafts the right issues? Are the approaches taken to them right? Has something important been omitted? Are there any good solutions to real problems that should be omitted from the package because they promise to generate sufficient static to jeopardize the whole? Discussion will follow the order of the Rule 23 subdivisions.

Rule 23(c)(1)

The Rule 23(c)(1) draft presents a variety of proposals that go beyond the mandate of the December 4 meeting. It was then decided to renew consideration of the proposal, once recommended for adoption but remanded by the Standing Committee for further consideration, that the requirement that a certification determination be made "as soon as practicable" be changed to "when practicable." The draft prepared for this meeting does several other things, and indeed deletes any direction on the time for making a certification decision. Perhaps, as suggested by Allen Black, "when practicable" should be restored, or an order might be required "without unreasonable delay" or "within a reasonable time." The draft requires that a certification order determine the claims,

defenses, or issues included in the certification and describe the class. It suggests that the provision that a certification "may be conditional" be changed to "is" conditional.

Another change made by the draft changes the event that cuts off alteration of a class certification decision from "the decision on the merits" to "final judgment." The purpose of the change is to avoid the ambiguity of a decision on the merits — an order granting or denying summary judgment, for example, might be seen as a determination on the merits, but often should not bar any subsequent change of the initial class certification determination. And complex proceedings may well continue in a remedial phase long after an adjudicated disposition of the merits. Proceedings to allocate a money award or to frame an injunction may show a need to redefine a class, establish subclasses to reflect conflicting interest, or even decertify a class because individual issues predominate.

The draft also provides one version of a new enterprise. It would provide that an order denying class certification precludes certification of substantially the same class by any other court "unless a change of law or fact creates a new certification issue." This approach would leave the way open for a state court to certify the same class on finding that state class-action law presents a different certification issue. In some ways the draft seems too broad. Unlike the approach taken in the later "overlapping classes" draft, it does not distinguish between refusals based on inadequate representation or typicality from other refusals. Neither does it leave any escape for the possibility that the refusal to certify rested on inadequate development of the certification question by would-be class counsel. Some relief might be found by allowing a court to deny certification without prejudice to renewal by someone else, or by providing for reconsideration at a later time.

"When Practicable." It was stated that indeed "when practicable" or "as soon as practicable" should be added back to the draft. There is a real danger that the parties may be held hostage for a long time before a certification decision is made. The rule could direct that the court "must when practicable determine by order" whether to certify a class.

The "as soon as practicable phrase" was challenged on the ground that some courts still rely on it to defeat any pre-certification resolution on the merits that does not bind the class, or to deny any discovery. It was replied that there is a real problem that the certification process can drag on too long. Some local district rules set firm deadlines, such as 90 days, but the deadlines are routinely extended. We should not write a rule that invites courts to take more time to reach a certification decision. But it was responded that "as soon as" is consistently ignored. There is something to be said for reflecting real and sound practice in the language of the rule. The point to be made is that the certification decision should not be unreasonably protracted.

The cases that take a seemingly long time to decide on certification are likely to take time because the parties or the judge think the question is very important. It is because it is important, because certification or refusal to certify commonly drives resolution of the case, that a reasonable time to decide is appropriate.

Among the things that may go into the certification decision is deposition of the class representative, and that is "easy." It is more difficult to control discovery from the defendant — often it is desirable that it involve a mix of certification and merits issues. The parties put this off

to see whether a settlement can be reached. Courts are flexible. Delay for discovery may be desirable. Discovery can show whether the case will be manageable as a class. So some delay may be desirable for deciding dispositive motions that resolve the individual claims without binding the class. The preliminary motions may show that there are individual issues that defeat certification. And plaintiffs may want delay to avoid the costs of notice: if they settle, the settlement commonly provides that the defendant pays notice costs. Plaintiffs also may want delay because it buys time to work toward settlement without the prospect that the case will be sidetracked by a Rule 23(f) appeal from a certification decision.

Support was voiced for the "when practicable" formula. And it was asked what it means to act "as soon as practicable"; how is this different from "when" practicable? It was suggested that the "common law" of actual practice has defined "as soon as" to mean "when." Immediate decision is not always desirable, and courts recognize this. The Federal Judicial Center study shows median times from filing to certification decision that confirm the general understanding. Adoption of "when" practicable will clarify the rule, bringing it closer to what most courts do now. And it will confirm the propriety of pre-certification motions to dismiss or for summary judgment. "When" practicable is a better indication of the case-management nature of the timing decision.

"Final judgment". The draft changes the event that bars amendment of a certification determination from "the decision on the merits" to "final judgment." It was observed that decision "on the merits" "can come in bits and pieces." When to the parts add up to "the" decision on the merits? How does this provision relate to the rule that there is to be no decision on the merits before certification? But if the phrase seems ambiguous on reading the rule, are there any actual problems in the real world?

One possible problem was found in an apparently common event. The court decides the merits of claim 1 in favor of the class. The class and defendant then negotiate a settlement that also resolves claim 2 and claim 3. The settlement redefines the class. Is this too late, because there has been a decision on the merits?

The change was supported as a move that would bring more clarity and certainty by discarding the ambiguity of "on the merits."

It was asked what problem is being solved? The change does seem to expand the time when a certification determination can be changed. But changing the class definition has repercussions. New notice has to be given. Emphasis on final judgment could lead to situations that mimic one-way intervention: there is a decision on the merits, and then the court either certifies a class despite an earlier refusal to certify, or expands a class previously certified. Or an earlier certified class might be decertified or narrowed in circumstances that protect class members against an adverse merits ruling, leaving them free to sue again.

It was urged that real problems appear in "hybrid" classes that combine demands for specific relief and for money. It is important to know from the beginning whether it is a (b)(2) or a (b)(3) class or both.

Claims, defenses, or issues certified. The draft requires the court to determine "whether and with respect to what claims, defenses, or issues" a class is certified. It was observed that it is not

necessary to describe claims to describe a class — the class could, for example, be all children who attend a particular public school system or will attend it in the future. And it was responded that that is why it may be necessary to describe the claims, issues, or defenses certified.

Certification for defined claims raises the question of claim preclusion. It was suggested that the definition of the "claim" precluded by a class judgment may depart from the expansive "transactional" approach commonly adopted by federal courts for most claim-preclusion purposes. A judgment rejecting a class claim of disparate impact employment discrimination, for example, should not preclude a claim by a class member for disparate treatment, even though the plaintiff in a non-class action would be expected to join both theories in a single action.

Definition of the claims certified for class treatment also may bear on the approach taken by other courts to related litigation. As with claim preclusion, it may be important to know just what is the subject of the class litigation so that other courts can determine whether related individual actions that raise individual claims can properly proceed. Here too, a plaintiff proceeding individually may be expected to join more theories in a single action, while class litigation may demand a narrower focus.

An illustration based on a defective product was urged. The class is defined as purchasers of the product during a particular period. The theories advanced involve such matters as breach of warranty, negligence, and the like. The way in which the class claims are defined affects many things in addition to claim preclusion: notice, the decision of class members whether to opt out, and the like. Determination of the issues to be resolved in the class action is inherent to defining the class.

Another illustration was offered: the extent of individual injury will not be tried on a class basis, however it may be resolved within or outside the framework of the class action. "Claims, defenses, or issues" should be part of the class definition. This may be particularly important if there are subclasses.

It was asked whether the requirement for identification of the class claims, defenses, or issues should be part of the introduction of (c)(1), or whether it should be moved to (c)(1)(A) as part of the description of the class: "An order certifying a class action must define the class and the class claims, defenses, or issues." It was agreed that it should be moved to (A) as illustrated.

It was asked whether it is proper to include "issues" in the class definition. The *Rhone-Poulenc* and *Costano* decisions cast considerable doubt on issues classes, at least in personal-injury mass torts. But other areas of class litigation may be treated differently. In employment discrimination, courts must think more carefully now that Title VII provides for individual damages — they are moving toward notices that certify both under (b)(2) and (b)(3). If we leave "issues" in (c)(1)(A), we may seem to encourage issues classes. But (c)(4) provides for them now; earlier Advisory Committee consideration of amendments that would emphasize issues classes were designed simply to encourage use of authority already clearly given.

Certification "conditional". The rule statement that a certification order is conditional was described as a technique akin to "drive-by" certification. It invites a casual approach.

Denial of certification as preclusion. Discussion of the provision that would bar any other court from certifying substantially the same class after certification is denied was postponed to consideration of the "overlapping classes" draft.

Notice

The draft revision of the notice provisions of Rule 23(c)(2) presents several issues. One proposal that has been considered has been dropped out — this draft does not address the question whether a defendant can be ordered to pay part or all of the costs of notifying a plaintiff class. The draft does, for the first time, establish an explicit requirement that notice be given in (b)(1) and (b)(2) classes. This requirement must be approached with care. It seems important that some form of notice be given, but the cost of notice may be a substantial obstacle to class litigation. When there is little or no money at stake, it is difficult to finance notice costs; many actions in these forms are brought by advocacy and public-interest groups that might not be able to proceed if saddled with notice costs. It is important to attempt to define the notice obligation in a way differently from the present provisions for (b)(3) actions. The draft does this by defining the purpose of giving notice. Notice must be calculated "to reach a sufficient number of class members to provide an effective opportunity to challenge class certification or representation and to monitor the performance of class representatives." Allen Black has urged, however, that it is unwise to invite class members, even by the mere phrasing of the rule, to challenge a class certification that has just been made. However it is expressed, the purpose is not to require individual notice to each class member. Mailed notice to a sampling of class members might do, supplemented by published notice, or in some settings published notice alone might do.

The notice draft also adopts an explicit plain language requirement. Current sentiment has moved beyond debate the desire for notice that a class member can actually understand. But the current Federal Judicial Center attempt to draft a model notice shows just how difficult it is to explain a class action in terms that most people can understand and at the same time satisfy a lawyer that the notice is precise and comprehensive. One possibility, reflected in the FJC efforts to develop a summary of the notice in less than two pages, is to provide a short form that conveys the essence of the matter in easily understood terms, and also to provide a more comprehensive notice. The combination could be worked through so that only the short form is sent to all class members, inviting requests for the longer form or suggesting a visit to a site where the longer form is available for remote electronic access. Or both short and long forms could be sent to all class members to whom notice is directed. It might even be desirable in some situations to have three forms, short, intermediate, and long.

The draft also provides for notice limited to a sample of a (b)(3) class if the cost of individual notice to all members who can be identified is excessive in relation to the generally small value of individual members' claims. It has been suggested that perhaps some room for flexibility should be created to allow sampling notice in other cases.

Long and short notice forms. Brief discussion generated a consensus that the Rule itself should not describe short- and long-form notices. This topic is better addressed in the Note. The nature of the action will be an important factor in deciding what should be done. It was noted that in a recent

settlement three notice forms were developed: a summary and a "full" notice went to all class members. A "really full" notice was made available for the asking.

Description of (b)(1), (2) notice. It was noted that the Department of Justice frequently encounters class actions challenging Medicare regulations or practices on behalf of mammoth classes. Only prospective relief is sought; it is not an occasion for (b)(3) certification. Class certification may make it easier to get sweeping relief, and with that to claim larger attorney fees. It is not always easy to identify class members. Nor is there an easy way to provide notice by inserts with regular communications on other topics. The cost of providing notice to all class members could be prohibitive. It is wise not to seek actual notice to all class members. And the focus that looks toward facilitating challenges to the class certification, definition, or representation "could be the first opportunity for bad objectors." In other settings, notice to class members may lead to other repercussions — in a Truth-in-Lending-Act action, for example, defendants have expressed the fear that class members, little understanding what the action is about, will stop paying their bills.

The question of notice in (b)(1) or (2) classes was described as a cost-benefit issue. Do we want to create a notice requirement, given the cost? Should we change the provision to a permissive one that the court "may" direct notice? It was noted that the San Francisco schools have recently emerged from a litigation growing out of the judgment in a class action brought 20 years ago on behalf of all (then) present and future school children. The judgment was based on a (b)(2) class without any notice. It inflicted severe disadvantages on some class members in providing advantages to others. There may be particularly important conflicts of interest among members of a larger group that is presented by part of the group as a single class. Notice is important.

It was suggested that the notice provision could describe factors bearing on the need for notice — cost, the importance of the issues, the potential for conflicts within the class. For many people, the injunctive or declaratory relief in a mandatory class action may be much more important than the few dollars involved in some "consumer" class actions. This could be part of the Rule, or part of a Note that accompanies a "may direct" rule.

Rule 23(d)(2) now authorizes the court to direct notice of just about anything, including certification of a mandatory class. It was asked whether these questions should be addressed there rather than in (c)(2).

It was noted that the FJC study found half a dozen (b)(1) or (2) classes that were settled without any notice, including some that involved a clear possibility of class conflicts.

It was tentatively concluded that if notice for (b)(1) and (2) classes is to be kept in (c)(2), it should be optional, with a description in the Note of the factors to be considered in deciding whether to direct notice. It should be made clear that individual notice to all class members is not required. And the draft language should be stripped down, removing at least the reference to challenges to class certification or representation. It might be: "a sufficient number of class members to monitor the performance of class representatives and class counsel." Before making a final decision, an attempt should be made to determine how far courts are now considering notice under (d)(2): perhaps present (d)(2) is doing the job.

Sampling notice. The draft provision for sampling notice in (b)(3) class actions turns on the "generally small value of individual members' claims." As amplified in the draft Note, the phrase is meant to describe classes that include some members who have relatively substantial individual claims as well as many members whose individual claims are small. In such cases individual notice may well be directed to the identifiable members who have larger claims, with only a sampling of others. The motive of the draft is to reduce the obstacle that notice costs may impose on worthy small-claims actions.

It was asked whether due process requires individual notice when it is possible to identify class members, no matter how small their claims, in order to protect the right to request exclusion. There is a due process undertone to the *Eisen* decision, even though it rests most directly on the language of Rule 23, But the *Mullane* decision seems to take a pragmatic approach that would support sampling.

In many consumer classes, individual claim forms are needed to participate in the judgment, so individual notice will be required at that stage if the class wins. In some cases individual distributions can be effected automatically because the defendant has computer records and the capacity for mass distribution: but in those cases, it is likely to be equally easy to seize the defendant's system as a means of effecting notice at the certification stage. How many cases are left for sampling notice? Need we worry about the cases where the plaintiff class loses so the claim-notice issue does not emerge?

It was asked why not allow sampling notice beyond the generally small claims setting? The answer was that the right to opt out should be protected. Due process analysis permits consideration of the cost of notice in relation to the interest to be protected and the prospect that the similar interests of all will be adequately protected by notice to many persons even if the many are a small subset of the total. As the stakes increase, the calculation changes.

Still, it was warned that we should be careful about the due process question. Justice Powell, author of the *Eisen* opinion, took the due process observations seriously. But the decision some years ago to put aside the "just ain't worth it" proposal reflects a purpose to preserve the "50-cent class." Is there much writing on this topic? An academic perspective might be that it seems ironic to find a due-process right to individual notice to protect a 50-cent interest, but not to protect a (b)(2) class member's interest in attending school.

It was suggested that perhaps sampling is being done in (b)(3) cases now: the class is certified, settled, and given notice by publication. But that may be because it is difficult to identify class members. It is clear the parties want a form of notice that will make the judgment binding. Before judgment, however, some defendants want to insist on notice requirements that will be costly to the plaintiffs. In many classes, however, plaintiffs' lawyers today are able to handle notice costs.

It was concluded that the sampling notice provision should not be pursued. No one is calling for the change. The proposal would need to be defended on the ground that the due-process observations in the *Eisen* opinion were not meant to resolve the issue. The *Amchem* and *Ortiz* opinions show that the line between Rule 23 analysis and due process analysis is thin. Why should

we make consumer classes easier, even if we are not going to make them more difficult? Why, in short, "crank up a lot of grumbling" by advancing a proposal that no one is calling for?

Rule 23(e): Settlement Review

Pre-certification settlement. Present Rule 23(e) refers ambiguously to dismissal or compromise of "a class action." The ambiguity generally is resolved — although there may be more exceptions than we know — by concluding that court approval is required even if the dismissal is effected before the determination whether to certify a class, but that notice to the class is not required. The draft adopts this approach, superseding earlier drafts that required approval only if a class had been certified. What this means is that by simply filing a complaint with class allegations, a party has seized hold of an obligation that cannot easily be let go. There is a warning to think carefully before unleashing this beast by filing a class action.

The first question is how much sense this divided approach makes. The purpose of requiring approval is concern that class members may have relied on the filing to toll limitations periods for filing individual actions, and perhaps to put off filing overlapping class actions. But without notice of the proposed dismissal and approval, the reliance interest may not be much protected. It was suggested that the approval requirement may have added value: the pre-certification dismissal may involve terms that reflect not a sensible individual settlement or abandonment of the enterprise, but a buy-out that may provide meaningful individual relief but that hinges on handsome payment to the counsel who sought to represent the class. Even though there is no requirement for court approval of attorney-fee payments in this setting, the fee terms could be used as a ground to refuse to approve the settlement or permit dismissal. There have been situations involving substantial payments to a lawyer to drop an intended class action.

It was guessed that under present practice, these issues seldom come to the surface. The parties come in without explanation, seek to amend to expunge the class allegations, and the judge approves without further inquiry. Some judges would not expect to see it if dismissal occurs early in the proceedings. But perhaps there is more disclosure and deeper exploration than we tend to think. How can we write a rule to maintain the present norm when we are uncertain of the norm? And for that matter, is there a problem that needs to be addressed? If present practice works "in a free market," why intrude? Why not just maintain whatever ambiguity exists in present practice? Is there a risk that by framing a rule that addresses only post-certification dismissal, we will be defeating protections afforded by many courts now?

It was noted that the reason for dismissing class allegations may be the most direct and sensible reason: further inquiry has persuaded the plaintiff that there is no claim, or that any claim is not sufficient to justify the costs of litigation.

How much sense a judicial approval requirement makes depends in part on what information is to be provided to the court. And, perhaps more important, we need to think about what it means to refuse approval. Should we insist that the unwilling representative and attorney continue to seek class certification and to pursue the class claim?

Two extremes were suggested to frame the issues. At one extreme a complaint is filed, not served, and then voluntarily dismissed or amended to delete class allegations. There is no limitations reliance or other reliance unless other class members know of the filing. At the other, there is lengthy pre-certification litigation in circumstances of much publicity and a real prospect that class members have relied on the pendency of this action. Perhaps we should have a rule that establishes judicial discretion to decide whether to become involved in reviewing the proposed dismissal. If there is reliance, perhaps there should be notice so class members can intervene, object to the settlement, file other actions, or otherwise protect themselves.

It was noted that in Title VII litigation, it is usually the class representative rather than class counsel who is willing to be bought off. And that usually judges are thrilled at the prospect.

It was asked whether people are bringing class claims for the purpose of increasing settlement leverage. It was responded that lawyers have long understood that they cannot walk away after filing. The present practice does deter filing class allegations for purposes of leverage. At one time lawyers thought they could avoid this by simply mailing a copy of a proposed complaint to an adversary without filing, but it is not clear whether this still is done or whether it has much effect. We have no way of determining how often such things happen. Perhaps in some cases a very aggressive judge could find it out. But is this a big enough problem to address in the Rule? Do we want to insist on this and highlight it? What guidance can we give — advise courts to look for "side agreements"?

The FJC study found voluntary pre-certification dismissal in 10% of the class actions studied, but it is not clear whether there was court review and approval.

It was asked again what a court should do if it finds unworthy motives and prefers not to allow dismissal. Rather than proceed with this class representative and attorney, perhaps it should seek out a new representative and attorney?

The language of the draft may not make the distinctions as clear as could be. (e)(1) requires court approval for dismissal whenever a representative sues, or is sued, as a class representative. Paragraph (A) requires notice only if the dismissal "would bind a class." That means that post-certification dismissal without prejudice would not require notice; it would be a change of meaning to require notice of dismissal whenever a class has been certified.

The tentative conclusion was that it is desirable to maintain the ambiguity of the present rule. If we were to make a clear change, justification would have to be found for the change. Making explicit a general present practice, on the other hand, might defeat desirable opportunities for subtlety and flexibility. Most authorities say that court approval is required for dismissal before certification, but notice is not required. But it will be difficult to maintain the ambiguity without falling back on the opaque language of present Rule 23(e). Perhaps it will be help enough to include a brief discussion of notice in the Note.

Notice. It was suggested that the qualifying "reasonable" be taken out of the notice requirement. The present rule requires notice, not "reasonable notice." Due process requires a lot of notice;

amplification in the rule in this way is not needed. The notice requirement would apply under the draft to (b)(1) and (2) classes.

The draft Note says that notice of a proposed dismissal may be ordered when it is not required. Who is to pay? Suppose, for example, there is a partial summary judgment before certification and the plaintiff decides that the remaining claims do not justify the costs of further seeking certification and proceeding on a class basis. Can we demand that the plaintiff pay for notice to the class before voluntary dismissal is possible?

It was noted that when a defendant wins a class action after adjudication, there is no requirement of notice to the defeated class members. Nor is notice required if there is summary judgment after certification. Why require notice when there is a settlement? To support objections or intervention? Should we suggest in the Note that a web site (referred to in more neutral terms) be established for each class action, with posting of all significant information?

It was agreed that the draft Note statement that a court may order notice of pre-certification settlement or dismissal if there is reason to suppose that class members have relied on the pending litigation is desirable. It was further agreed to delete the statement that notice might be ordered following an involuntary dismissal after certification.

The suggestion was repeated that notice should be required when dismissal occurs after certification, without using the "would bind a class" term. The difficulty remains that the post-certification dismissal might be without prejudice. Decertification followed by dismissal also would not bind the class. Perhaps it would be better to refer to settlement, voluntary dismissal, or compromise "of the claims, defenses, or issues of a certified class," although that expression still would require notice of a dismissal without prejudice.

Reasonableness to class members. Allen Black suggested that the criterion for approving a settlement should be whether it is "reasonable, fair, and adequate to class members." Fairness in the large should not be considered. But it was noted that a class-action settlement may have powerful effects on people who are not class members. Hiring and promotion practices mandated by an employment discrimination decree, for example, may have enormous impact on employees outside the defined class. The court should be free to listen to, and take account of, the interests of intervenors. A statement to this effect might be added to the Note.

"Finding". The draft allows approval of a settlement only "on finding" that it is reasonable, fair, and adequate. More elaborate phrases might be used to describe the requirement that findings be made. The intent is to require findings so explicit as to support review of the decision. The Note might say that more directly.

"Side agreements". Draft Rule 23(e)(2) provides alternative versions for filing "all agreements or understandings made in connection with the proposed settlement." One alternative requires that the full agreements be filed. The other requires only a brief summary.

It has been urged that many of these side agreements should be protected by permitting filing under seal. A common illustration is provided by a separate agreement that permits a defendant to

withdraw from a settlement if opt-outs exceed a stated threshold. The parties resist public access to such agreements because they give "opt-out farmers" a target to pursue in seeking to persuade class members to opt out of the settlement. Another illustration might be an agreement by a settling defendant to cooperate as discovery continues against remaining defendants.

It was noted that the draft language reaches many forms of agreement. It reaches such things as fee allocation, which we had thought we want to reach. Payments to objectors are included. It also reaches agreements among defendants as to shares of payment, and agreements with insurers. "In connection with" may be too broad, although the burden would be reduced if only summaries need be filed.

An alternative would be to frame the rule to say that the court may require or direct a party seeking approval to file. That would permit flexibility without having to find Rule language that usefully distinguishes between agreements that must be filed and those that need not be filed. The Rule could then refer both to the agreements and to summaries of the agreements; the Note might suggest that a court might wish to begin with summaries that will help determine whether there are any agreements that should be filed in full. And the Note could point out the need to be sensitive to work-product and similar strategic interests.

As to fee-allocation agreements, it was argued that the division among attorneys can be addressed as part of the fee approval process. The same is true of objector fees. It was responded that agreements as to attorney-fee allocation should be disclosed to the court in connection with the settlement, and rejoined that this subject is better addressed in the fee approval process. The RAND study reflected concern with the buy-out of an appeal after settlement is approved; the draft reflects that separately.

The filing suggestion came to the committee "from out there." There was concern about different treatment for objectors. There also was concern for situations like *Amchem* and *Ortiz*, where class counsel separately settle the claims of individual clients before settling class claims. And there may have been some agreements that restrict the freedom of class counsel to bring future related actions, although most states would forbid such agreements as an improper restriction of the attorney's right to practice law.

As compared to a provision that simply authorizes the court to direct filing, it was urged that the rule should require filing but leave it to the court to determine what should be filed.

It was noted that objectors may come in, but that without filing they may not know what to ask about related agreements. It helps to require filing as the draft does.

It was suggested that perhaps the rule should say that the parties must disclose the settlement agreement, and that the court may require additional disclosures as appropriate. The Note would give examples — allocation agreements, disposition of discovery materials, and the like. On this approach, we could use the language of (2) as drafted, referring to agreements or understandings in connection with the settlement. The Note can observe that filing under seal may be appropriate. Another example might include the sophisticated substitute for an agreement not to bring future

cases — the defendant hires class counsel, so as to ensure that conflicts of interest will bar future filings.

Post-settlement opt-out limits. The draft, reflecting the December 4 meeting, allows members of a (b)(3) class to opt out after settlement terms are announced, even if there was an earlier opportunity to opt out. But it makes an exception if the court finds that the judgment is so favorable to class members that there is no good reason to allow an opportunity to request exclusion. This limit was included to reflect the fact that settlement may come after intense preparation, or even after trial has begun. In such circumstances there may be such well-developed information that the court review process provides a reassurance of fairness similar to the reassurance provided by actual adjudication; just as there is no opportunity to opt out after adjudication, so there is no need to permit opting out after such a settlement.

The draft language was thought too wordy. It was suggested that perhaps the exception should refer to "the advanced stage of the litigation." Or, if the information base comes from the maturity of litigation in other actions, it might be better to refer to "circumstances" that make an opportunity to request exclusion "unnecessary." The idea is that there is a full record, from whatever sources, to evaluate the settlement. In these circumstances the right to object provides sufficient protection.

It was asked why there should be a right to opt out at all, with the suggestion that this opportunity would defeat settlements in Title VII actions. Every class member thinks to have a unique injury. That is particularly true in disparate treatment cases (although certifying such cases for class treatment is probably a bad idea to begin with).

The settlement opt-out was defended as very attractive. We keep hearing that there are settlements unfair to class members. A pre-settlement opportunity to opt out is not much protection; members are trapped in the class by the power of inertia. They are in the class "without having done much." And many cases are settled at the same time as certification is ordered; settlements are indeed possible in the face of an opt-out opportunity. This works. It might be possible to attempt to adjust for the unique needs of specific categories of cases, such as employment cases, but the perpetual dilemma of Rule 23 is that it applies to disparate forms of litigation without much possibility of drawing refined distinctions.

The settlement opt-out has gained force as the difficulties of supporting objectors have become more apparent. The drafts that would have enhanced objector rights met sustained resistance. If we cannot count on objectors to provide assistance in the review process, the protection afforded by an opportunity to opt out is important. If many class members opt out and the settlement is destroyed, that may be a good thing as a sign that the settlement is not reasonable. This is better than arming multiple objectors with discovery rights. And it provides important protection for class members who have individual claims that support individual litigation.
Objectors. Draft (e)(4)(A) confirms the right of class members to object. Allen Black has suggested that the rule should draw explicitly a distinction that now appears only by implication from paragraph (B). A class member may object solely on personal grounds, seeking better personal treatment on grounds that distinguish the objector's position from that of other class members. Or an objector may seek to object on behalf of the class. It is urged that an objector who seeks to speak

for the class should meet the standards required for a class representative. Rather than do that, it might make sense to give the court a preliminary screening function by requiring intervention: "A class member may object to a proposed settlement, voluntary dismissal, or compromise (i) as it applies to the objector, or (ii) on behalf of the class if the court grants intervention for this purpose." The distinction may draw from at least two sources: other class members may rely on an objector who purports to speak for them, and leverage is gained by purporting to speak for other class members.

One response was that the suggested line is not clear. If a class member protests — "You mean this is all I get?" "We were gypped" — is that personal, or on behalf of a class? But the rule could make it clear that an objection is only personal unless a specified procedure is followed to gain standing to object on behalf of the class. This topic was deferred for later discussion.

Settling objections for class. Draft (e)(4)(B), requiring court approval for dismissal of objections made on behalf of the class, was put off for later consideration.

Preclusion: Draft (e)(5) would preclude later approval of a settlement substantially the same as a rejected settlement absent changed circumstances. This proposal was deferred for later discussion of the overlapping class proposal.

Attorney Appointment

Discussion of the Rule 23(*) provisions for appointing class counsel began with the note that the Third Circuit is examining this subject. It hopes to have a preliminary report from its task force ready for presentation at the November Circuit Conference. The FJC is working on this topic in tandem with the task force.

The current draft counsel-appointment rule is less aggressive than earlier drafts. It seems odd that Rule 23 now says nothing about class counsel, leaving this important topic to exploration in conjunction with assessing the adequacy of class representatives. "By their attorney ye shall know them." The emphasis of the present draft is largely on procedure: to say that the court appoints, and to say that counsel has an obligation to the class.

The most central questions presented by the draft are: (1) Should the court appoint counsel for a defendant class? (2) Should appointment be limited to the order certifying the class, or should appointment be required "before or at the time of certifying" a class? (3) Should applications be required — and if the rule applies to defendant classes, should any application requirement be limited to plaintiff classes?

As with the attorney-fee draft, this draft is written on a blank slate. There is no support in present Rule 23, but neither is there any reason to be concerned about making inadvertent changes in a present rule that does not exist.

Defendant classes. It was quickly agreed that the attorney appointment rule should apply to defendant classes.

Time to appoint. It was urged that class counsel should not be appointed before certification. In federal courts, there often is an MDL proceeding. The various lawyers involved in the MDL

proceeding work out counsel assignments among themselves; when the time for class certification comes, this deal tends to be reflected in the designation of class counsel. This can be recognized in the Note.

Duty to class. Draft (1)(B) says one thing and presents another for discussion. It says, drawing from Rule 23(a)(4), that class counsel is to fairly and adequately represent the interests of the class. In brackets, it also presents for discussion a statement that the class is the client of class counsel. The identification of the class as client replaces earlier draft provisions that described class counsel as fiduciary for the class. Does it mean anything to describe the class as client? Would there be problems when a class member also has an individual attorney? There is no clear or precise meaning in the designation of class as client.

Designating the class as client was supported on several grounds. The earlier reference to fiduciary status described both the class representatives and counsel as fiduciaries. This designation was dropped from concern that the fiduciary concept is increasingly used to impose obligations and liabilities that extend beyond the rules of professional responsibility. But it remains important to designate the class as client for several reasons.

Two separate sets of problems converge in identifying the class as counsel. The first arises from the relationship between state professional responsibility law and federal procedure. Today the professional responsibility of an attorney acting in federal court is governed by different rules in different federal courts. In many federal courts the predominant rule is that state law governs. State law plays a role in any event because attorneys are licensed by states, and the states seek to regulate the behavior of attorneys they have licensed no matter what court may be involved. The law of professional responsibility as it regulates the duties of an attorney who represents a class remains remarkably undeveloped. It is widely agreed that the underlying problems are difficult. One simple illustration serves to illustrate the point. The class representative may wish to accept a settlement offer that the attorney believes is inadequate to protect the class, or the representative may wish to reject a settlement offer that the attorney believes is the best resolution for the class. An individual client would control the decision; can the class representative control the decision on behalf of the class? The uncertainty that arises from lack of any guidance can be debilitating in itself.

The difficulty does not arise from obscurity alone; the draft that designates the class as client does not of itself answer any of the questions that arise from the designation. The difficulty could be worse if different states begin to develop answers that are at odds with the best development of federal class-action procedure. This prospect is made more threatening by the perception that there is an increasing tendency in some states to seek control of procedure in the guise of purporting to regulate professional responsibility. Most things that lawyers do in litigation — indeed in a real sense every procedural step a lawyer takes — are governed both by rules of procedure and by rules of professional responsibility. State regulation of professional responsibility can easily become control of procedure. But it is federal law that creates a federal-court class action. Federal courts must be able to control the nature of their creation. The purpose of designating the class as client is to enable gradual development of a federal judge-made law for this area. On its face, this provision does not protect counsel who act in reliance on federal principles from state discipline. But it is a beginning.

It is important to remember that designation of the class as client does not make individual class members clients of class counsel. If conflicts emerge within the class that require recognition of subclasses, for example, original class counsel should be allowed to continue representation of at least one subclass without difficulty arising from former representation of the part that has become a separate subclass. To take another example, the fact that class counsel might be disqualified from representing one or more individual class members as individual clients because of a conflict of interests should not disqualify class counsel from representing the class.

It was asked why the duty to represent the class is expressed by a word that deviates from the Rule 23(a)(4) parallel: (a)(4) requires that the class representative fairly and adequately "protect" the interests of the class. Why say "represent" here? The answer was in part that lawyers represent clients as a matter of ordinary expression. Beyond that, the distinct wording helps to underscore that the duty of counsel is something apart from the duty of class representative, an obligation that is independent of the representative's obligation to the class.

The next observation was that the draft clearly makes the class the client, not individual class members. The rule would say something important if it says this, something that goes beyond the duty to represent the class. But the significant statement also has uncertain consequences. We should make the statement only if we are comfortable with the uncertainty.

The obligation to represent class interests is a clear statement of something that exists now. The relationship with the class representative is not the same as the relationship with an individual client. The nature of the changed relationship is something that the representative must understand in making the decision to pursue class certification. But the nature of the change is very difficult to define. We must be careful before we undertake to enter this area. We do not know what developments may follow. Suppose, for example, a case begins with a real individual client who comes to a lawyer to pursue an individual complaint. They decide together to pursue class litigation. Then the client, now class representative, wishes to reject a proposed settlement: how are we affecting the approach a court should take to working this through? And what about communications by an adversary with class members: courts regulate this now as a matter of Rule 23 procedure. Would the definition of class as client make all class members into persons "represented" by counsel, so that rules of professional responsibility control before there is a court order? And if there is a court order, is it clear that all states would recognize a "court order" exception to permit direct communication?

It was asked why we should attempt to take on these questions; why not simply collapse the duty to appoint into the provisions that establish an appointment procedure, leaving out statements about the class lawyer's duty to the class?

A suggested compromise was to state in the rule that class counsel has a duty to fairly and adequately represent the class, but not to add the statement that the class is client. This would provide a foundation, and could lead to gradual occupation of the field by federal law. The duty of counsel to class would become a matter of Rule 23 principle. It might even be argued that it is easier to occupy the field without referring to the class as client; a rule that establishes the class as client may seem to invite state regulation.

It was pointed out that we have many other implicit assumptions that the court has supervisory authority over class counsel as representing class interests. The requirement that a class settlement be approved is one. The assumption that courts can inquire into "side agreements" is another. If we have an appointment rule, it is useful to say something about what class counsel is appointed to do.

Pre-appointment acts. It was asked why we should include even the much-reduced statement in draft 1(c) that an attorney may not bind the class as its attorney until appointed by the court as class attorney? This provision is the residuum of earlier attempts to control acts on behalf of a proposed class before certification. Those attempts fell apart for good reasons. There is no good to be accomplished by this remaining provision and some potential for mischief. All agreed that it should be dropped.

Application for appointment. The draft includes an optional provision that would allow a reasonable period for filing applications to serve as class counsel. This may help competing applicants; there is an analogy to the Private Securities Litigation Reform Act procedure. And the draft presents the question whether an application should be required to represent a defendant class — defendant classes are relatively rare, and there is an obvious problem that no one may be willing to apply or serve.

The first question was whether competitions for appointment as class counsel occur outside securities litigation. The answer is that bidding has been found appropriate in other fields. It was urged that competitions would be inappropriate in Title VII litigation, and would be encouraged by this rule. An experienced lawyer who has done a lot of work to prepare a class action should not be displaced by someone else who wants to compete to represent the class. It was argued that it would be better to provide that the court "may" — not "must" — allow a reasonable time to apply. The reasonable time need not be long. The draft encourages the court to recognize the preparatory effort of the attorney that filed, and to recognize experience as well.

It was suggested that there is not likely to be a competition for appointment until an action is publicized. There will be competitions in mass tort cases. That might encourage a requirement that the court "must" allow a reasonable time to apply. But there would be a manifest problem with the prepackaged cases in which several things occur at once: the complaint is filed, an agreed class certification order is presented, a settlement agreement is tendered for preliminary approval, and notice to the class is offered. To require that there be a delay while other lawyers apply to represent the class could be untoward. For one thing, the settlement shows that there is money to be had; there will be competing applications, and often to no good end.

This push toward the permissive "may" was met with the observation that many judges would welcome the shelter of a "must" provision that avoids adding yet another decision point. The application process will be much like a fee application — lawyers will attempt to personalize it in ways that make it emotionally difficult for a judge to deny the application without seeming to deny the worthiness of the lawyers.

Another observation was that the appointment process is likely to lead to appointment of local counsel when it was local counsel who filed the action. But big firms may try to muscle out

smaller firms by arguing they can do it better, faster, and cheaper. And there will be many cases in which there is no competition — the true "public interest" case often will be filed by the only people interested and willing to pursue it. A mandatory waiting period, moreover, may deter some filings. An attorney contemplating the need to do substantial work to prepare to file a small-claims class, for example, may fear that the work will be lost when a rival appears to gain a free ride by offering terms based on the free ride. Much depends on the nature of the case. There are many situations now in which competing actions are filed in federal courts, consolidated by the multidistrict procedure, and the lawyers work out their respective roles as part of the MDL proceedings.

Requiring an application, on the other hand, may give the judge some leverage. It may be particularly useful in supporting a focus on attorney fees at the beginning of the litigation; see Judge Becker's opinion in the Gunter case, 223 F.3d 190.

This discussion was resolved by agreeing that the rule should provide that the court "may allow a reasonable period" for applications. The Note should observe that there may be no advantage in waiting when a settlement is presented at the time of filing. But if there is no achieved settlement, the expectation would be that ordinarily there is a waiting period before appointment of counsel.
Defendant-class application. If counsel can be appointed for a defendant class only on application, certification of a defendant class could be defeated easily. No one need apply. The rule should be limited to a "plaintiff" class; the alternative of referring to a claimant class is an unnecessary precaution — courts are more likely to understand that a counterclaiming class is a plaintiff class than to know what to make of a "claimant" class.

Multiple class counsel. In many cases it will be desirable to have several lawyers functioning on behalf of a class, and to draw them from more than one firm. Should the rule be drafted in terms that reflect the values that may flow from arranging a "consortium"?

There is a risk in consortiums. They may work to avoid competition between attorneys who otherwise would arrange to represent the class at lower cost. A consortium may tend to provide work for all members, when it is unnecessary work. There have been strange experiences in which lawyers compete with each other for appointment by derogating each others' abilities, and then come forward as a team.

Courts understand that they can authorize consortiums now. In MDL proceedings there is a committee of lawyers. But the courts insist on designation of one lawyer who can speak with authority for all.

This discussion was resolved by agreeing that something might be said about the arrangement of consortiums to support the appointed class counsel. But that will depend on whether there is something useful to be said. Detailed treatment is a matter best left to the Manual on Complex Litigation.

Laundry list. Draft (2)(b) presents the familiar question whether it is wise to include a laundry list of factors in a rule. The rule could be drafted to provide a general criterion, echoing the duty of counsel to fairly and adequately represent the class, with Note discussion of the factors that bear on appointment. This approach might make it easier to recognize the interests that make it important

to seal some of the useful information to prevent access by opposing parties. An applicant should not be forced to reveal to potential adversaries the extent and nature of the preparation that has been devoted to the case, what resources will be committed to pursuing the litigation, or even what the fee proposal is.

The first decision was to strike the description of application information as "detailed." Applicants will provide all desirable detail without this prompting, and it is better to avoid a point of possible wrangling among competing applicants.

It also was agreed that much of the application information should be protected against access by the class adversary. The information is needed for the court (and perhaps class representatives?). This might be expressed as a provision for filing without disclosure to the opposing party, or might be left to recognition in the Note. Some other form of expression in the Rule might be better. We may want to find out whether experience under the PSLRA provides useful guidance.

One way to consign the list of factors to the Note would be to require that the application disclose "matters pertinent to counsel's ability to fulfill the duty to fairly and adequately represent the interests of the class." The Note could set out the list. But the same preface could be used, establishing the test for appointment, to be followed by the list. The list does include matters that often are not considered now, particularly proposed terms for fees and nontaxable costs and representation in parallel litigation that might be coordinated or consolidated with the class action. Leaving these factors to expression in a Note might diminish the impact. That presents a temptation to keep the list in the body of the Rule.

Further discussion of the "laundry list" question was deferred for discussion with the lawyers group on the next day.

Class Action Attorney Fees

Scope. The first point made about the attorney-fee draft is that it goes beyond fees for the lawyer appointed as class counsel. It would include objectors. And, if there is a basis in agreement or authorization in law, it would cover an award for counsel who did preliminary work, filed the action, but did not win appointment as class counsel. There was no response to the question whether this scope is desirable. But it was asked who is to pay fees to the lawyer who does not represent the class or an objector? The opposing party? It was answered that any such award must be authorized by law — a common fund award might well be made to a lawyer whose efforts helped to generate the fund. Beyond the common-fund cases, there may be room to interpret some fee-award statutes to permit an award to a successful objector who won a reduction in a statutory fee award to class counsel, but that and other examples would depend on an interpretation of the statute.

Other points that may deserve discussion are the feature that calls for disclosure of agreements with respect to fees, and that would provide discovery for objectors. The draft deliberately does not take a position on the choice between "lodestar" and "percentage-of-recovery" fee calculation. And it is limited to fees authorized by law or agreement of the parties, unlike earlier drafts that seemed to support creation of new bases for fee awards.

Objector discovery. It was suggested that the provision for objector discovery might be taken out of the draft. The problems are the same whether the objection goes to settlement or a fee award. Explicit rule provisions for discovery will encourage "bad" objectors. There is discovery now on fee application disputes. We should put this in the Note.

Other issues. The factors in the laundry list, whether in rule or note, suggest difficult questions about the court's authority to supervise fee-allocation agreements and representation agreements outside the class action. There is concern that class counsel or others will receive substantial fees for doing little work and incurring little risk by acting under standard contingent-fee arrangements made with individual class members. The result may be two fees paid for essentially the same work, first to class counsel and then to individual counsel. It is not obvious that the class-action court can do much about that.

A final question is what is an "objection" to a fee award. It seems common for class members to write protest letters to the court, protesting in some manner the fee award. Should the line depend on whether the communication is formally filed? Should the rule say nothing on this question, leaving it to common-sense adjustment by the courts?

These and other fee-award topics were thought particularly suitable for discussion with the lawyers group.

LAWYERS GROUP DISCUSSION

Judge Rosenthal began the meeting with the lawyers group with thanks for taking the time to prepare and to join the subcommittee's discussion. The purpose of the current study continues to be to determine whether any changes should be made in Rule 23, and if so what changes. The advice of those who have participated extensively in class-action practice, who bring different perspectives from different forms of involvement, and who have demonstrated careful reflection by continual involvement with Advisory Committee efforts, is extraordinarily helpful.

The focus of the current effort is different from the focus in earlier years. It has moved away from the criteria for class certification. Attention now goes to the process by which class actions are litigated, recognizing that changes in the process will inevitably have some effect on certification practices.

As a first step, it would help to have individual statements on what priorities the subcommittee should set. Is the new focus proper? Should all of these problems be considered, should other problems be added or substituted? If the right problems are being considered, are the draft approaches sensible?

The first partipant to speak began by expressing uncertainty whether the attorney-fee subject "cries out for rulemaking." Everyone knows what the perceived issues are. A lot depends on whether the award is to be made on a common-fund theory. Courts are doing a pretty good job. There are not many horrible results, and most of those are corrected.

Appointment of class counsel may be more amenable to beneficial rulemaking, though courts seem to be doing a good job here as well. There is a lot of ferment about auctioning the appointment. The Third Circuit is launching a project to study the appointment of class counsel. (It was noted that the subcommittee is working with the Third Circuit task force, which will have support from the Federal Judicial Center.)

There is a problem with overlapping classes, some in state courts, others in federal courts. Some state courts develop reputations that attract filings. The result can create a real mess. The law-professor problem of "reverse auctions" is a real problem; there have been early settlements won by picking out the most amenable class representative. It will be difficult to do anything about this, but attention could focus here.

The second participant to speak agreed that it is wise not to deal with the requirements for class certification. If anything is to be done with Rule 23, it is better to focus on class-action process.

The overlapping class problem, with the associated racing to file and racing to settle, is a big problem. But there are limits to what can be accomplished by rulemaking. A statutory approach could be more powerful. The drafts are interesting. But it is not clear that there is authority to write even a rule that deals with the preclusive effects of a refusal to certify a federal class. The question of § 2072 authority needs to be addressed.

Settlements do generate much concern about the need to assure fairness. It is important to ensure that all needed information is conveyed to the court. These topics are important ones for the Advisory Committee.

It is not clear that attorney fees should be addressed by a new rule. Generally, a rule is most appropriate when there is a need to clarify the law or to fill a vacuum. If indeed the law now is in reasonably good shape, we may simply invite more litigation and unsettle well-settled points if we seek to capture things in a rule. Probably we do not need a rule that attempts only that.

Appointment of class counsel deserves study. But again it is not clear that we can make the process better by writing a new rule.

As a general matter, it is not useful to codify best practices in a rule. The Manual for Complex Litigation can do that. It can be more expository than a Rule can be.

The third participant to speak expressed agreement with many of the points made by Allen Black in the letter he circulated shortly before the meeting.

The most useful of these topics to address is appointment of class counsel. It is difficult to manage this process. If selection is left to plaintiffs' counsel to negotiate their respective roles among themselves, the process becomes complicated and political. Courts need to get back into the business of sorting out these relationships. It is not unusual for litigation to be delayed for months while counsel concentrate on working out their own shares of the action.

Plain-language notice is a good idea. One important point to be made is that an entire settlement agreement can be posted on the web site for a litigation.

The proposal that would preclude certification of substantially the same class after a federal court has denied certification presents real problems. The denial may occur because certification was not vigorously sought or well argued. The class allegation may have been included for leverage; when that does not work, plaintiff's counsel loses interest. Writing a rule will be difficult.

The overlapping class problem is not as bad as it was two or three years ago because "the drive-by windows are being closed." The problems that remain are in part a result of a federal system and a competitive market. Perhaps we need to impress by rule or through the Manual that counsel has a duty to tell the court of any known related litigation. This information will enable the courts to coordinate their activities. This is a professional obligation of counsel on all sides; sometimes they all know, but no one tells.

As to attorney fees, the best practices keep getting better. If they are codified, practice will petrify. There is a lot going on. Fee applications are scrutinized intensively. Some courts are setting fee terms at the beginning, specifying a percent of recovery or setting an hourly rate. Monthly reports on activities are required. But curiously, it seems possible that fees set at the outset are higher than the awards that would be made if the matter were left for determination at the conclusion. When the settlement or judgment has come around, the outcome intuitively feels more inevitable, less contingent, than it seems at the beginning. We should let the experimentation continue. It might help to have an autopsy of cases that have produced seemingly disproportionate fees. Fees generally do not seem too high, but awards that seem excessive occur often enough to suggest some problems remain.

The fourth participant to speak noted that the core problem is the basic decision whether to certify a class. The problem is complex. Certification or a refusal to certify has many ramifications down the road. What can facilitate a good certification decision depends on what the impediments are. The impediments involve at least three things: (1) The judge does not really believe that he has control — there is competition from other courts. (2) There is a lack of information; the importance of this problem is often underestimated. In the mid-90's personal injury classes were often certified. But the certification decisions were made on the basis of pleadings and generalities; there was no idea of how the case would be tried nor of what impact certification would have on settlement. It is an enormous problem to get information about what will be the pivotal issues, how they will be tried, what is to be done about individual class members. (3) Class actions invoke great political pressures. They are being used as a vehicle to express the tremendous social and business issues that get litigated. The Holocaust is litigated. There is a lot of pressure on the judge from these issues. The certification decision is very visible.

To address these problems we should:

(1) consolidate decision-making with one judge. This is very sensitive, and imposes great responsibility, but it is better than the present situation of competition without any control.

(2) Without undertaking to evaluate who should win on the merits, courts should be guided to look down the road at how the nature of the merits issues affects the way the case can be tried. This proposal is not the same as the preliminary look at the merits considered and rejected by the Advisory Committee several years ago. It is that the court should know enough about the issues that will be disputed to know what will be tried. Discovery can be framed for this purpose. This knowledge will support better decisions about superiority and manageability. There may be some situations, such as *Rhone-Poulenc*, where the actual results of several individual actions supply this need. But the problem arises in cases that do not have this form of track record.

General discussion of this issue began with the observation that some courts require trial plans as part of the certification decision. The plans can help to show what trial will be like. The Manual for Complex Litigation can encourage this practice. This practice has gone on "forever" in antitrust and other commercial cases. The parties tell the judge what issues they mean to try on a class-wide basis. But it was responded that most trial "plans" fail to add anything useful to the general and speculative arguments made in the initial certification request.

The task is to look at the merits "as common issues," without looking at them to guess who will win. These problems are played out in tort cases. The defendants want to look at each snow flake, arguing aggregation is impossible. The plaintiffs want to look at all class members as a single drift that can be plowed in one swoop by heavy equipment. But it is possible to tell whether a trial can work by looking at the nature of the issues that are framed by the dispute on the merits, without at the same time attempting to predict who will win on trial of those issues.

The trick, in short, is to defer the certification decision until it is clear that there is enough information about the merits to decide whether the case can be tried on a class basis.
(3) There should be early and meaningful appellate review of the certification decision. The courts of appeals seem to be acting more often in the role of saying "no" than in the role of saying "here's what you can do."

It is a bit disturbing that the current proposals seem an attempt to regulate the marketplace. Rules cannot do that. It is ironic that Rule 23 created the marketplace by creating class actions. We should look for the best process.

And it is disconcerting that ideas may be denied consideration because they have been rejected earlier. We cannot know what the politics are. Old ideas that seem good deserve further support. At least they should be kept visible.

Finally, the idea of mandatory limited-fund aggregation is being addressed in bankruptcy. Bankruptcy is incredibly cumbersome. It is a shame that there is not a more balanced way. A rule revision of the *Ortiz* decision would be welcome, providing an alternative to bankruptcy for mature torts that cannot be brought into another form of consolidated proceeding. Bankruptcy "is all federal," but even together the bankruptcy court and the district court may lack jurisdiction under the current Code to effect closure. Rules on limited fund classes are the right direction for this problem. The model might be a mandatory class proceeding that does not require a firm showing that the defendant's assets are inadequate to satisfy all claims, just as bankruptcy reorganization can be sought without showing actual insolvency.

A rule dealing with overlapping classes would help. Consolidation under present MDL law does not give closure.

The fifth participant closed the round of initial statements by recognizing that we have class actions and will continue to have class actions. There are a number of problems that have plagued his practice. And there are other systemic problems that should be addressed, without regard to whether they help or hinder any particular identifiable group of litigants.

Overlapping classes are high on the list of "plague me" problems. Different groups of plaintiffs' counsel see an opportunity and compete to get there first, with an appealing case, in a favorable court. Even when federal actions can be consolidated under § 1407, it is frustrating to bring some measure of sense to this process. And there is forum shopping. This can confer an advantage of the defendant, who can pick which group of lawyers to deal with. But these problems are cumbersome and impose high costs on the system. When one drive-by window closes, another opens.

Antitrust, mass-tort, consumer, and other classes differ in many ways. But there is the equivalent of a (c)(4) issues class in mass torts. Some trial plans indeed are useful, but the earlier discussion is right: the judge needs more information about the merits to inform the certification decision. The desire to certify leads to common issues trials without thinking about the mess that may be left after the common issues are tried. I try to get judges to think about what the verdict form will look like, but they do not want to do it. It seems to them premature to talk about verdict forms at the certification stage, but this could be a powerful discipline in thinking about what the trial issues should be. Common-issues trials, further, may present due process problems. The trial of a "composite perfect plaintiff" may not be fair. The Fourth Circuit rightly identifies the problem in the Meineke (?) case.

The law of fraudulent joinder would be the first place to make improvements. Many state-court classes are framed by joining a local retailer as a defendant when everyone knows that this defendant will be dropped after the joinder has thwarted removal.

As to systemic problems, there is a need to be fair to class members. Notice is a problem. At times class members are not notified of major developments in their cases. But it will be difficult to frame a rule that defines the circumstances that call for interim notice. And notice is costly.

The "back-end opt out" in (b)(3) classes is good, referring to the proposal that would allow class members to request exclusion after settlement even if there was an earlier opportunity to request exclusion. Often this is provided by agreement now, adding a provision for the defendant to back out of the settlement if the opt-outs exceed a specified threshold.

A mandatory class to allow an end game when both plaintiffs and defendants agree could be a good thing. Bankruptcy is an unattractive alternative.

Specific Proposals

Following these opening observations, discussion turned to the specific proposals in the agenda.

Overlapping Classes

The problem is the inability of the present system to require everyone to appear before the same decision maker. The proposals in the agenda adopt two approaches. One is "preemptive," according a federal court exclusive control over all related litigation. The other is "preclusive," foreclosing certification by any court of a class that has been once rejected by a federal court. It may be most helpful to discuss these questions on the premise that the Enabling Act does not impose limits that will prevent doing what should be done.

Beginning with preemptive federal control, introduction of the draft rule model began with the observation that it is not entirely possible to put aside the premise that there is Enabling Act authority to frame a rule. The concepts that are used to justify Enabling Act authority may influence the shape of the rule that is adopted. The draft is based on the premise that Rule 23, as it now stands, authorizes a federal court to create a class. The class is not something that exists in nature, but a legal construct in much the way that a corporation is a legal construct. The corporation analogy shows just how real this seemingly artificial construct can be. One purpose of the class-action construct is to achieve efficient, consistent, and fair final disposition of what otherwise would be many individual actions. This very purpose is defeated if the class disintegrates under the pressure of competing litigation in other courts. A court seized of a res in in rem litigation has authority to prevent interference with its jurisdiction and control of the res by litigation in other courts. A bankruptcy proceeding, similarly designed to effect coherent ordering and disposition of competing claims, triggers an automatic stay that prevents defeat by competing litigation. Similar protections are necessary if a federal court is to retain effective control and achieve the purposes of class litigation.

This purpose shapes what should be done. The draft in the agenda is too inflexible because it is a blanket prohibition that forbids a class member to "pursue" litigation in any other court. There may be circumstances in which one or more class members should be allowed to proceed, just as the automatic stay in bankruptcy can be lifted. One pressing need may be to allow a class member to file an individual action to protect against limitations problems, even if nothing more can be done after the filing. The need to file individual actions is enhanced by the common prospect that the class member will have related claims against other defendants — if there is a class action against the manufacturer of a defective product, individual class members may have individual claims against many different retail dealers, repair people, or the like. Other courts should have the opportunity to permit filing and then consider whether it makes sense to proceed against the defendants not involved in the class action. Another pressing need may arise from the different circumstances of different class members. There may be some individual actions that have progressed to trial, or a stage ready for trial, while the class action is still in the initial stages. Some class members may have compelling needs for immediate relief. There must be power to allow individual actions to proceed in these and like circumstances; often enough the result will not be a significant interference with the class action itself.

A rule on overlapping classes probably must be addressed to restraints on class members, rather than directly to other courts. In some ways this limit may be unfortunate. It could be more efficient to empower a federal court to behave as a multi-court litigation panel, or even to create a new panel or expand the authority of the present Judicial Panel on Multidistrict Litigation.

It was observed that once the federal class is decertified, there is no longer a class to be protected. And so the draft provides.

The preemptive effect of federal class certification is balanced in the drafts by addressing the preclusive effect of a refusal to certify. There are two rather different drafts. The first appears in Rule 23(c)(1), and provides simply that an order denying class certification precludes certification of substantially the same class by any other court unless a change of law or fact creates a new certification issue. The change of law can be accomplished by moving into a different court system; a state rule that adopts verbatim the language of Federal Rule 23, for example, can present a different certification issue if state courts interpret the common language differently. This draft makes no allowance for the different grounds on which certification is denied. The alternative draft lacks the excuse for changes of law or fact, giving a refusal to certify the effect of precluding certification by any other court of a substantially similar class to pursue substantially similar claims, issues, or defenses. But it has different escape mechanisms. A refusal to certify based on inadequate representation or lack of typicality would not bar certification in another action. The court that refused to certify can defeat preclusion by specifying that the refusal is without prejudice, either when denying certification or later.

It was observed that the preclusion approach is easier to conceptualize if it takes effect only upon certification of a federal class. But that leaves a time gap between filing and certification, and that may create pressure to hasten the certification decision. Protection of thoughtful certification decisions would require that other proceedings be stayed from the time of filing. But that approach weakens the analogy to in rem or bankruptcy proceedings because there is no class entity until the certification order is actually made. And there could easily be a new form of race to file. The analogy to the effect that simple filing has in tolling statutes of limitations is not strong, because tolling is done for the benefit of class members. The preclusion rule works against the interests of class members who prefer other forms of litigation or other courts.

Another question about the preemption approach is whether the federal court has "personal jurisdiction" to regulate class members. Suppose an action is filed in federal court in Michigan seeking certification of a class that includes a member living in Indiana whose only connection with the defendant is in Indiana. Can the federal court in Michigan properly restrain Indiana litigation by the Indiana citizen? Is this question different from the authority of the federal court in Michigan to enter a class judgment that binds the Indiana class member on the merits?

It was suggested that the stay of state proceedings could be seen as in effect a rules-based All writs Act. The effect is to protect the federal court's jurisdiction to decide the certification issue.

It was suggested that as a practical matter, the stay of proceedings in other courts must take effect before certification is ordered. We do not want the preemptive authority to go to the first court to decide the issue. And we also have to confront the race to the courthouse; we should not

automatically give this preemptive authority to the federal court where the first action is filed. In commercial cases, where there may be 50 or 60 filings, the practical solution is to get the judges on the phone to work it out. This proves effective in most cases. It was observed that on the other hand there have been notable situations in which some judges refrain from cooperating, preferring to maintain separate proceedings even at the cost of mammoth duplicating discovery and like inefficiencies. And some judges are quite uncertain whether it is proper judicial behavior to engage in ex parte coordinating activities with judges of courts in other jurisdictions.

The question of abstention analogies was raised. Many courts do respect "other-action-pending" ideas, and in terms more sophisticated than all yielding automatically to the court of first filing. Attention is paid to the capacity of the different courts to frame the most comprehensive proceeding, other differences in capacity to process the litigation, and so on.

At a minimum, it would be useful to build a system that reinforces the obligation of attorneys to inform the court of parallel actions.

A different question is how class members are notified that they cannot do anything? Some beginnings may be made in pretrial conferences and like settings, but we need more.

A different concern was expressed that the draft rules appear to give a single judge the power to take control, without any detached body to decide which judge will assume that control. It is dangerous to make this depend on the deliberate choice of courts by plaintiffs, random assignment to particular judges, and the uncertain pace of developments after that.

It was noted that today a judge who is motivated can take control. The real impact will be on the allocation between state and federal courts. There may be a rush to file in the federal court thought most favorable by one or another plaintiff, but the rush to file in state court will be deterred by the expectation that a federal court will soon take control.

Once a single court takes preemptive control, all parties will concentrate their efforts there, including the best plaintiffs. What happens with diffusion is that the lowest common denominator prevails. The first decision remains very important.

Turning to the effects of a federal refusal to certify, it was asked what should be done when a federal court considers certification of a statewide class and concludes that the issues are not amenable to class treatment. Then a state court in a different state certifies a statewide class for that state based on the same dispute. This is happening now. It was answered that the draft rules would not reach that situation: the different-state class is not substantially the same as the class rejected by the federal court. Similar answers are likely to be given as between state courts, but in any event are outside the reach of a federal rule. If a Michigan court, for example, denies certification of a Michigan-wide class for reasons that would apply to an Indiana-wide class, should that preclude certification of an Indiana-wide class by an Indiana court? Or if the Michigan court certifies the class, should that preclude the defendant from advancing again in Indiana the same arguments that failed to defeat certification in Michigan?

It was asked how common it is to attempt to win certification of a class in another court after one court has denied certification. The response was that good lawyers do not make repeated attempts, but that other lawyers do it. And there may be good reasons. After the refusal to certify a nationwide cigarette smokers class in *Costano*, many state-wide classes have been certified. Even if there are not good reasons, however, "they keep trying. Four, or five, or six refusals may make it go away."

The real problem with preclusion may be that the first attorney to seek certification has not done a good job of pursuing it. It is a lot to draft a rule relying on the expectation that there was effective representation on the certification issue. There were good issues that were not developed in the *Costano* litigation, but that were developed later. So in one specific situation, five state courts denied class certification. Then a federal court spent two years developing a record on certification and ultimately certified a "good" class. How can the rule incorporate a requirement that the first denial be based on effective presentation of the best arguments for certification?

A different problem arises from recognition of state authority to certify a class on the ground that state criteria differ from federal criteria. This approach virtually invites states to adopt different criteria, and that would not be a good thing. Perhaps differences in class-action procedure should not be allowed to defeat preclusion; only substantive-law changes should justify reconsideration.

Another concern was that the opportunity for preclusion would encourage defendants to seek to win the first decision on certification by picking the proceeding brought by the weakest plaintiff. A good plaintiff who learns of the federal filing needs to know whether that plaintiff knows how to litigate the certification issue and will want to be involved. The issue of who will be class counsel comes up early, "giving a whole different dynamic driven by preemption and preclusion." This may not be a bad dynamic. It may concentrate forces in one court, yielding better resolution of the certification issue. But that depends on learning that the action has been filed — and how is that to happen? It might be possible to preclude only those would-be representatives who had a full-and-fair opportunity to participate in the first certification decision, but that would seem to create a new objector opportunity and would emphasize the notice question.

A different problem was suggested. Suppose a state court, after 20 minutes of argument and before an answer is filed, certifies a nationwide class. A federal court later refuses to certify for reasons "that go to the nature of the claims." What happens next? Can the federal court negate the earlier and persisting state certification?

It was observed that MDL practice seems to be changing by moving toward consolidation earlier, when fewer cases are pending, because defendants want to avoid the problems of competing actions. People feel comfortable with one MDL judge taking control — perhaps in part because of a perception that the JPML is more likely now than before to send the cases to a court that did not have any of the original filings, and to rely on something other than a random selection of judges. The MDL consolidation does support coordination with state courts. People have confidence that the MDL judge will "do it right. The MDL blessing is beneficial.

The difficulty of relying on MDL proceedings is first that there must be more than one federal action. In the Lease Oil Antitrust Litigation there was only one federal action for some time; during

this period competing state actions were filed and settled. Finally an absent-minded plaintiff filed a second federal action that was promptly transferred in MDL proceedings. The MDL court directed the defendants to stop negotiating settlements of state cases, effectively ending the competition. (It was noted that federal courts disagree on the question whether there is power to make such an order.)

It was asked whether there is power now to protect the process of determining whether to certify a class by an injunction.

The discussion was summarized with the observation that all participants seem to believe that in a perfect world, it would be useful to give a federal court control of competing actions and to preclude repeated efforts to certify the same class. There are concerns about § 2072 authority, but the topic deserves continued work.

Alternatives also might be considered. The American Law Institute Complex Litigation Project developed a model for mandatory intervention that might be adapted to reduce competing class actions. It would be possible to ask the Judicial Conference to recommend legislation authorizing the JPML to designate a federal court with exclusive power to resolve a class certification issue.

It also was noted that it is conceptually easier to identify the authority to provide that rejection of a settlement precludes other courts from approving the same settlement.

One thought was that MDL consolidation might be made the trigger for a rule that authorizes only an MDL consolidation court to exercise the power to determine whether a federal class action should preempt state proceedings.

Certification Decision Process

The (c)(1) proposal was introduced with explanations similar to those offered in the first discussion.

The proposed change that would permit amendment of a class certification "before final judgment" rather than the present "before decision on the merits" was supported by observing that the reference to "on the merits" is confusing. Many different events might seem to be a decision on the merits. But it is difficult to know where to make the choice. Suppose there is a partial summary judgment against a class, followed by further proceedings that ultimately lead to decertification. Should the decertification defeat the preclusion results that otherwise would flow from the partial summary judgment? Should that depend on whether there was any opportunity to seek appellate review of the summary-judgment ruling? So too, what happens if a class member opts out after there has been some activity on the merits: are the earlier rulings binding?

It was suggested that in practice, "on the merits" means "final judgment. It has to mean 'when it's over.'" But the question does arise. It was asked whether there are practical problems — perhaps if not, the change should be dropped.

Similar doubts were expressed about the proposal to drop the statement that a decision whether to certify is "conditional." It is there now. It may have the effect of reducing pressure, making it easier to certify in the belief that any mistake can be undone. But removing the "conditional" term may increase rigidity.

Discussion turned to the proposal to delete the "as soon as practicable" requirement, whether in favor of "when practicable" or in favor of some other phrase. Concern was expressed that judges now understand this phrase to mean that they are free to decide on certification when they are going to decide. There is a kind of protocol that for the most part is pretty orderly. It would be undesirable for a change of language to be interpreted as an invitation to put off the certification decision and become "lost in the merits." There is a little bit of desirable pressure in the "as soon as practicable" phrase.

It was noted that the Standing Committee sent back for further consideration the original proposal to substitute "when practicable" for "as soon as practicable." That does not preclude advancing the same proposal again for good reasons. The common understanding is that the timing of the certification is not a temporal problem in the sense of defining a specific time period. Instead, it is a matter of deciding promptly to learn all that needs to be learned to make a good decision, and then promptly deciding. Most judges seem to understand that now. But as Rule 23(f) appeal petitions are beginning to come to the courts of appeals, arguments about the timing of certification are emerging. It is possible that there will be pressure to use the present language to encourage unwise acceleration.

The timing of certification was joined to the question whether a denial of certification should preclude certification of the same class in other proceedings. If there is to be preclusion, we may wish to soften the language of (c)(1) to ensure that the first decision is made carefully.

If a change to "when practicable" might be read as an invitation to take more time, it may be important to provide advice in the Note to guide courts in the inquiry to be made before the certification decision. There are risks now that some courts assume there is more time pressure to decide on certification than should be, and believe that any consideration of the merits is fenced off in a way that should not be. At the same time, once the work needed to support an informed determination has been done, there should be no delay.

It was suggested that "when practicable" makes it clear that it is proper to decide motions to dismiss or for summary judgment before a certification decision. Many courts find this helpful when a defendant is willing to surrender the advantage of precluding the class in return for early disposition of individual claims. Some defendants are willing to do this, particularly if they are satisfied that defeat of these individual plaintiffs will not be followed by another action in which other plaintiffs renew the issues and seek class certification. Other participants suggested that they almost always move to dismiss before the certification decision, and that summary-judgment motions are common.

But the certification decision should be a first order of business. The question is who is the plaintiff — only the individuals before the court, or a class? Taking time to decide on certification permits other things to be done, such as considering settlement, but that should not be relevant to

timing the certification decision. It is dangerous to delay the decision for the purpose of pursuing settlement. Making this the first order of business, with only limited discretion on timing, creates predictability. There may be good consequences, deterring filings by some plaintiffs who count on delay for other purposes. And this is not simply a matter of general case administration that should be handled as a matter of Rule 16 procedure.

It was observed that courts seem to be giving the certification decision first priority in most cases.

One participant advised leaving "as soon as practicable" in the rule. Courts remain free to decide what is practicable. No matter what the Note to a changed rule might say, courts will view any change as an invitation to do other things before deciding on certification.

So the question is whether there is a way to say more in Rule (c)(1) that will encourage the proper rate of deliberate speed toward a certification decision that is fully informed, including consideration of the ways in which the nature of the dispute will shape events at trial, and not unduly delayed.

Class Notice

(b)(1) and (2) class notice. The draft (c)(2) proposal extends the requirement of notice to (b)(1) and (b)(2) class actions. The character of the required notice is distinguished from notice of a (b)(3) class by a provision that looks to the purpose of requiring notice. The purpose is described as reaching a sufficient number of class members to establish an effective opportunity to challenge the class definition or certification and to monitor the performance of class representatives and class counsel. Is this a good idea?

The first observation was that it makes little sense to require notice unless the notice is comprehensible. The "plain language" element in the draft will help if it is enforced. But the suggestion in the rule that class members may want to challenge the certification decision is unattractive — it invites reopening a recent and careful decision. But that part can be dropped.

The notice idea was supported as good. It is important that the Note comment on "hybrid" classes certified both as mandatory classes and as opt-out classes. And the reference to "action" in the introductory phrase "in a class action certified" should be dropped.

It was suggested that the purpose of notice might be described as supporting "an effective opportunity to seek to participate." This need not be the same as intervention. And the Note should discuss the value of web sites, using different language to describe them. Notice could tell class members how to reach the site. It should be required that all significant developments in the litigation be posted on the site.

Sampling notice. The draft provision for sampling notice in (b)(3) class actions involving generally small individual claims was discussed briefly. Although it was recognized that this practice might encourage some well-founded actions that could not otherwise support the cost of notice, doubts

were expressed about the equal-protection aspect of giving some class members but not others an effective opportunity to opt out. It was agreed that the provision should be dropped.

Settlement Review

The settlement-review provisions of draft (e) were introduced with the reminder that concerns about the need for effective judicial review have been expressed throughout the Rule 23 study period. It has been thought useful to develop provisions that will provide courts with better assurances that all useful information is provided.

Pre-certification dismissal. The provision requiring approval of a settlement or voluntary dismissal before certification was supported with the observation that courts look for signs of collusion or a pay-off. If one plaintiff settles, the court still should seek to ensure that it is not a "hold-up." The mere decision to file with Rule 23 allegations may be made for publicity and bargaining power; the court has an interest in reviewing and controlling misuse of Rule 23. The mere anticipation that there will be judicial scrutiny may deter nonmeritorious filings.

But it was asked what is a court to do if it thinks the settlement inappropriate? Reject the settlement and require the plaintiff to proceed on a class basis? How can adequate representation by the individual plaintiff or counsel be assured? And what happens if indeed a settlement looks excessive, suggesting that the plaintiff and counsel are being bought off: can a court say that the plaintiff is getting an inappropriately good deal, and that only a lesser settlement will be approved? Or should it do what at least one court has done, seeking out other representatives?

It was agreed that there are lots of worthless cases. They get cleared out. It is perplexing to know what consequence should attach to the mere presence of Rule 23 allegations. But there is a concern that others may have relied on the filing, and will not know about the dismissal.

On the other side, it was asked what should be done about the good-faith plaintiff who files the action and then learns facts that make it plain that it is not worth pursuing. It may be as simple as the defendant explaining the facts to the plaintiff. Why not just allow a dismissal that does not preclude any other class member from picking up the cudgels? On the other hand, the court may conclude that there probably is a good claim, that class counsel is simply unable to identify or develop it. Should the court be concerned to find a way to provide better class representation?

It was observed that the law is pretty much settled in most courts today. Rule 23(e) requires court approval — although not notice to the class — when a voluntary dismissal or settlement is sought before class certification. When a Rule 23 complaint is filed, the representative plaintiff is affecting others. In some sense they are being brought, albeit tentatively, into court. And in some actions there may be a great deal of publicity. People may believe they are class members. Should the court not have some say before the plaintiff is allowed to drop the action?

The approval requirement need not entail vast effort in the simple cases offered to show why approval need not be required. If a good reason is offered, approval can be given readily. In some circumstances it may be appropriate to require the plaintiff to say on the record that the claims lack merit and should not be pursued as a class action. Reassurances on the record are desirable.

Perhaps the solution is to continue the approval requirement, and to state in the note that the central purpose of review is to determine whether there has been any reliance on the claim for class relief.

Side agreements. Discussion of the requirement that the court be informed of all agreements made in connection with a proposed settlement began with observations that focused on the need to inform the court of all terms of the settlement agreement itself. Anything that was important enough to agree upon as part of the settlement must be disclosed to the court. But some parts might be disclosed only to the court. An agreement that the defendant can walk away from the settlement if opt-outs exclude a specified threshold of numbers or amount, for example, should be held under seal. Publication of such an agreement encourages "opt-out farmers" to know what target they must hit to undo the settlement. Some concern was expressed that such limited access to a part of the settlement package is troubling.

Then it was asked whether agreements about allocation of payments among the defendants, and about contributions by insurers, should be disclosed. This question prompted questions about the reach of the language requiring disclosure of agreements or understandings "made in connection with" the proposed settlement. Are there alternative definitions of the duty to disclose that would work better? One suggestion was to establish the duty with respect to agreements among opposing parties, including cross-claiming defendants and objectors. Disclosure should be made of anything material to the goal of protecting class members. Class members are interested in what they get, but not in who pays it.

It was protested that other agreements than those among opposing parties may shed light on what it might be possible to get by alternative settlement deals. It is important to class members to know how much a defendant can afford to pay; how much the class claims are "worth"; how much each class member will get, and how much other class members are getting. Knowing what insurers are contributing may be important to know what a defendant can pay. So too it may be important to know how much each defendant is contributing. In response, it was urged that all class members are entitled to know about is the deal their representatives made. Insurance relationships are outside the actual settlement agreement. The focus should be on what the court needs to know to decide whether the settlement is reasonable. And that is something that should be left for the court to decide in each case; no attempt should be made to spell it out by rule.

Another participant urged that there are instances where it is important to know such matters as which defendant is paying what. In one negotiation, the defendants adamantly refused to say who was putting up the money; there was concern that some of the people on the plaintiffs' side had conflicts with some of the defendants, and that those defendants were paying less.

One resolution of these uncertainties may be to soften the "must file" requirement of draft (e)(2). It could be drafted to empower the court to require filing. The Note could give examples. And the Note might say something about the obligation of counsel to disclose agreements that are material to the review process.

Class settlement without certification. It was suggested that the present draft might be read to authorize a court to approve a class settlement without ever certifying a class. No one intends that

result. Perhaps something should be said to make it express. One method would be to add a provision in (e)(1)(B): the court may approve a settlement "that would bind a class only after certifying the class and after a hearing * * *."

Post-settlement opt-out. It was asked whether the provision in the settlement opt-out draft that authorizes a court to defeat the settlement opt-out would permit denial of any opportunity to opt out of a (b)(3) class. It is clear that the intent is only to deny a second opt-out opportunity; there must be at least one opt-out opportunity in any (b)(3) class. This intent must be made clear. One approximate rendition would be (e)(3)(B): "determines that there is no good reason to allow a member who has had a prior opportunity to request exclusion to make a second request to be excluded."

The reasons for allowing a second opt-out opportunity in many settlements begin with concern that we can have less confidence in a settlement outcome than in an adjudicated outcome. Earlier Rule 23 hearings produced many doubts about the quality of settlements, going in both directions. It is feared that some settlements reward nonmeritorious claims because of the costs and risks of defending against a class. At the same time, there is concern — augmented by the "reverse auction" fear — that other settlements sell out strong class claims at bargain prices for the benefit of counsel. The RAND report and many professors believe that we need stronger judicial review. A decision not to opt out made before the terms of a settlement are known is less well informed than a decision made when the terms are known. If many members opt out, the settlement probably does not deserve to survive. Another set of reasons arises from the difficulties of enhancing the role of objectors as an alternative means of protecting class interests. At the same time, settlement may occur in circumstances that afford reassurances nearly as great as actual adjudication. Pretrial development may be so thorough that the court can make a confident appraisal of the relationship between the settlement terms and the predictable hazards of trial. Or settlement may occur after the case has been partly tried. That is why the court is given discretion to deny a second opt-out opportunity.

It was asked who would have the burden of showing that there is no good reason to permit a second opt-out? The proponents of the settlement? Objectors could be heard, but the decision "affects a lot of people who are not at the table."

And it was argued that opt-out could be the death knell of settlements. But it was responded that this need not be a bad thing. The court has difficulty in evaluating a proposed settlement; when a settlement class is proposed, there even may be some difficulty in getting the information needed to ensure that class certification criteria are met. An opportunity to opt out at the time of settlement tests the settlement on the basis of informed decision by class members; this opportunity is often afforded now because certification and settlement occur at a time that requires a first opportunity to request exclusion. The same opportunity should be made available if an earlier opportunity to request exclusion did not afford an opportunity to decide on the basis of actual settlement terms. So much skepticism has been voiced about objectors that the post-settlement opt-out seemed a good alternative.

The protests were renewed by arguing that a post-settlement opt-out creates a dynamic that makes settlement impossible. Negotiation is not possible when the other side "may leave the table."

The settlement is viewed as a signal of what the defendant is willing to pay, even though the payment may make sense only in the context of achieving resolution of (almost) all claims in a single efficient proceeding. Lawyers with client inventories will opt them out, expecting that the first settlement simply sets a floor that they can better later on. And the "farmers" will advertise for opt-outs; it is possible to solicit opt-outs effectively even with a short settlement-review period.

This protest was met with the reminder that today many settlements are negotiated before there is any notice to the class, and must survive the first opt-out that is required in all (b)(3) classes. It is possible to settle in the shadow of an opt-out opportunity, and such settlements in fact occur with some frequency.

One practitioner observed that the settlement opt-out is an idea that will be hated by many plaintiffs' lawyers and by many defense lawyers, but it is a good thing. One consequence will be a lot of negotiation over most-favored-nations clauses. Plaintiffs will want them to protect them against later challenges for having negotiated the worst deal. Defendants may want them as a signal to would-be opt outs that better deals will be so costly to the defendant that there is little reason to opt out in hope of bargaining a better deal.

It was suggested that there is an incentive to opt out even if the same settlement terms are obtained in a later individual agreement. The individual agreement is not subject to court supervision of attorney fees.

It was asked whether a defendant "back-door opt-out" reservation is made in anything but personal injury mass tort cases. It was agreed that they are used only in personal injury cases. Defendants insist on them for their own protection; if the settlement does not buy something close to global peace, it may not be worth it. The overall effect of these arrangements is a form of price discrimination: better terms are offered to the opt-outs, but only if so few opt out as to make the overall exposure more attractive than continued class proceedings.

The settlement opt-out was again championed as something far better than the alternative of giving objectors enhanced discovery rights. There was a lot of enthusiasm for the earlier proposals to support objectors by discovery. An alternative was suggested: the purpose of most objectors is to seize leverage to win a buy-out. The leverage is the leverage of threatened appeal. Perhaps the court should simply exclude objectors from the class, so they can continue to pursue their own claims but lack standing to appeal the class settlement. This proposal was met with the suggestion that "the hold-up objectors are the ones who do not have any clients."

It was again observed that a settlement opt-out will give greater confidence in the quality of the settlement, even though it will change the dynamics of negotiation and may make it more difficult to reach some settlements.

It was argued that it is better to get more information for court review of the settlement than to provide a second opt-out opportunity. Settlement will be very difficult to reach if the class includes a lawyer with a large inventory of individual clients who can be opted out as a package, or if the class includes even a small number of members who have large individual claims and can opt out in hopes of winning still more favorable treatment.

A compromise was suggested in the form of a provisional settlement opt-out. The court could advise class members that they could indicate a desire to opt out of the settlement if the court should decide to permit that. Once the number of those who wished to opt out were known, and their reasons evaluated, the court could decide whether to permit exclusion. It was responded that this approach would make a complicated situation even worse. The pressure is on at the wrong point. It is now knowable what the outcome will be, either in terms of the number who may request exclusion or the court's response to the requests. That makes it difficult to make a deal. In negotiating, the plaintiff knows there are class members who are difficult to please, and tries to build special terms for them into the deal. Giving a right to opt out will make for a two-level negotiation.

The settlement opt-out was defended again on the ground that the first opt-out opportunity is limited by inertia and ignorance. And it was responded that this is an argument of fairness, not one based on securing information that supports judicial evaluation of a settlement. And it was rejoined that information about class members' evaluation of a settlement is important information.

It was asked how often we now have identifiable people who will opt out of mass-tort class actions in pursuit of a special deal. What bearing does this have on the settlement opt-out? It was suggested that with a second opportunity, these people will deliberately bypass the first opt-out. In the present system, you know who remains in the class after the original opt-out period has expired. You cannot know that if there is a second settlement opt-out opportunity.

All of this discussion was met with the observation that we are seeking a fair process. The arguments that a settlement opt-out will upset negotiations do not tell us whether it is a fair process. The lawyer who had expressed greatest concerns about the effect on negotiations agreed that more thought should be given to assessing the character and extent of the effect.

It was suggested that a defendant could make an offer that expires, with the condition that later offers will not be as good. A few "big" defendants do this. But most companies facing a class action cannot afford this roll of the dice.

The use of most-favored-nations clauses was raised again. It was said that they were used in early state actions against tobacco defendants and were not effective. But this device was upheld by the D.C. Circuit in the vitamin antitrust litigation, rejecting arguments by opt-outs that the effect is an unfair restriction on the right to opt out. They have been used in other settings. The plaintiff wants them for obvious reasons; the defendant wants them to enhance its position in later negotiations. The effect depends on the defendant's ability to make a cogent threat that it will go to trial rather than settle. Much depends on "who has the greater pain in going forward" without settling the opt-out claims.

The provisional settlement opt-out would have a particular effect on the lawyers who advertise for opt outs. They could not know whether, in the end, the clients they recruited would be allowed to opt out. This would be a new risk that might deter their efforts.

Another possibility would be to defer the first notice of a (b)(3) class from the time of certification until a time when more was known. In cases with a fair prospect of settlement, the

notice could be deferred until settlement was reached, so the first opt-out decision could be made in light of known settlement terms.

A different observation was that in bankruptcy "the contours are defined." You can pursue a claim only if the plan provides for it. The problem of discriminating among claimants is approached by giving a chance to get more money if you jump more hurdles. Claimants with greater motivation can do it, but within the same structure. Perhaps something like that could be done in Rule 23: there is a right not to opt out of the class action, but out of the settlement, with further pursuit of the opt-out claims within the framework of the same class action. But this approach must account for the fact that there are many different types of class actions; it would be complicated to construct a general provision for all.

A still different observation was that when there are related actions, everyone looks at what is going on elsewhere.

It also was suggested that the decision in the *Amchem* case is likely to lead to more subclassing. For a while opt-in classes were considered as an alternative, but many viewed this as the effective end of class actions. Perhaps serious personal injury cases would be suitable for opt-in classes. Some of the same concerns that led to that discussion carry over to the settlement opt-out.

The final observation was that there is a fundamental difficulty. Our model is one-claim litigation. But we cannot afford to do that.

Class-Attorney Appointment

Discussion began with the observation that attorneys are very important in the Rule 23 process, yet the rule says nothing about them. The draft requires that the court appoint class counsel in any class action, whether it be a plaintiff class or a defendant class. Subdivision (1)(B) articulates the responsibilities of class counsel to fairly and adequately represent the interests of the class. The suggested addition that would define the class as the client is under attack. The (1)(C) provision that ensures that would-be counsel cannot bind a class before appointment has been discarded as unnecessary.

The procedure for appointment is likely to provide that the court "may," rather than "must," allow time to apply; this softening is designed to provide for cases in which filing and settlement occur at the same time. (2)(B) is a "laundry list" of factors that reflects general present practice but also includes some items not commonly included — proposed terms for fees and the possibility of using the appointment process to facilitate coordination or consolidation of related actions. Strong arguments have been made that confidentiality should be maintained for some of the information required by the application list. (2)(C) would support directions with respect to fee awards at the beginning of the action.

The first question is whether the time has come to write a rule. If a rule is to be written, what should it say?

It was thought nice to have a rule, if it can be done. But it was asked whether the rule assumes that there will be one class counsel? And the timing provision seems to gear appointment to the time of certification; should provision be made for pre-certification appointment?

It was answered that the question of counsel consortiums might be Note material rather than rule text. In many cases one lawyer cannot do it all. Collaborative efforts are common. We should note, however, that consortiums may result from a desire to avoid competition, and may result in featherbedding. Judges should be able at some point to say that there are too many lawyers participating in the case. As to timing, the question of pre-certification appointment has been considered, but has seemed fraught with problems.

The appointment time question spurred the observation that the rule could easily say that the court may appoint counsel before certification when appropriate. This reduces the risk that two or more lawyers will both be engaging in pre-certification litigation as part of the competition for appointment. It is important that there be someone in charge up front. But how can you act for a class that does not exist? Could this be solved by designating a lawyer as lead counsel, rather than as class counsel? In current practice, a lawyer who files a class complaint has all the duties to the class that exist after certification, but none of the authority. We do not want competition for appointment to play out as duplicating activities. In MDL proceedings lead counsel is appointed before certification. In run-of-the-mill classes, competing lawyers make a deal and try to work together; that is not always the best thing for the class. But this is Note material; guidance can be provided by pointing to the Manual for Complex Litigation. All agreed that it makes sense to discuss these issues in the Note.

It was agreed that a rule on appointing class counsel will be useful as a means of making practice more orderly.

The question whether it would be desirable to define the class as the client of class counsel was presented by the same supporting arguments as were made in subcommittee on the first day. The immediate response of one participant was "No." It will not do to define the class as client unless we are ready to spell out answers to all of the unresolved questions of the nature of the duties the class attorney owes to the class. If we define the class as client without further guidance, the ongoing process that is gradually developing the questions and framing possible answers will be disrupted. There is a beginning now; it is premature to say anything along this line without undertaking to answer the whole set of questions. On the other hand, it is useful to state the duty to fairly and adequately represent the class.

Another participant said that he had always thought the class is the client. But there is a lot of uncertainty; do you have a relationship with each class member? The one who opposed saying so in the rule agreed that to some extent that is right. But it is a complicated relationship and the questions are complex. If a class member objects to a settlement, does that create a conflict that requires class counsel to resign? There is a risk that people will not distinguish between the class-entity client and class members.

Another participant suggested that it is better to state that the class is client. This statement makes it clear that there are not conflicts with individual class members. So if a class representative

wants out of a proposed settlement, the statement that the class is the client makes it clear that class counsel can continue to represent the class. A class can own property, as the class does in one action she is involved with. A class can make contracts. The class is an entity. "Classes should be people too."

It was urged again that it is enough to state the duty of class counsel to fairly and adequately represent class interests.

Doubts were expressed because it is uncertain what is meant by stating that the class is client. The phrase might indeed invoke state law. There is a downside in confusion. There is enough foundation in Rule 23 to authorize federal-court development of principles that define the responsibility of class counsel without making the class the client.

The laundry-list of factors question was addressed first by a suggestion that the list should go in the note. New factors will emerge in the future, but a list expressed in the rule might impede this process. Even after moving the list to the note, it should be made clear that the information goes to the court ex parte. Information about preparatory work, for example, reveals work product. Ex parte submissions are used for this reason when a court orders periodic statements about work being done by class counsel.

Apart from the list of factors, it was suggested that the rule should state a criterion for appointing counsel. The basic concept should be that the judge does for the class what in-house counsel does in hiring counsel. The choice is not based on price alone, but on quality as well. The standard should refer to what a private client would do if well informed.

It was asked what experience has been with auctions: are judges simply accepting the low bids? One answer was that judges are "doing all sorts of things." In one case, the judge allowed a lawyer to adopt the low bid that was made by another lawyer. Some want escalating percentage-of-recovery scales, increasing the percentage as the recovery increases; others prefer diminishing scales. One judge has conducted three bidding contests and used three different bidding methods. This is a developing experience. But overall it seems to be driving up fees; paradoxically it also may be increasing settlement value. A strange relationship is created between judge and the bidders. The judge learns what plaintiffs think the case is worth; this may make it harder to dismiss.

It was asked whether we should suggest that the judge who conducts the bidding should not handle the case, and noted that we can look to the Manual on Complex Litigation for guidance.

The bidding phenomenon is being studied. The Federal Judicial Center will be working on it.

Apart from bidding, it was agreed that it is proper to provide that an application for appointment include proposed terms for fees.

Attorney Fees

The model for the attorney-fee draft is Rule 54(d)(2)(B), expanded in some respects. The rule does not create new grounds for awards, and is not limited to class counsel.

The questions raised by the draft include the timing provision (it has been suggested that the 14-day Rule 54 limit should be replaced by a direction that the motion be made "as directed by the court"); whether there should be disclosure of agreements affecting fees and nontaxable costs; and the role of objectors. The draft requires notice of a fee application to class members — they are interested, particularly if the award comes out of the class recovery, but notice can be expensive. The hearing requirement is presented with an alternative that requires a hearing only if there is an objection — but if that limit is adopted, it will be necessary to decide what is an objection for this purpose. The rule presents yet another laundry list of factors, but does not attempt to make a choice between lodestar and percent-of-recovery methods of measuring fees. There also is a question whether the court can in some way deal with fees charged by individually retained plaintiffs' attorneys, and whether a class member who opts out can avoid all liability for class counsel fees. The first question, finally, is whether there is any need for a fee rule.

It was suggested that courts are doing a good job on fee applications now. It is not clear what reason there is to write a rule now.

A reason to adopt a rule was found in the observation that some circuits have moved to require detailed information to support fee applications only in recent years. There are doubts whether district courts are always getting the appropriate information. And when the information is provided, it is not clear that the factors measuring fees are applied in a consistent way.

It was responded that the plaintiffs' bar seems to have a pretty well-understood view of the kind of information that must be provided. Courts take the information. If there are objections, there is a hearing. But if there are no objections and the court feels familiar with the case, the award may be made without a hearing.

It was agreed that repeat plaintiffs' counsel know the law. It is well developed. The Federal Judicial Center has a good bench book on attorney fees, although not enough people even have it. Experienced courts do it. But there is no harm in setting it out in a rule. The class notice of the settlement should tell the class what is being asked, but sometimes the parties forget to include this in the notice. The provision for discovery, however, raises problems. The necessary information is required in the (**)(4) list of factors to consider. The list can safely be put in the Note, however. Discovery should not be made available as a tool for objectors. It is a good idea to require disclosure of fee-sharing agreements; it reminds lawyers that they are subject to the reasonable-fee limit. At times courts have invalidated individual fee agreements, but most are reluctant to do this so long as the only source of authority is an unarticulated inherent power.

It was asked whether anything has been omitted from the list. The list covers, in different words, the "Johnson" factors; they still seem to be used in percent-of-recovery cases as a cross-check on the reasonableness of the chosen percentage.

Another participant thought that the process works well now. There is expense in notice to the class, in discovery, and in the special master provision. It is better to avoid unnecessary expense, whether it is paid by the defendant or out of class recovery.

It was pointed out that the special master provision simply reflects Rule 54(d), and suggested that masters can be particularly valuable in sorting through extensive fee materials.

It was noted that the RAND study focused on coupon settlements, and on public dissatisfaction with fee awards in these and other cases where the class recovery seems symbolic and class attorney fees seem large. The focus on results actually achieved is good; it echoes the PSLRA. The idea is to encourage class attorneys to do things that will encourage class members to participate in getting relief. This can work. In one case, the settlement did not establish a fund at all; it simply required the defendant to pay claims as they were filed. Attorney fees were geared to the actual claims made, stretched out over time.

It was suggested that if the post-settlement opt-out proposal is adopted, the notice of the fee application will be used to encourage opt outs. In negotiating a settlement for the defendant, it will be wise to learn how much class counsel intends to demand as a fee award because of the danger than an extravagant demand will encourage opt-outs. This may be a good thing. This discussion led to renewed discussion of the settlement opt out. It was suggested that lawyers who advertise for opt outs can do it quickly, in the time likely to be set for reasoned consideration of the opt-out opportunity. Front-end opt-outs may be made by class members who have lawyers, but often they are made by unrepresented class members who do not like class actions or law suits or lawyers; they are people who are not going to sue in any event. In mass-tort actions, class members may tend to go to lawyers for advice about opting out; that is a good thing. In antitrust actions, the lawyer seeking opt-outs is likely to go directly to the high-stakes class members, and a phenomenon is developing in which substantial numbers of class members who somehow have come to be represented by the same lawyer opt out. The settlement opt-out means you do not know when negotiating the settlement what the value is; if many opt out, you have accomplished less for the class. Until you know what has been accomplished for the class, you do not know what the effect on fees will be. To meet this uncertainty, the defense may negotiate three deals: (1) if up to X class members opt out, you get Y; (2) if more than X class members opt out, you get Y-minus; and (3) if more than X-plus class members opt out, the deal is off. All of this has an effect on attorney fees that may feed back to the opt-out process.

One suggested tactic would be to condition the right to opt out on terms that forbid paying a new lawyer a fee more generous than the fee set for class counsel. If the class-counsel fee is set at 17.9%, the same ceiling would apply after opting out. That could discourage opting out. This tactic does not seem to have been used, but it is a good idea. Of course it may be difficult to limit counsel fees if they take the opt-outs to a different court. One approach might mimic the practice followed in some MDL cases that imposes a "tax" on individual attorney fees, to be paid to the fund for lead counsel to compensate work done on behalf of all. The court might even think about conditioning the right to opt out by prohibiting aggregation of opt-out plaintiffs, or even by requiring that the opt-outs initiate litigation only in the class-action court.

This discussion continued by noting that in the Breast Implant litigation opt-outs were required to make contributions to the consolidation lawyers' fund, and that the Eleventh Circuit upheld this order. But it was asked why should we limit the opportunity of opt-outs to act independently, when the motive of permitting a settlement opt-out is to protect individual interests? We are concerned about the complications the opt-out causes for settlements, but if we want freedom from the negotiated settlement we should not prohibit other aggregations or otherwise limit pursuit of individual litigation. In response it was urged that the limits reduce the free ride for the lawyer who aggregates opt-outs. This lawyer has none of the risk. The impetus to opt out often comes from counsel, who encourage it in the hope of getting something better. They look to get easy settlements, with no work. So the answer is to permit aggregation of the opt-outs, but only if they get the same fee and have to remit a portion of that to the common fee fund. The opt-out lawyers get nothing from the common fee fund unless they have done work that contributes to the common recovery. This approach would protect class members against predatory opt-out farmers. Encouragement to opt out comes from lawyers. Protection is needed; there have been cases in which the defendant refuses to deal outside the class settlement, and the opt-out lawyer is unwilling or unable to take the opt-out cases to trial. But it was thought cumbersome to hitch the settlement opt-out to attorney-fee controls.

It was further observed that if many class members opt out, a new deal is likely to be negotiated. That is a good result. Or there may be only a few opt-outs. In setting up the deal, defense counsel is likely to tell the defendant that the cost of likely opt-outs is $X; that is a part of it. But if the opt-out is provisional, and the court can decide against it after the number of opt-outs and their reasons are known, there is a strong incentive to negotiate a good deal. The court can be persuaded to deny the opt-out opportunity if only a few seek to opt-out. That may be better than an attempt to discourage opt-outs by regulating counsel fees.

One suggestion was that regulation of opt-out fee awards to regulate free riders could be discussed in the Note.

A different issue was raised by asking whether all of these calculations would be messed up by a rule prohibiting simultaneous negotiation of fees with settlement on the merits. It was answered that plaintiffs' counsel "follow *Prandini* now" by negotiating settlement on the merits first. Of course defendants want to know the total liability. So the practice is to report to the court when the parties believe they have done the merits deal, and get court approval to begin fee negotiations. The defendant says that it has retained the option to back out if the total package costs too much. This system puts plaintiffs' counsel at a disadvantage, "but we live with it."

The question whether a fee rule should be adopted at all returned. One view was that it is useful. Many lawyers like to think that they do not need it in their own cases, but even then it is useful to address such questions as notice. Another view was agnostic. A third view was that specificity will help. We hope that state courts will more and more look to the federal model. A rule with "some heft to it" will encourage good state-court practices. This consideration may be a good reason for codifying a best-practices rule.

Other Issues

It was asked whether there were other topics that might be addressed by the Rule 23 review.

An avowedly "futile plea" was made to reopen the early drafts that abolished the distinctions between (b)(1), (2), and (3) classes as formally separate categories. On close examination, the separation of these categories is illusory; there is no clear concept that separates them. The resulting allocation of the right to opt out to (b)(3) classes only is correspondingly without any sense. But at least the proposal to require notice in (b)(1) and (2) classes will reduce the distinctions to some degree.

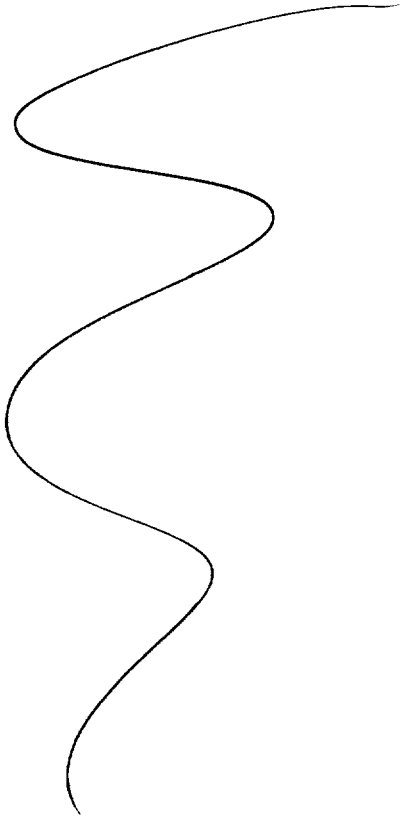
Another suggestion was that if this process is intended to yield a package that will put further Rule 23 reform to rest for some time, "it would be a shame not to deal with settlement classes." There is a lot of frustration with *Amchem* and *Ortiz*. Those decisions defeat settlements that people want to do. This happens in cases that the defendants argue cannot be dealt with as a class at trial, but that make sense for settlement. A rule directed to settlement classes would address the difficulties seen by the Supreme Court. It would have to say that the predominance requirement means something different in settlement than it means at trial. Settlement is a big step toward establishing class cohesiveness. There should be a right to opt out, unless there is a limited fund; defendants can live with the opt-out. Before doing a settlement, a defendant worries about how much satellite litigation will be encouraged if the settlement blows up. The failed settlement is a signal that the defendant is willing to deal; the result is a disaster. The decision to settle is a strategic matter of great importance. The defendant wants assurance from counsel that cannot be given. There have been cases where these concerns persuaded a defendant it could not take the risk of settling. But if there is not to be a settlement-class rule, an alternative would be something that makes it easier to establish a limited-fund class.

Supplemental

Agenda

Book

Materials



MCCABE

Federal Judicial Center
Research Division

memorandum

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To: Advisory Committee on Civil Rules

From: Tom Willging Tom

Date: February 27, 2001

Subject: Data re voluntary dismissals of cases filed as class actions

At the class action subcommittee's January 28, 2001 meeting, a question arose as to the frequency of voluntary dismissals in cases filed as class actions. The context of the discussion related to whether to add a requirement to Rule 23(e) that a voluntary dismissal be subject to judicial approval, like a "settlement" or "compromise" of the action. Subcommittee members wondered about the extent to which voluntary dismissals occurred and the characteristics of such cases. This memorandum addresses those questions, using the database created in conjunction with the Federal Judicial Center's *Empirical Study Of Class Actions in Four Federal District Courts* (1996).

Among the 407 cases filed as class actions and terminated between July 1, 1992 and June 30, 1994, 34 (8%) were recorded as having been terminated by a voluntary dismissal. Of the 34, 15 had been terminated after a motion to dismiss or motion for summary judgment had been granted, dismissing all or part of the case, or after a judge denied a plaintiffs' motion to certify a class. The remaining nineteen cases (5% of the 407 cases studied) were voluntarily dismissed without the pressure of an adverse ruling on the merits or class certification. We examined those nineteen cases in more depth.

The most striking fact about the nineteen cases is that for five (26%) of them we found evidence that a settlement had been reached. In one of those five, notice was sent to the class. No hearings were conducted and the court approved the settlement without any changes and authorized the voluntary dismissal of all five cases. In the other fourteen cases, there was no evidence of a settlement, notice to the class, a hearing, or court action on the dismissal.

The nineteen cases consisted of five civil rights cases, four securities cases, three banking cases, 4 other federal statutory actions and 1 each of three other types. No diversity cases were involved. The median life of the nineteen cases was six months, but 25% of the cases lasted twenty-eight months or more.

In summary, our data indicate that twenty of the thirty-four voluntary dismissals involved some form of judicial action in conjunction with the dismissal. The remaining fourteen cases represent approximately 3% of the

cases in our study. Whether this degree of activity regarding voluntary dismissal warrants a change in the rule raises a question for the committee to decide.

Federal Judicial Center
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memorandum

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To: Advisory Committee on Civil Rules

From: Tom Willging, Bob Niemic, and Shannon Wheatman

Date: February 23, 2001

Subject: Draft class action notice forms

In the October, 2000 agenda book, we included a Federal Judicial Center draft of a combined "Notice of Class Action Settlement, Right to Exclusion, and Hearing" for a securities class action. We have revised that form and the latest version appears behind Tab A. We have also drafted a form for use in a mass tort-products liability setting; that draft appears behind Tab B.

These drafts are designed to illustrate for counsel how they might comply with proposed language in Rule 23(c) that would require that the notice concisely and clearly describe in plain, easily understood language the nature of the action, the claims, issues or defenses with respect to which the class has been certified, the right to be excluded from a class certified under Rule 23(b)(3), and the potential consequences of class language. Note that the above language comes from the November 2000 draft of Rule 23(c).

Professor Lawrence Solan of Brooklyn Law School, a lawyer with a Ph.D. in linguistics, has reviewed both of the enclosed drafts. His suggested changes have yet to be incorporated in the mass tort notice, but they will not alter the structure of the draft.

We are in the process of testing the enclosed draft notices by presenting them to focus groups in Baltimore. The groups are composed of ordinary citizens with at least a high school education. Two groups were held on February 21 and two more are scheduled for March 6. At the April 23-24 meeting of the Advisory Committee, we hope to present a preliminary report on what we learned from those groups.

After revising the drafts in light of the focus group experience, subject to available Center resources, we hope to test the revised notices by surveying a representative national group of citizens and comparing the FJC notices with two class action notices adapted from recent cases. We hope to be able to report the results of this survey by October 2001.

We welcome any comments you may have regarding the enclosed forms.

Why did you receive this notice?

This notice has been sent to you because you may be a member of a group of individuals–a "class"–for whom a proposed settlement with defendants has been reached. If the proposed settlement is approved by the court, you may be eligible for money and other benefits, unless you decide to exclude yourself from the class. This notice will help you answer the following questions:

1. What is a class action?

A class action is a lawsuit in which one or more persons sue on behalf of other persons who have similar claims. The persons included in this group are called the "class." The settlement of a class action lawsuit determines the rights of the entire class except for those who choose to exclude themselves from the class (see section 6c below). For this reason, the settlement of a class action must be approved by the judge. Those class members who do not exclude themselves from the class may submit a claim (see section 6a below) and receive payment of money and other benefits. They may also remain in the class, but object to the terms of the settlement (see section 6b below).

WARNING: If you are a member of the class and you do not exclude yourself or file a claim, then you will not share in the settlement proceeds and you may also be barred from pursuing your own case against the defendants for the claims that are the subject of this lawsuit.

2. Who are the parties in this class action?

The plaintiffs in this lawsuit are John Smith and Mary North. John Smith was employed as a construction worker and alleges that he used products of the XYZ Corporation that contained asbestos fibers during the course of his employment from 1972 to 1998. Mr. Smith alleges that he has incurred personal injuries (lung cancer and asbestosis) as a result of his exposure to XYZ Corporation's products and he seeks damages for loss of earnings, medical expenses, pain and suffering, and punitive damages. Ms. North is a homeowner whose home was insulated with products manufactured by XYZ Corporation. She alleges that her exposure to these products has increased her risk of developing cancer or other diseases and she seeks damages to pay for the medical costs of monitoring her health. On January 11, 1999, they filed this lawsuit as a class action against XYZ Corporation, the defendant. Plaintiffs filed the lawsuit as a class action to assert their own individual claims and to represent a class of persons who have similar claims.

3. Are you a member of the class?

By order of October 4, 2000, Judge Jane Jones decided that the lawsuit can proceed as a class action for settlement purposes only on behalf of a class consisting of anyone who:

- has been exposed to asbestos fibers in Xbestos, XYZinsulate, and any other products of XYZ Corporation at any time.
- is not an officer or director of XYZ Corporation or a member of the immediate family of an officer or director of XYZ Corporation, and
- does not exclude themselves from the class.

You are a member of the class if you are in the group described in the first bullet and not in any of the groups identified in the second and third bullets.

4. What is this lawsuit about?

Plaintiffs claim that defendant produced building insulation materials and other products with knowledge that the asbestos fibers contained in those products posed a danger to the health and safety of anyone exposed to them. Plaintiffs claim that defendant negligently manufactured and marketed such dangerous products and that defendant willfully disregarded the health and safety of those exposed to its products. Defendants vigorously deny these claims.

Prior to the settlement the defendant sought to dismiss the case on the grounds that it was filed after the legal time limit (the statute of limitations) had expired and that the plaintiffs' initial papers failed to present a legally sufficient claim. Judge Jones denied requests to dismiss the case and has allowed the parties to explore the factual basis for their claims and defenses by examining witnesses and documents that might be relevant to those claims and defenses. The parties developed a large amount of information about the claims and defenses, including information from other cases dating back to the 1980s. Plaintiffs

asked the judge to decide that the case should proceed as a class action. Before the judge ruled on that request, the parties announced this settlement. Based on the facts discovered and the risks involved in a trial, attorneys for the class concluded that the proposed settlement is fair, reasonable, and adequate, and that it serves the best interests of class members.

5. What does the proposed settlement provide?

On September 10, 2000, the parties in the lawsuit arrived at a proposed settlement of the lawsuit. The proposed settlement requires Judge Jones's approval. The terms of the proposed settlement are summarized below. The full settlement terms are contained in a settlement agreement dated October 4, 2000. Judge Jones preliminarily approved that settlement and authorized that this notice be sent to the class. You can obtain a copy of the settlement agreement by calling 1-800-555-xxxx, writing to Herman Green, Esq. at P.O. Box 6226, Any Town, US 12345, or visiting www.xxxxx.com on the Internet.

5a. What is the settlement fund?

In the proposed settlement, defendant has agreed to create a settlement fund in the amount of $300,000,000.00 plus whatever interest accrues after the fund is created. Up to $24,010,000.00 (8% of the settlement funds), will be used to pay attorney fees and expenses, the costs of administering the settlement, and special payments to the class representatives (see section 5b below). The amount remaining, at least $275,990,000.00, will be distributed to class members who submit valid claims. Whatever interest that accrues on the settlement fund after it is created will be distributed in the same way as the fund.

The settlement fund of $300,000,000.00 will be divided into two funds that will provide benefits to class members who submit valid claims (claimants). The Injury Compensation Fund will consist of $200,000,000.00 (see section 5c(1) below), which will be used to create a trust to compensate claimants for personal injuries arising out of the use of defendant's asbestos products. The Medical Monitoring Fund will consist of $70,000,000.00 (see section 5c(2) below) to compensate claimants for the costs of determining whether or not they have an asbestos-related disease.

5b. What fees and expenses will be deducted from the settlement fund?

The attorneys for the class intend to ask the judge to award them fees for their services in representing the class in this lawsuit, in an amount not to exceed $18,000,000.00 (6% of settlement fund), plus accrued interest. This amount would be paid from the settlement fund.

The attorneys for the class also intend to ask the judge to award them no more than $1,500,000.00 (0.5% of settlement fund) plus accrued interest to reimburse them for expenses they incurred in conducting this lawsuit. This amount would be paid from the settlement fund, based on proof of these expenses submitted by the attorneys for the class.

The settlement also calls for the two class representatives, John Smith and Mary North, to receive special payments of $5,000.00 each, for a total of $10,000.00. The settlement agreement also provides that the costs of administering the notice to class members would be paid out of the settlement fund. The estimated cost of administering the notice is $4,500,000.00, which is 1.5% of the settlement fund.

An award of attorney fees of $18,000,000.00, an award of expenses of $1,500,000.00, costs of administration of $4,500,000.00, and special payment to class representatives of $10,000 would be, in total, $24,010,000.00 which would be 8% of the settlement fund. The judge may award less than $24,000,000.00.

The defendants have agreed not to oppose the above applications for fees and expenses.

5c. What can you expect to receive under the proposed settlement?

5c(1). Benefits based on personal injuries. Payments from the Injury Compensation Fund described in section 5a will be based on medical diagnosis of specific injuries that scientists have found to be associated with exposure to asbestos fibers.

Type of Injury	Minimum Payment	Maximum Payment	Average Payment
Mesothelioma	$10,000	$100,000	$20,000-$30,000
Lung Cancer	$5,000	$43,000	$9,000-$15,000
Other Cancer	$2,500	$16,000	$4,000-$6,000
Non-Malignant	$1,250	$15,000	$3,000-$4,000

To qualify for a payment, each claimant must submit a statement from a physician with a description of the claimant's current medical condition, including a diagnosis in one of the above categories. In addition, each claimant must submit all medical records relating to the treatment of that injury, a signed release permitting the administrators of the fund to obtain claimant's medical records, and records indicating lost earnings resulting from the medical condition. The administrator will then assign a value to the claim based on the severity of the injury, medical expenses, and lost earnings.

If a claimant accepts the administrator's proposed award, it is then fixed at that amount. If the claimant disagrees with the proposed award, he or she may ask for arbitration, which will be conducted according to the rules of the American Arbitration Association. A claimant's acceptance of the arbitrator's award will determine the amount to be paid. If the claimant disagrees with the arbitrator's proposed award, he or she may file an action in court seeking damages, but punitive damages (that is, damages designed to penalize a defendant for intentional misconduct) may not be sought.

The number of claims for payment from the $200,000,000.00 Injury Compensation Fund is uncertain. To make sure that the fund does not get used up before some claims are filed, claims will initially be paid at one-half the value established by the administrator, arbitrator, or judge. If there are sufficient funds available after five years, the remaining payments will be made in whole or in part. For further information on payment of claims, you may request a copy of the settlement agreement, as indicated at the beginning of section 5 above.

5c(2). Medical monitoring benefits.

Payments from the Medical Monitoring Fund will be based on proof of exposure to asbestos-containing products manufactured by XYZ Corporation. Payments will consist of reimbursement for medical expenses incurred in testing for the presence of asbestos disease. For future medical monitoring expenses, claimants should contact the Claims Administrator (see section 10, below for information) and request information about medical facilities in your area that will conduct tests and bill the Medical Monitoring Fund. In lieu of reimbursement for your medical expenses, you may submit a claim with proof of exposure to an XYZ product and receive payment of $1,000.00 to cover expenses of testing for asbestos disease.

6. What are your options?

If you are a member of the class (see section 3 above), you have the following options. You may:

- file a claim (see section 6a below)
- object in writing to the proposed settlement (see 6b below)
- file a claim and object in writing to the proposed settlement

- exclude yourself from the class (see section 6c below)
- do nothing (see section 6d below)

For any of the above options, you may, but do not need to, hire an attorney to represent you.

The sections that follow identify the consequences of pursuing each option.

6a. What happens if you file a claim?

If you are a class member and you complete and mail a valid claim form (**BLUE FORM**) by June 1, 2001, and if the judge approves the proposed settlement, you will receive the benefits of that settlement as described in this notice (see section 5 above). In exchange for receiving the benefits of the settlement, you will be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products.

How do you file a claim?

To be eligible to participate in the distribution of the settlement fund, you must complete and sign the enclosed **BLUE FORM** and mail and postmark it by June 1, 2000.

If you file a claim attorneys for the class will act as your representatives. Attorney fees and expenses for those attorneys will be paid by the defendants as part of the settlement fund. You may, however, if you wish, remain a member of the class, and hire an attorney of your own choosing to represent you in this matter. If you hire your own attorney, however, you will be responsible for paying your own attorney's fees and expenses under whatever fee arrangement you make with your attorney. Your attorney does not have to be admitted to practice before the United States District Court for the Northern District of State.

6b. What happens if you object to the proposed settlement?

If you are a class member and do not exclude yourself by June 1, 2001 (see section 6c below), you may object to, or comment on, the proposed settlement, by mailing the enclosed Objection Form (**GREEN FORM**) along with a written statement to the court in the manner described below. The written statement should contain any reasons you believe support your objections or comments. For example, you may wish to discuss any of the following subjects:

- whether the proposed settlement is fair, reasonable, and adequate
- whether the proposed settlement should receive court approval
- whether the class should be certified or redefined
- whether John Smith and Mary North and their attorneys adequately represent the class
- whether the applications for attorney fees and expenses are reasonable
- whether such applications should receive court approval
- any other aspect of the proposed settlement or the payment and distribution process for the proposed settlement.

Judge Jones will consider your objections or comments in deciding whether to approve the proposed settlement. She may agree with you but, even if she does not, your claim will not be affected because you made an objection or comment.

Note: Even if you file a comment or objection, you still must file a claim if you want to share in any settlement the court may approve.

If you object to the proposed settlement, how do you tell the court?

If you want to object to the proposed settlement, you must complete the **GREEN FORM** and attach a written statement in the manner described in this box. If you mail a written statement postmarked by April 1, 2001, you may appear at the hearing described below, but you do not have to appear. Your written statement should indicate whether you intend to appear at the hearing. Your written statement will be considered whether or not you appear at the hearing. Your written statement must identify the name and case number of this lawsuit (that is, Smith v. XYZ Corporation, No. 00-1234), your name and address, and the name and address of any attorney you might hire to represent you in this lawsuit (see section 8 below). You must sign and date your statement.

Attorneys for the class and attorneys for the defendants will have an opportunity to file a response to any objections or comments that are filed and to ask you (or your attorney if you have one) questions if you file an objection or comment and you decide to appear at the hearing.

6c. What happens if you exclude yourself from the class?

If you exclude yourself from the class by filing an Exclusion Form (**PURPLE FORM**), you will not share in the proposed settlement (see section 5 above).

If you exclude yourself from the class by filing a **PURPLE FORM**, you may pursue, on your own or as a member or representative of another class (if there is one), whatever claims you may have against the defendant. You may do this by hiring an attorney or by representing yourself. If you do this, you should not expect any financial benefit from the proposed settlement, the attorneys for the class, or the class representatives.

Note: If you bring or participate in another lawsuit, you will have to prove your claim in that lawsuit.

How do you exclude yourself from the class?

To exclude yourself from the class, you must complete and sign the enclosed **PURPLE FORM** and mail and postmark it by April 1, 2001.

6d. WARNING: What happens if you do nothing in response to this notice?

If you do nothing, you will not receive the financial benefits of the proposed settlement. If you do nothing and the judge approves the proposed settlement, you will also be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products. If you do not want to be barred from bringing such a lawsuit, consider excluding yourself. If you want to receive the benefits of the settlement, consider filing a claim.

7. Do you need to hire your own attorney?

With respect to hiring an attorney, your options are:

a. do nothing and the judge will consider you to be represented by the attorneys for the class;

b. file an claim as described above and the judge will consider you to be represented by the attorneys for the class;

c. hire an attorney to represent you at your own expense; or

d. represent yourself.

If you decide on either of the last two choices above, you or your attorney will have to file an Appearance Form (**ORANGE FORM**) as described below.

How do you or your attorney enter an appearance in this lawsuit?

If you hire your own attorney, to participate in the hearing your attorney must complete the enclosed **ORANGE FORM** and mail and postmark it by April 15, 2001.

8. Will there be a hearing in court about this proposed settlement? Should you attend the hearing?

On April 15, 2001 at 9am, Judge Jones will hold a hearing on the settlement in courtroom # 5 in the Federal Courthouse located at 75 Main Street, Any Town, US. The purpose of the hearing is to determine whether the proposed settlement is fair, reasonable, and adequate, and deserves court approval. Judge Jones will also consider the application(s) of attorneys for the class for attorney fees and expenses. You may attend the hearing if you wish but you are not required to attend. Instead of attending the hearing, you may if you wish send the judge a written statement of objections or comments as described above in section 6b.

If you attend the hearing and if you have filed a written statement as described above, you or your attorney will be entitled to briefly state your objections to, or comments on, the proposed settlement. Your written statement will be considered whether or not you appear at the hearing. You may be asked questions at the hearing as stated above.

9. How will the settlement fund be distributed?

Judge Jones will appoint a claims administrator who will distribute the settlement fund. Each claim will be reviewed by the claims administrator under the supervision of attorneys for the class. Together, they will decide the extent to which your claim satisfies the terms for eligibility as described in the settlement agreement. You will be eligible to receive a part of the net settlement fund only if you are a class member and either (a) present proof that you have an asbestos-related disease and show the medical expenses and lost earnings you have incurred, or (b) file a claim for medical monitoring benefits.

The claims administrator will notify you in writing if your claim has been rejected in whole or in part and will give you the reasons for any such rejection. You will have thirty days after that to correct any deficiencies in your claim.

As described above, the terms of the proposed settlement call for defendants to create two settlement funds, one for $200,000,000.00 to compensate claimants for asbestos disease claims and one for $70,000,000.00 to support medical monitoring claims. The remaining $30,000,000.00 will be allocated to attorney fees and expenses and the costs of administering the settlement. In addition to any benefit they may receive based on personal injuries or medical monitoring, the class representatives, John Smith and Mary North, will each receive a payment of $5,000.00 for serving as class representatives, for a total payment to class representatives of $10,000.00. If Judge Jones approves the proposed settlement, up to $24,010,000.00 will be awarded as attorney fees, expenses, the costs of administering the settlement to date, and special payments to the two class representatives. Whatever interest that accrues on the settlement fund after it is created will be distributed proportionately with the distributions described in this paragraph.

If Judge Jones approves the proposed settlement, each eligible class member who submits a valid claim for the Injury Compensation Fund will receive a payment in the form of a check determined according to the process described in section 5c(1) above. The amount of each check will be based on the type of disease and the amount of medical expenses and lost earnings. The initial payment will consist of one-half of the amount determined by the claims administrator, arbitrator, or judge. The timing of the initial payment will depend on the time needed to obtain and process the information that describes the claim. If funds are available, all or part of the balance will be paid in five years.

Each eligible class member who submits a valid claim for the Medical Monitoring Fund will receive a payment in the form of a check determined according to the process described in section 5c(2) above. The claims administrator expects to distribute medical monitoring fund checks within six months of the judge's action on the proposed settlement.

10. Where can you get additional information?

This notice provides only a summary of matters regarding the lawsuit. The documents and orders in the lawsuit provide greater detail and may clarify matters that are described only in general or summary terms in this notice. The settlement agreement dated October 4, 2000 may be of special interest. If there is any difference between this notice and the settlement agreement, the language of the settlement agreement controls. Copies of the settlement agreement, other documents, court orders, and other information related to the lawsuit may be examined at www.xxxx.com on the Internet. You may also obtain a copy of the settlement agreement and other information by calling 1-800-555-xxxx.

You also may examine the court papers, the settlement agreement, the orders entered by Judge Jones, and the other papers filed in the lawsuit at the Office of the Clerk of the United States District Court for the Northern District of State at 75 Main Street, Any Town, US 10103 during regular business hours.

If you wish, you may seek the advice and guidance of your own attorney, at your own expense.

If you wish to communicate with or obtain information from attorneys for the class, you may do so by letter [or e-mail] at the address listed below. You should address any such inquiries concerning a claim—or other matters described in this notice—to either:

The Claims Administrator
P.O. Box 32453
Any Town, US 12345 Email: admin@xxx.com

or

Attorneys for the class
P.O. Box 1628
Any Town, US 12345 Email: classatt@xxx.net

The parties created the above sources specifically to provide information about this case. They welcome your calls, e-mails, or letters. Please do not call the judge or the clerk of the court.

Dated: October 4, 2001.

Attorneys for the Class
By order of the District Court

Jane Jones
United States District Judge

Summary of Important Information

Date	Form	Deadline	If you file on time:
April 1, 2001	Exclusion Form **(PURPLE FORM)**	Deadline for excluding yourself from the class action	You will not share in the benefits of the settlement and will be free to pursue any claims you may have against the defendant.
April 1, 2001	Objection Form **(GREEN FORM)**	Deadline for court to receive a comment or objection	You may object to or comment on proposed settlement
April 15, 2001	Appearance Form **(ORANGE FORM)**	Deadline for entering an appearance	You may notify the court of your intention to appear at the hearing on the proposed settlement and, if you so choose, to be represented by your own attorney
April 15, 2001		Hearing	The judge will: • determine whether the proposed settlement is fair, reasonable, and adequate • consider attorney-fee and attorney-expense requests • allow time for you or your attorney to briefly state objections or to comment on the proposed settlement
June 1, 2001	Claim Form **(BLUE FORM)**	Deadline for filing a claim	You will: • be bound by the proposed settlement if it is approved • share in the settlement if your claim is valid; • be barred from suing defendant based on the alleged wrongdoing

United States District Court for the
Northern District of State

John Smith v. XYZ Corporation — Civil Action No. 00-1234

Summary of notice of proposed class action settlement, right to exclusion, and hearing

You have received this class action notice because our records show that you may have been exposed to asbestos fibers in products of XYZ Corporation. Plaintiffs (the "class") have brought a class action lawsuit against defendants ("XYZ Corporation") alleging that XYZ Corporation produced building insulation materials and other products with knowledge that the asbestos fibers contained in those products posed a danger to the health and safety of anyone exposed to them. Plaintiffs and defendant have decided to settle the case. The settlement must receive court approval to become effective. You may be entitled to money from the settlement fund if you have been exposed to asbestos fibers in Xbestos, XYZinsulate, or any other products of XYZ Corporation. You may qualify only if you do not exclude yourself from the class and you are not a defendant, an officer or director of XYZ Corporation, or a member of the immediate family of an officer or director.

Under the terms of the settlement, the defendant has agreed to create a settlement fund in the amount of $300,000,000.00 plus whatever interest is earned after the fund is created. The attorneys for the class are asking for $24,010,000.00 plus interest for their services, expenses, and cost of administering the settlement. The amount remaining, at least $275,990,000.00 (part going to the Injury Compensation Fund and part going to the Medical Monitoring Fund) will be distributed to class members who submit valid claims.

Payments from the Injury Compensation Fund described below will be based on medical diagnosis of specific injuries that scientists have found to be associated with exposure to asbestos fibers.

Type of Injury	**Minimum Payment**	**Maximum Payment**	**Average Payment**
Mesothelioma	$10,000	$100,000	$20,000-$30,000
Lung Cancer	$5,000	$43,000	$9,000-$15,000
Other Cancer	$2,500	$16,000	$4,000-$6,000
Non-Malignant	$1,250	$15,000	$3,000-$4,000

To qualify for a payment, each claimant must submit a statement from a physician with a description of the claimant's current medical condition, including a diagnosis in one of the above

categories. In addition, each claimant must submit all medical records relating to the treatment of that injury, a signed release permitting the administrators of the fund to obtain medical records, and records indicating lost earnings resulting from the medical condition. The administrator will then assign a value to the claim based on the severity of the injury, medical expenses, and lost earnings. You will have the right either to accept the administrator's finding, or to appeal it to an arbitrator or a judge.

We cannot know in advance exactly how many claims there will be for payment from the Injury Compensation Fund. To make sure that the fund does not get used up before some claims are filed, claims will initially be paid at one-half the value established by the administrator, arbitrator, or judge. If there are sufficient funds available after five years, the remaining payments will be made in whole or in part.

The Medical Monitoring Fund will consist of $70,000,000.00 to compensate claimants for the costs of determining whether or not they have an asbestos-related disease that may have resulted from their exposure to defendant's asbestos products. To qualify for payment, a claimant must present evidence of exposure to one or more of defendant's asbestos-containing products and must also present evidence of medical expenses incurred to test for the presence of asbestos-related disease. A minimum payment of $1,000.00 will be made to those who present evidence of exposure but do not, for any reason, have evidence of medical expenses.

You have four options:

1. **If you are satisfied with the terms of the settlement and want to participate in the class action**, you will need to complete and sign the enclosed Claim Form **(BLUE FORM)** and mail and postmark it by June 1, 2001. In exchange for receiving the benefits of the settlement, you will be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products.

2. **If you are not satisfied with the terms of the settlement and want to participate in the class action**, you can object to, or comment on, the proposed settlement by completing and signing the enclosed Objection Form **(GREEN FORM)** and mailing it along with a written statement postmarked by April 1, 2001 detailing the reasons you believe support your objection. For example, in your written statement of objection you may wish to discuss whether the proposed settlement is fair, reasonable, and adequate; whether the class representatives and their attorneys adequately represent the class; whether the attorney fees or expenses are reasonable; and any other aspect of the proposed settlement or the payment and distribution plan for the proposed settlement. U.S. District Judge Jane Jones will consider your objections or comments in deciding whether she will approve the proposed settlement.

Even if you file an objection, you still must file a claim if you want to share in any settlement the court may approve. Filing a claim does not affect your comment or objection.

3. **If you do not want to participate in this class action** you should exclude yourself from the class by completing and signing the enclosed Exclusion Form **(PURPLE FORM)** and mail and postmark it by April 1, 2001. If you do exclude yourself, you will not share in the proposed settlement. However, you will be free to pursue on your own as a member or

representative or member of another class (if there is one), whatever claims you might have against the defendant based on exposure to any of defendant's asbestos products.

4. **If you do nothing**, you will not receive the financial benefits of the proposed settlement. If you do nothing and the court approves the proposed settlement, you will also be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products.

On April 15, 2001 at 9am, Judge Jones will hold a **hearing** on the settlement in courtroom #5 in the Federal Courthouse located at 75 Spring Street, Any Town, US. The purpose of the hearing is to determine whether the proposed settlement is fair, reasonable, and adequate and, whether it deserves court approval. You may attend the hearing if you wish but you are not required to attend.

If you file a claim or if you do nothing in response to this class action you will be represented by the attorneys for the class. But, you are free to represent yourself or hire an attorney to represent you at your own expense. If you remain a member of the class and decide to hire an attorney or if you plan to appear at the hearing and represent yourself you will need to complete and sign the enclosed Appearance Form (**ORANGE FORM**) and mail and postmark it by April 15, 2001.

If Judge Jones approves the proposed settlement, a claims administrator will notify you in writing if your claim has been accepted or rejected and will give you the reasons for any such rejection. You will have thirty days after that to correct any deficiencies in your claim. Each eligible class member who submits a valid claim will receive a payment in the form of a check. The amount of each check will be based on the type of disease and the amount of medical expenses and lost earnings. The claims administrator expects to distribute the first set of payments within a year of Judge Jones' action on the proposed settlement.

This notice provides only a summary of matters regarding the lawsuit. If there is any difference between the terms of this notice and the settlement agreement, the language of the settlement agreement controls. Copies of the settlement agreement, other documents, court orders, and other information related to the lawsuit may be examined at www.xxxx.com on the Internet. You may also obtain a copy of the settlement agreement and other information by calling 1-800-555-xxxx. Please do not call the judge or the clerk of the court. If you wish to communicate with or obtain information from attorneys for the class, you may do so by letter [or e-mail] at the address listed below. You should address any such inquiries to either:

The Claims Administrator
P.O. Box 32453
Any Town, US 12345 Email: admin@xxx.com

or

Attorneys for the class
P.O. Box 1628
Any Town, US 12345 Email: classatt@xxx.net

BLUE FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

CLAIM FORM

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

If you want to be eligible to participate in the distribution of the settlement fund, you must complete this form and mail and postmark it by June 1, 2001 to:

Claims Administrator
P.O. Box 32453
Any Town, US 12345

Section I. Identification (Please type or print)

Your name_____

Address _____

_____

Any Town, US, Zip Code _____

Telephone _____

Your e-mail address (if any)_____

Section II. Exposure to products of XYZ Corporation (Please type or print)

Dates of Exposure (e.g., employment dates, date of installation on home; attach records, if available)	**Names of products of XYZ Corp. used or installed**	**Names of co-workers or installers of XYZ Corp. products (include statements, if available)**

(Use additional sheets if necessary)

Section III. Summary of medical claims relating to products of XYZ Corporation (Please type or print) (For medical monitoring claims, go directly to section V.)

Diagnosis (attach physician's statement)	**Total medical expenses to date (attach billing statements)**	**Anticipated future medical expenses (attach physician's statement)**	**Lost earnings to date (attach documents, such as tax returns, pay stubs)**	**Anticipated future lost earnings (attach information about age, occupation, and past earnings)**

(Use additional sheets if necessary)

The diagnosis must include a statement by a physician who has examined and treated you, indicating the most specific diagnosis possible, the likely cause or causes of the condition, the date of onset, and the prognosis. To claim future medical expenses, you must include a statement from a physician describing future treatment plans and estimating their cost. Claims for lost earnings must include proof of earnings prior to any disability related to the diagnosis. Claims for future earnings should include information about your age, occupation, and a summary of earnings prior to the onset of your inability to work.

Section IV. Statement of additional claims, settlements, or payments.

In addition to the claims you are presenting in this form, you must provide information about any claims relating to the diagnosis presented in Section III that you have made to other companies or by direct claim whether in court cases, bankruptcy proceedings, or other proceedings:

Title or caption of proceedings (if any)	Name of company or number of companies	Type of proceeding (civil case, bankruptcy, direct claim)	Amount of settlement, judgment, or agreement to pay

Section V. Statement of medical monitoring claims.

Please check and complete one of the following two options:

_____(1) I have incurred medical and other expenses of $_____ in relation to determining whether or not I have an asbestos-related medical condition. I have attached receipts and other records supporting this claim.

_____ (2) I accept the defendant's offer to pay $1,000 for medical monitoring expenses.

I understand that by signing and mailing this Claim Form, if the proposed settlement is approved, I am agreeing to follow the claims procedure specified in the class action settlement. This means that I can only bring a lawsuit based on the alleged dangerousness or harmfulness of any product manufactured by XYZ Corporation if I have first presented a claim to the claims administrator and proceeded to arbitrate any dispute about the administrator's award. In exchange, I will receive any share of the settlement to which I may be entitled.

Your signature _____

Date: _____

GREEN FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

OBJECTION FORM

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

Please enter my objection to the proposed class action settlement in this case.

I (circle one) [will] [will not] appear at the hearing scheduled in this case for April 15, 2001 at 9:00 A.M. in the courtroom of Judge Jones, located at 75 Main Street, Any Town, US.

Your signature _____

Date: _____

Please type or print:

Your name _____

Address _____

_____

Any Town, US, Zip Code _____

Telephone _____

Your e-mail address (if any) _____

Remember to attach to this form your written statement detailing the reasons you are objecting to the proposed settlement.

(Please turn over for addresses)

Please send this form and your written statement by prepaid first-class mail by April 1, 2001 to:

Clerk of the United States District Court for the Northern District of State
P.O. Box 6226
Any Town, US 12345

You must at the same time send a copy of the objection form and the written statement to the lead attorney for the class:

Herman Green, Esq.
P.O. Box 1628
Any Town, US 12345

and to defendant's attorney:

John Simmons, Esq.
835 Peach Street
Suite 950
Any Town, US 12345

PURPLE FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

EXCLUSION FORM

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

If you want to exclude yourself from the class, you must complete this form and mail and postmark it by June 1, 2001 to:

Claims Administrator
P.O. Box 32453
Any Town US 12345

I have received the "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing," dated October 4, 2000 and do NOT wish to remain a member of the plaintiff class certified in the case of Smith v. XYZ Corporation, Civil Action No. 00-1234, in the United States District Court for the Northern District of State.

(Additional information and signature line are on the back of this form.)

I understand that by signing and mailing this form:

- I will not receive any of the monetary benefits of the proposed settlement as described in the "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing;"

- I will not be represented in this action as a class member if the proposed settlement is not approved; and

I may pursue, at my own expense, whatever claims I may have against any of the defendant. I understand that I would have to prove any claim I might file, and that any claim would be subject to any defenses defendants may have.

Your signature _____

Date: _____

Please type or print:

Your name _____

Address _____

_____

City, State, Zip Code _____

Telephone _____

Email (if any) _____

ORANGE FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

APPEARANCE FORM

[redacted]

Please enter my appearance as counsel[1] for _____, who is a member of the class in the case captioned above.

I (circle one) [will] [will not] appear at the hearing scheduled in this case for April 15, 2001 at 9:00 A.M. in the courtroom of Judge Jones, located at 75 Main Street, Any Town, US.

Your signature _____ (To be signed by counsel or by the class member if the class member does not have his or her own attorney)

Date: _____

Please type or print your name and address or that or your attorney:

Your name _____

Address _____

_____

City, State, Zip Code _____

Telephone _____ E-mail address (if any) _____

Please mail and postmark by April 1, 2001 to:

Clerk of the United States District Court for the Northern District of State
P.O. Box 6226
Any Town, US 12345

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[1] If you are an individual representing yourself, leave this line blank.

United States District Court for the
Northern District of State

John Smith and Mary North, on behalf of themselves and
all others with similar claims,
Plaintiffs

v.

XYZ Corporation
and
Anne Adams,
Defendants

Civil Action No. 00-1234

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT, RIGHT TO EXCLUSION, AND HEARING

To: All persons and entities who purchased one or more shares of stock of XYZ Corporation during the time period from January 2, 1999 through December 31, 1999.

Read this notice carefully. You may be entitled to share in the settlement proceeds of a class action lawsuit. Your rights to money and other benefits may be affected.

This is <u>not</u> a lawsuit against you. You are <u>not</u> being sued.