MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

NOVEMBER 9 and 10, 1995

The Advisory Committee on Civil Rules met on November 9 and 10, 1995, at The University of Alabama School of Law. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former Committee Chair Chief Judge Sam C. Pointer Jr., and former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette attended as Reporter, and Sol Schreiber, Esq. attended as a member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej, along with Karen Kremer, represented the Administrative Office of the United States Courts. Thomas E. Willging and Robert J. Niemic represented the Federal Judicial Center. Professor Francis E. McGovern attended as an invited speaker on experience with state-court class actions. Observers included Frank Bainbridge, Esq., Sheila Birnbaum Esq., Robert S. Campbell, Jr., Esq. (liaison, American College of Trial Lawyers), Alfred W. Cortese, Jr., Esq., Robert Heim, Esq., Professor Deborah R. Hensler, Robert Klein, Esq., Barry McNeil, Esq. (Chair-elect, ABA Litigation Section), Professor Linda S. Mullenix, Fred Nisko, Esq., Professor Carol M. Rice, Evan Schwab, Esq., Fred S. Souk, Esq., Melvin Spaeth, Esq., and H. Thomas Wells Jr., Esq. (liaison, ABA Litigation Section).

Judge Higginbotham opened the meeting by welcoming the Committee and observers to Tuscaloosa and the Law School.

The Minutes of the April 20, 1995 meeting were approved.

Judge Higginbotham reported on the September meeting of the Judicial Conference of the United States. Shortly before the meeting, the proposals to publish for comment revised jury voir dire provisions in Criminal Rule 24(a) and Civil Rule 47(a) were moved to the discussion calendar. It was proposed that the Judicial Conference direct the Standing Committee that the revisions not be published for comment. This proposal raised concerns on at least two scores. The first concern is that it would be a new and unfortunate precedent to bring the Judicial Conference into the rulemaking process before the ordinary consideration of proposals that have worked through the full processes of the Advisory Committees and

Standing Committee. The second concern is that such interference could make it more difficult to persuade Congress that the Enabling Act process should be respected because it provides an orderly and designedly deliberate process for considering rules changes. After spirited discussion, the Judicial Conference decided not to interfere with the proposed publications. This action seems to reflect a judgment about the need to respect the regular Enabling Act process, not final approval of the merits of the Criminal Rule 24(a) and Civil Rule 47(a) proposals. There seems to have been a strong sense that allowing public comment is particularly important with respect to attorney participation in jury voir dire. The matter is of great importance to the bar, and the bar should know that it has had full opportunity to make its views known.

Brief further discussion was given to the Civil Rule 47(a) proposal. It was noted that the public comment period may propose alternatives that will improve the initial proposal. Jury questionnaires are often suggested, but must be controlled both to protect juror privacy and also to reduce the opportunities for manipulation of psychological profiles or other jury selection devices. New York, which has followed the practice of selecting civil juries outside the presence of a judge, is moving toward a system of greater judicial involvement that nonetheless is likely to leave room for lawyer participation. And thoughtful attention must be directed to the fact that many judges who permit substantial lawyer participation under present Rule 47(a) oppose amendment of the rule to require this practice. If possible, some means must be found to address the underlying concern that judges are better able to control improper uses of voir dire if they have an unconditional right to deny any participation.

The report on pending legislation pointed out that it was decided that the "Contract With America" bills were moving so fast in the House of Representatives that it would not be fruitful to attempt to voice Rules Committee concerns in the House. The Subcommittee chaired by Judge Scirica, including members Doty, Rowe, Vinson, and Wittmann, has met with some success in working with members of the Senate staff. Congress is working toward a conference report on securities legislation, although as of the time of this meeting the Senate had not yet appointed conferees. Some difficulties continue to divide the House and Senate. The chair of the SEC has stated profound reservations about the legislation. It is still too early to guess the prospects for eventual passage. There are important substantive provisions in the bill, and the subcommittee has been at pains to state repeatedly that substantive matters are outside the area of proper Committee concern. When substance and procedure are tied together in the bill, as often happens, this approach has necessarily constrained the subcommittee's freedom to make suggestions. And there are many procedural provisions, dealing with pleading, discovery, Civil Rule 11 sanctions, jury interrogatories, class actions, and other matters. Some of the troubling procedural provisions have been dropped, such as the proposals for steering committees or guardians ad litem in class actions. Other class action innovations -- and there are many -- are limited to securities actions, but seem to have reached a stage that is beyond further modification. Pleading requirements have been moved to a relatively "low stakes" table; the most recent version incorporates Second Circuit standards for pleading with particularity. The Rule 11 provisions continue to be a challenge. The current version requires the court to review the complaint, responsive pleadings, and dispositive motions, and make findings whether there has been any violation of Rule 11. Any Rule 11 violation in the complaint that is not de minimis presumptively requires an award of the full attorney fees incurred by the defendant, no matter how small a portion of the fees was incurred by reason of the violation rather than entirely proper portions of the complaint. These Rule 11 provisions have become a surrogate for a more general fee-shifting proposal, and the compromise seems untouchable during this session. If the bill does not pass this session, however, there may be an opportunity for further consideration and improvement of these provisions.

Rule 23

Civil Rule 23 formed the central focus of the meeting. The materials with the discussion draft suggested that four major proposals should be discussed first: (1) The new Rule 23(f) provision for permissive interlocutory appeals; (2) that Rule 23(b)(3) be modified to require that a class action be "necessary" for the fair and efficient adjudication of the controversy; (3) that Rule 23(b)(3) require consideration of the probable success of the class claim on the merits, and of the significance of even probable success; and (4) that Rule 23 be modified -- most likely with respect to (b)(3) classes only -- to make clear the appropriateness of "settlement" classes. The meeting provided opportunity for full discussion of each of these four proposals, and tentative decisions were reached as to the first three. No time was available to discuss the more detailed changes that also were proposed in the discussion draft. The discussion draft posed two separate issues with respect to these changes. The first issue is whether it is wise to propose a number of significant changes in tandem with a set of major changes. The choices to be made will not be easy. If the Committee finds several aspects of Rule 23 that bear useful improvements, it seems undesirable to defer these matters for a period that is likely to extend several years into the future. On the other hand, consideration of even two or three fundamental changes will continue to require careful attention and much hard work. If the Standing Committee, members of the bench and bar, Judicial Conference, Supreme Court, and Congress are asked to consider fundamental changes, there may be a risk that other significant changes will not receive the attention required to ensure the best possible revisions. The second issue really is all the other changes. None can be advanced without careful Committee review. If it is decided that they should be considered on the merits with an eye to determining which merit a recommendation for publication, the Committee must review them to support appropriate determinations.

Rule 23(f): Permissive Interlocutory Appeals

Draft Rule 23(f) would provide for permissive interlocutory appeal from a district court order granting or denying class certification. The draft is closely modeled on the language of 28 U.S.C. § 1292(b), in an effort to invoke familiar concepts that will ease application of a new rule. It departs from § 1292(b), however, in important respects. First, it does not require permission to appeal from the district court, nor even an initial request to the district court for permission. Second, it does not incorporate any of the limiting § 1292(b) requirements that have limited use of § 1292(b) in the class certification context -- that there be "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although § 1292(b) has provided a useful opportunity for appeal with respect to various Rule 23 rulings, the draft is intended to make appeals more readily available. The opportunity for more frequent review may be particularly important if other substantial changes are made in Rule 23. Particularly during the early years of any new Rule 23 provisions, the opportunity for appellate guidance by interlocutory appeal can be invaluable.

The limits built into the draft were noted repeatedly throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. District court proceedings are stayed only if a stay is ordered by the district judge or the court of appeals -- the stay provision is modeled on § 1292(b) to ensure there is no confusion of meaning. The district-court-first analogy to Appellate Rule 8(a) also was noted repeatedly. The Advisory Committee Note to this

provision should observe that ordinarily an application to stay district court proceedings should be made first to the district court. The question was raised whether the rule should provide a presumptive stay of discovery when a court of appeals grants permission to appeal. It was agreed that it is better to adhere to the general provisions of the § 1292(b) model; such problems seem to be worked out well in practice under § 1292(b), and creation of a presumption might distort the stay decision.

The first question addressed to the nature of the permissive appeal was whether there should be an opportunity to appeal as of right, even broader than the former "death-knell" theory that was used by some courts to permit appeal when a denial of class certification seemed to threaten the practical termination of litigation that could not be pursued to vindicate individual claims alone. The discretionary opportunity provided by the draft was thought to be illusory. It was observed that at least in some circuits, certification for appeal under § 1292(b) frequently fails because the court of appeals denies permission to appeal; eliminating the need for district-court certification does not ensure that the court of appeals will grant permission.

The response to the fear that a discretionary system of interlocutory appeal would prove illusory was the fear that a right to appeal would lead to abuse. The Federal Judicial Center study confirms the belief that there are many "routine" class certification decisions. Appeals in such cases are likely to do little more than increase delay and expense. Yet there will be strong temptations to appeal certification decisions; defendants will be particularly tempted to appeal orders that grant certification. Perhaps worse, the right to appeal certification decisions might lead a party to contest a certification that otherwise would be accepted by stipulation. It is anticipated -- and the Advisory Committee Note would make clear -- that permission to appeal, although discretionary in the court of appeals, will rarely be given.

It was further urged that the draft provides significantly greater protection against improvident certification decisions than § 1292(b) now provides. Removing the power of the district court to defeat any opportunity to appeal is a significant change. A grant or denial of certification can "make or break" the litigation, and the need for review at times will be greatest in situations that are least likely to lead to district-court certification. And the danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.

An argument was advanced for restoring the requirement of district court permission to appeal, drawing from the observation that a class certification decision may be provisional. When a judge has reached a reasonably firm decision as to certification, appellate review often will be welcome, particularly in cases that present uncertain questions of law. There is little reason to fear that necessary appeals will be thwarted by district court intransigence. And if the district judge has no voice in the appeal decision, there will be a tendency to defer certification rulings. These arguments were later renewed, with the added suggestion that district-court discretion is particularly important in cases that have generated lengthy records on the certification question. The district court's familiarity with the record will support a better evaluation of the value of appeal. The response was renewed also, this time with the added observations that certification for appeal might be inappropriately denied by a judge bent on pursuing settlement following a grant of class certification designed to encourage settlement, or that certification for appeal might be inappropriately denied by a judge who has denied class certification because of distaste for the underlying claim.

Discussion returned to the fear that the draft rule would encourage too many efforts to appeal; it was suggested that appeals would be attempted in the overwhelming majority of cases. It was rejoined, however, that this prediction rested on experience with the most complex and contentious of class actions. More routine actions are not likely to involve such persistent efforts. The explicit invocation of court of appeals discretion, moreover, is a significant safeguard against feckless attempts to appeal. Although adding "in its discretion" to an openly permissive appeal provision may seem redundant, it is valuable as an explicit reaffirmation of the sweep of appellate discretion. The phrase is lifted bodily from § 1292(b); the Committee Note should state that the scope of appellate discretion is as broad under proposed Rule 23(f) as it is under § 1292(b). Invoking this familiar concept should allay concerns about the risks of improvident and disruptive appeal attempts. It is expected, moreover, that most certification decisions will depend heavily on specific case circumstances. There will be little reason to grant appeal in such cases; the major impetus for appeal will come in cases presenting unsettled questions of law.

Further discussion led to the conclusion that the Committee Note should discuss the possible importance of district court contributions to the decision whether to permit interlocutory appeal. District courts should be encouraged to offer advice on the desirability of appeal at the time of making certification decisions. The advice would not be a condition of appeal, but would be more or less persuasive according to the reasons offered by the district court and the extent to which certification turns on case-specific facts developed at length in the district court. District courts can be quite helplful in "separating the wheat from the chaff" of intended appeals. District court advice may help the parties as well as the court of appeals; a cogent statement of reasons for refusing appeal may often discourage a party who otherwise would attempt an appeal.

It also was asked whether an appeal provision could reasonably be discussed before deciding whether to propose any other changes in Rule 23. Until the Committee has concluded its deliberations on Rule 23, it will not be possible to know what the Rule will be. The scope of appeal, the nature of the issues that may be advanced, and the frequency or infrequency of "routine" certification decisions, all depend on the nature of the rule itself. It was responded that the Committee may decide to urge only the appeal amendment. But it was further agreed that a decision to propose an appeal provision may appropriately be revisited, at the behest of any Committee member, at the conclusion of the Rule 23 deliberations.

A motion to approve proposed Rule 23(f) passed, 11 for and 1 opposed as to particular (unspecified) features of the draft.

CERTIFICATION "NECESSARY"

The discussion draft proposed that to certify a Rule 23(b)(3) class, a district court must find that certification is "necessary" for the fair and efficient adjudication of the controversy, not merely superior to other available methods:

(3) the court finds * * * that a class action is ~~superior to other available methods~~ necessary for the fair and efficient adjudication of the controversy. * * *

The background of this proposal was described as the great level of interest and concern that have come to surround use of Rule 23 to address mass torts, and particularly dispersed mass torts. The Committee has heard many views on this set of problems through its activities focused on Rule 23. There has been a strong sense that much of the difficulty has been due to the substantive law, a difficulty beyond the reach of this Committee. There also has been much concern that certification of a class can give artifical strength to claims that individually lack any significant merit. The greatest concern focuses on claims that, if valid, would generate substantial individual damage awards. Although many of the claims may be brought as individual actions, the defendants would defeat most. If all are aggregated in a single action, however, even a relatively small risk of losing on the merits must be weighed by the defendants against the crushing liability that would be imposed by a loss on the merits. This calculation may be further affected by a fear that the sheer weight of the responsibility of denying any recovery to all members of a class may increase the prospect that the class will win on an aggregate claim that would be lost far more often if pursued in individual litigation. The result is a great pressure to settle. The pressure to settle also may be enhanced by the transaction costs of litigating individual claims -- if a defendant can purchase "global peace" by settlement, much of the settlement cost may be offset by saving the expense of individual litigations.

On the other side of the equation is the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation. Consolidation of actions in the same court under Civil Rule 42, and aggregation of actions in different courts under 28 U.S.C. §§ 1404, 1406, and 1407 is not a particularly effective means of addressing this problem, even recognizing that the efficiencies of consolidated proceedings may make it possible to pursue claims that would not bear the risks and expenses of separate adjudication. Class actions in such circumstances do far more than merely achieve efficiency. The proposal is not designed to deter consolidations, but only to limit class certification to settings in which individual litigation is not a realistic alternative.

Changing this criterion of Rule 23(b)(3) certification from superiority to necessity could emphasize the role of class actions in addressing claims that do not bear the costs of individual litigation. For such claims, class certification is necessary. Certification is not necessary for claims that could reasonably be pursued in individual actions. It may be that a single event or set of events will give rise to claims of both types because some victims suffer substantial injury, while many other victims suffer only relatively minor injuries.

Such is the purpose of the proposal. It is limited to (b)(3) classes. The questions the Committee addressed began with the central issues: is the change desirable? What might it mean in practice -- is there force to the concern that "necessary" might mean a lower threshold, not a higher threshold? Should the change be broadened to include (b)(1) or (b)(2) classes?

The first response was that the proposal was a mere cosmetic change that is not adequate to address any of the real problems of Rule 23.

The next response was that indeed the change seemed to lower the standard, making it easier to achieve certification. The annotations to the proposal say that the test of necessity is a practical test, not an absolute one; is this something that can safely be left to the Committee Note, or should it somehow be worked into the language of the Rule? Another view of this question was that there is no meaningful difference between superiority and necessity; unless we can find and express a difference, we should not

amend the language of the present rule. In any event, the concept of necessity is ambiguous.

And then the proposal was championed as a good thing. The only way to effect change is to modify the language of the rule. The problems indeed are clustered around (b)(3) and the "freeway" effect it has in generating claims that, but for class certification, would not ever develop into litigation. If it were possible to find the equivalent in formal drafting language, the rule should caution against "willy-nilly" certification. The Note should say this. A clear and convincing preponderance of the factors conducing to certification should be required.

The opposing view conceded that necessity implies a higher standard than superiority, and argued that a higher standard is undesirable. To find that a class action is superior is to find that it is a better means of proceeding. To change the standard is to require that a court deny certification even though a class action would be better than -- superior to -- the realistically available alternative methods of proceeding. The change may seem to be loading the rule too much in favor of defendants. The perceived problems would be better addressed through the proposed factors that look to the probability and social benefits of success on the merits of the class claim.

Another concern about the necessity standard was expressed in relation to employment discrimination claims. The statutory amendments that have added damages remedies now bring these cases into the ambit of (b)(3) classes. Class certification may be necessary to ensure that all affected individuals recover damages; a rule that emphasizes necessity may lead to certification of a class that will generate many practical problems, and that would not be "superior" to other available methods that often would not be invoked. This result may be a good thing, but we need to think about the problem before deciding on a language change.

The concern about the ambiguous relationship between the superiority and necessity standards led to the suggestion that the rule retain the superiority requirement and add necessity as an additional requirement. This should make it clear that the standard is being ratcheted up. This proposal was in fact adopted after much further discussion.

Attention then moved to the element of this requirement that focuses on the "fair and efficient adjudication of the controversy." It was observed that the meaning of this phrase depends on the "controversy" that it refers to. If the controversy includes claims that grow out of a common fact setting but that would not give rise to individual litigation, the concepts of fairness and efficiency may diverge. A class action may be superior and indeed necessary precisely because there is no viable alternative means of adjudication. It is more fair if the claim deserves to be enforced. At the same time, class proceedings may be "efficient" only in the sense that the alternatives are so inefficient as to be unavailable. For that matter, certification also may not be "fair" in light of the prospect that an aggregation of worthless small claims may gain leverage that forces settlement to avoid the costs of class litigation and the risk of a mistaken judgment on the merits. This discussion did not lead to any proposal for amending any of the three terms involved.

Another suggestion was that as a matter of drafting, factor (C) should be reframed. "Desirability" somehow duplicates the inquiry into superiority or necessity; it would be better to refer to the consequences of concentrating the litigation in the particular forum. This suggestion was met, however,

with the concern that the longstanding language of Rule 23 should be changed only when a change of meaning is intended. Any substitute for desirability must be explained in the Note as a styling change, not a change of meaning, and even then there would be a risk that the Note would be overlooked and some change of meaning read into the change of language.

These concerns provoked the observation that before addressing matters of language, it is most important to determine what policy should be embodied in the rule. Should we maintain present policy, or is it desirable to suggest some change?

One broad policy issue was found in the question whether adoption of a higher standard for (b)(3) class certification would be, or would be perceived to be, a pro-defendant choice. The response was that the change cannot meaningfully be seen in that light. The purpose of this change is not to address the classes that aggregate numerous small claims; if anything is do be done about such classes, it will be through other proposals. Instead, it addresses the classes that include plaintiffs who have substantial individual claims and who could pursue individual litigation. In the last few years, defendants have often sought certification of such classes. The interests of the defendants, often spurred by liability insurers, are to achieve a global settlement that avoids the costs and uncertainties of individual litigation. Making certification more difficult in these cases could at least as easily be seen as a pro-plaintiff change. As an additional complication, the interests of the defendants may overlap with the interests of some members of the plaintiff class because a class adjudication can effect a more orderly and uniform distribution of the assets available to satisfy the claims of all plaintiffs. A carefully structured class disposition can ensure that all persons injured by a common course of conduct share in the judgment, not simply those who got the earlier judgments. The purpose is not so much to favor plaintiffs or defendants as to find a procedure that most effectively recognizes the interests of all.

The Committee then was admonished that this proposal reflects rulemaking at its worst. The Rules were, in the beginning, relatively simple. People could understand them. They have become complex. The cognoscenti understand them still. But there are 800,000 lawyers who may need to understand them, and it is counterproductive to continue along a course of trivial changes that generate confusion far out of proportion to any incremental benefit that might be achieved.

The policy issues were brought back into the discussion with an illustration of a "single event" mass tort. An airplane crash might generate 150 claims. Each claim could be tried separately. A joint class proceeding may be more efficient, but is not necessary. This is a real situation that causes real difficulty. Individual actions in the federal courts can be consolidated without difficulty, given the array of consolidation devices. The Note should comment on this alternative to certification. This change is important. This argument was met by the contrary view that class certification is suitable for the single-event mass disaster. And in return it was accepted that perhaps in some single-event settings a class action is necessary because consolidation will not accomplish all the appropriate results. Class certification, for example, might help address settings in which individual state-court actions cannot be consolidated with a mass of federal actions.

A different perspective was opened by the observation that the proposed necessity standard seems calculated to underscore a preference for individual litigation where individual litigation is possible. It was answered that this is indeed the purpose, that many lawyers believe there is too much emphasis on moving cases, getting rid of them, even though individual actions would be better. This is the policy that

should be addressed before language is chosen.

This policy was then underscored by referring to the decision in Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). It was suggested that the result in the Rhone-Poulenc case is right, and that Rule 23(b)(3) should be amended to make it easier to support similar results in future cases. We need to find a way to make it easier to refuse certification. This view was echoed in the statement that the issue is whether Rule 23(b)(3) should be amended to discourage class certification.

The earlier suggestion was renewed by a motion that the superiority language should be retained, and supplemented by adding a requirement of necessity. There would be no change in the "fair and efficient language," which refers to matters that depend heavily on the context of specific cases. This change may indeed encourage certification of small-claims classes; whether there may be offsetting changes that may discourage certification depends on the additional proposals still to be discussed.

The virtues of this proposal were urged to be twofold. The existing body of doctrine that elaborates the superiority requirement will be retained, providing a familiar first step of analysis. The additional necessity requirement need be addressed only if superiority is found. Necessity then will provide an additional and higher requirement that will require further evaluation of the same factors that bore on the superiority determination.

The objection was made that it seems undesirable to require this two-step process. The proposal seems to be that necessity is a higher standard that always embraces superiority, and always requires something more. The finding of superiority will be necessary in all cases, but never sufficient for certification. Why not focus on necessity alone, explaining it as well as can be, without retaining both requirements?

The motion to retain the superiority requirement and add a necessity requirement passed by vote of 8 to 4. This portion of Rule (b)(3) would read:

(3) the court finds * * * that a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. * * *

State Class Actions

Professor Frances McGovern then addressed the Committee on current experience with class actions in state courts. He spoke from extensive experience with state-court class actions, including experience as a special master charged with facilitating coordination between state courts and the federal court supervising the consolidated federal cases arising out of claims concerning silicone gel breast implants. He has worked extensively with the MTLC committee established by the Conference of Chief Justices.

There has been an explosion in state class actions. Many of them involve claims that are framed as "fraud" claims arising out of the terms of various kinds of insurance and loan transactions. The volume is

remarkable. The procedures also are remarkable; state judges achieve much greater uniformity of procedure than federal judges, largely by adhering closely to the recommendations made in the Manual for Complex Litigation. There are some major problems.

Polybutelene pipe cases illustrate one type of state actions. Chlorine attacks the pipe joints, causing them to leak. State law governs, and individual claims ordinarily are too small to meet the amount-in-controversy requirement for diversity jurisdiction. Some individual claims have been tried to judgment. The defendants want to settle. A Texas state judge refused to certify a nationwide class for a $750,000,000 settlement. A federal judge denied jurisdiction of an attempted class action. The result was that class actions were filed in three states. A California judge took on the task of persuading judges from the other state to go to California to work out a settlement. When that did not work, he conducted a settlement conference that came very close to a settlement. The lawyers have been "sent back" to the other state courts to attempt to conclude the settlement of all actions in all states. It may work.

For some time, class actions have provided the "end game" after a number of individual actions have been tried to judgment, establishing a framework of information that facilitates just and reasonable settlement on a class basis. But recently some lawyers are attempting to bypass this process, putting the class action "up front" before there have been many individual adjudications.

State judges increasingly are turning down "sweetheart" settlements that establish res judicata for the defendants in return for deals that benefit the class lawyers more than the class.

State class actions have become very important. And federal Rule 23 is very important to what the state courts do. Most states follow Rule 23, although there are variations in the extent of its adoption.

Deborah Hensler then stated that Rand is trying to put together a project to get a good view on the frequency and diversity of class actions. The methodology would be different than that used by the Federal Judicial Center study, aiming at generating complementary information. A survey of potential plaintiffs would be an important element in the study. A series of case studies, based on data collection from sources outside court files, would be attempted as the basis for a systematic measure of the costs and benefits of class actions for plaintiffs and defendants. This is a very ambitious proposal, which will require substantial independent funding. It may not be possible to mount as ambitious a project as would be desirable. Although it takes a while to make sure that the cases studied are fairly representative, not "eccentric," results could be available in time to inform this Committee's ongoing consideration of Rule 23.

PROBABILITY OF SUCCESS

Over the course of the past year, it has been urged that Rule 23 should incorporate a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification. The discussion draft included this feature in two -- perhaps redundant -- ways, dealing only with (b)(3) classes:

(3) the court finds * * * that the probability of success on the merits of the claim [by or against members of the class] warrants the burdens of certification, and that a class action is superior * * *. The matters pertinent to the findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses.

Discussion began by framing the general issues: should any consideration of the merits be required? If so, what should be the means of calibrating the strength of the claims to the certification decision? Should the preliminary injunction analogy be used, or does it suggest an unnecessarily elevated standard of success? How would this approach affect the relationship between the certification decision and other proceedings -- would it require substantially increased opportunity for discovery on the merits, delay the certification decision, create difficulty for certification of settlement classes, increase the occasions for interlocutory appeal? Although the provision may seem a boon for defendants, may it generate offsetting problems by elevating the stakes at an early stage of the litigation for fear that a preliminary finding of probable success may increase settlement pressure and even affect a defendant's standing with the financial community? So, in the end, is this an approach that may help plaintiffs in cases that lead to a favorable preliminary appraisal of the merits, and may harm plaintiffs when the preliminary appraisal is unfavorable?

It was suggested that perhaps it would be more appropriate to rely on analogy to temporary restraining order practice rather than preliminary injunction practice. The difficulty with preliminary injunction procedure was thought to be that it may be akin to trying the case before certification. Civil Rule 65, indeed, authorizes the court to combine the preliminary injunction hearing with trial on the merits. A temporary restraining order often issues only after a hearing, but the hearing is expedited and there is little or no discovery. The key is to find an abbreviated procedure, a matter that invokes the procedural distinctions between temporary restraining orders and preliminary injunctions, not any supposed difference in the standards for preliminary relief.

It was observed that with preliminary consideration of the merits, lawyers inevitably will demand an opportunity for discovery to support well-informed presentations on the merits. And, once discovery is opened up, it will be difficult to limit its scope. It will be difficult to resist this pressure, and it will be difficult to keep the focus of discovery narrow. If the purpose is to separate out claims that gain settlement power by certification despite scant prospect of success at trial on the merits, an abbreviated procedure will not do the job. During the delay, it may happen that some individual claims are tried; that is not necessarily an undesirable thing.

The fear that a probable success requirement would impede certification of classes for the purpose of settlement was stated to be a real problem. It also was noted that defendants often push for certification of a plaintiff class if they believe they have strong cases, and that the probable success requirement could prove adverse to defendants in this way as well.

Concern with the effects on settlement classes was met by the suggestion that a probable success requirement could be viewed from the perspective of settlement. If certification is made to support future efforts to settle, the requirement means only that there is a reasonable prospect that settlement will be achieved, since settlement will count as success on the merits. If certification is made to support a settlement already reached, the measurement of success on the merits becomes one with the proceedings to determine whether to approve the settlement. The defendant wants certification, the plaintiff wants

certification, and a probable success element should not be a problem if the rule is properly drafted.

The probable success factor was urged to be a good token of the broader problems of class actions today. Some class actions are very good, as shown by the wide array of opinions gathered by the Committee's efforts to reach out to the bench and bar for advice. Other class actions are simply means by which complaisant plaintiffs' lawyers offer res judicata for sale at bargain rates to intimidated defendants. The Federal Judicial Center study shows that individual recoveries are small in most class actions. Account should be taken both of the prospects of meaningful recovery for anyone, and whether there is enough real good in any recovery to justify the burden of class proceedings. Although the Rhone-Poulenc decision in the Seventh Circuit does not say so expressly, it turns in part on an estimate of the probable merits of the class claim, and also on the costs to the system even if the class claim succeeds. The history of plaintiff failures at trial generated a particular fear that a single class proceeding might reach a wrong result. Even if a right result should be achieved, great difficulties would be encountered in further proceedings to translate the class judgment into individual judgments. Other cases involving minuscule individual recoveries, administered and distributed at great cost, impose quite different burdens. "Fluid" class recovery in such cases involves elements of social policy that should be beyond the reach of the Rules Enabling Act process.

It was asked whether success on the merits should be measured by the representative parties' claims or by the class claim. The response was that it is the class claim that is important, but that the plaintiffs' individual claims may be strong evidence of the strength of the class claim. The question is how many class members have claims sufficiently similar to the individual representatives' claims to warrant certification.

This discussion led to more pointed suggestions as to the nature of the showing that might be required. Rather than a thorough appraisal of the merits, it was suggested that a "first look" might be sufficient, or that the effort should be only to ensure that the claims are not "bogus."

The first look approach was resisted on the ground that the certification decision is very important. If the merits are to be considered, it should not be done on the basis of half-a-dozen affidavits. If there is to be discretionary consideration of the merits at the certification stage, it should not be so open-ended.

The "bogus" claim approach met the response that few cases involve bogus claims. Most contemporary criticism of Rule 23 arises from dispersed mass-tort cases, and these cases do not involve bogus claims.

These observations returned the discussion to the opening point. The class device should facilitate prosecution of strong claims, but should not be misused to add strength to weak claims. Many experienced lawyers say that, despite the difficulties of making a rigorous empirical demonstration, a significant share of class actions involve coercive use of the class device to force settlement of claims that have little chance of success on the merits but that promise overwhelming liability should the slender prospect of success on the merits mature into reality.

The quest for alternative formulations led to additional suggestions looking to a "significant probability of success," or "sufficient merit to warrant certification." These and other formulas led to the suggestion

that before further drafting efforts were made, the Committee should determine the general question whether any consideration of the merits might be appropriate.

A motion to add to the (b)(3) certification some consideration of the probable merits passed by 11 to 1.

Robert Heim, an observer, then told the Committee that although he had been an early proponent of the preliminary injunction probability-of-success analogy, the Committee discussions had persuaded him that this approach might impose an undue burden on plaintiffs. The burden would be particularly troubling if appraisal of the probable outcome were to be made early in the litigation. Defendants too may have cause to fear this approach, particularly as the preliminary appraisal might come to influence such subsequent matters as settlement negotiations, summary judgment, or even attitudes at trial. It would be better simply to adopt a low threshold that gives the court discretion to look at the merits without embarking on an extended inquiry. This result could be accomplished by adopting a new element in the Rule 23(b)(3) calculus, requiring the court to find that the issues presented by the facts and the law are not insubstantial [and have been sufficiently well developed through prior judicial experience].

Immediate response to this suggestion was that perhaps this inquiry should be reduced from an element of the certification decision to a mere place in the list of factors that bear on the elements of certification -- the most obvious fit would be with the determination that certification is superior and necessary for the fair and efficient adjudication of the controversy. The question is one of weeding out weak cases, and a simple role as one factor in the certification process will accomplish that task. It was suggested that if this look at the merits should become only a factor, a balancing element should be incorporated, so that a greater prospect of success on the merits would be required when the burdens of certification are greater. Treating the inquiry as a mere factor in the certification determinations was urged to reduce the risk of untoward consequences. Indeed, it was urged that as a mere factor, this inquiry could actually help plaintiffs win certification of classes on strong small claims, reducing the concern that preliminary consideration of the merits may seem an unfairly pro-defendant provision. (And it was responded that perhaps the bilateral impact of this approach is enhanced if it is made an element of certification, not a mere factor.)

Another response was that it is dangerous to require prior judicial experience with the underlying claims. This element seems to reflect concern with dispersed mass torts. There is no reason to insist that there have been earlier litigation of related claims before determining whether to certify claims that arise out of a single transaction -- securities fraud actions offer a common example. It was responded that the concern really goes to the newness of the kind of claim. Securities litigation often presents issues of a kind made familiar by much earlier litigation that arises out of distinct events but invokes common principles. So of other kinds of class actions. But some class actions present issues that are new and unfamiliar; it takes time for the claims to mature through individual adjudication before courts can safely consider class litigation. Premature class certification can create many claims that otherwise "would not be."

The balancing approach reappeared, with the suggestion that a "not insubstantial" test standing alone would not have much effect. Insubstantial claims should be dismissed without regard to attempted class certification. It also was urged that "not insubstantial" has a double-negative ring that is not well-suited to rule drafting. The effort to sort out claims that can proceed as individual claims but not as class claims also seems to intrinsically involve balancing. What is sought is a sufficient prospect of success by the members of the class to justify the incremental costs, delays, risks, and settlement pressures that flow

from certification. Why not say this openly, recognizing that the adverse consequences of certification vary from case to case, and allowing only relatively strong claims to support a certification that imposes relatively onerous burdens?

The difficulty of making a cogent appraisal of the likely outcome returned to the discussion. A "determination" of probable merits should not be required, but only a preliminary assessment. But there is a danger that in many cases the assessment will not in fact be preliminary. Any requirement in this dimension will put real pressure on the judge. Findings will be made. Discovery will be had. The determination may be tied to, or sequenced with, summary judgment.

A separate question was raised about the risk that an adverse ruling on the probable success factor might spur a plaintiff to mount a second action. The same representative plaintiff might allow the first action to meander along without certification, but seek certification of the same class in another court with another opportunity to persuade a different judge on the probable success issue. It would be a nice question whether the first determination should preclude relitigation by the same plaintiff, particularly if there is no final judgment in the first action. And the problems would become much more tangled if the same lawyers simply found a different representative plaintiff to maintain a second action. Certification and defeat of the class claim brings some measure of finality. Denial of certification is less likely to do so. These questions were met with the response that if there is a need to make certification more difficult, the need should not be put aside because of the prospect that a plaintiff who once fails to make the required showing may try a second time to make the same required showing.

Comparisons with present practice also were noted. One comparison is the finding in the Federal Judicial Center study that in a majority of the class actions studied, motions to dismiss or for summary judgment were made before a ruling on certification. Another was that evidentiary hearings now are required on only a small fraction of class certifications, and that the hearings that are had typically run from two hours to perhaps a single day.

Discussion of the probability-of-success factor resumed after an overnight break. It was suggested at the beginning of the morning session that it would be difficult to be achieve a final formula, with confidence, at this meeting. There will be many opportunities for review, aided by comment, before the present discussion draft can be transformed into a new rule. The Committee should seek to do the best it can for the moment, recognizing that the time has not yet come to take a proposal to the Standing Committee with a recommendation for publication and comment. Instead, the draft that emerges from this meeting can be reported to the Standing Committee as an information item at its January meeting, seeking their views as support for further consideration at the April meeting of this Committee. If a proposal for publication can be reached at the April meeting, and is approved by the Standing Committee in early summer, it would go out for public comment at the same time as a proposal presented to the Standing Committee in January.

Turning to the actual approach to be taken, it was observed that the "not insubstantial" claim approach involves a double negative in one sense, but it reflects a common recognition that goes beyond the surface logic of words. Lawyers understand that however precise a line we might imagine between "substantial" and "insubstantial," there is a big difference between requiring that a claim be substantial and requiring that a claim be not insubstantial. Earlier discussion has shown many difficulties with a balancing test. It seems more attractive to adopt a test that allows a first look at the merits, but that often

can be met without a need for extensive discovery or formal hearings. The test would be designed to screen out claims so weak on the merits as to gain potential strength only by class certification. Even at that, the certification decision will be a major event, just as it often is now. If the rule requires only a finding that the claims are not insubstantial, it will be far different from requiring that a means be found to weigh different measures of probable success on the merits against different levels of certification-induced burdens, risks, and pressures to settle. There even is a virtue in the negative reference to "not insubstantial," moving away from the dangers of early factfinding.

Initial discussion settled on a draft that incorporates the "not insubstantial" requirement among the findings required for certification of a (b)(3) class, and that adds "on the merits" to make it clear that insubstantiality does not refer to the dollar amount of individual or aggregate claims. The draft would add this element to (b)(3):

(3) the court finds * * * that the class claims, issues, or defenses are not insubstantial on the merits, * * *. The matters pertinent to ~~the~~ these findings include * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

This approach was contrasted with the balancing approach that dominated much of the earlier discussion. The balancing approach continued to find support, particularly if the rule were to identify explicitly the continuing concern that certification of a class can impose not only great expense but also a coercive pressure to settle in face of a very small probability that a weak claim may result in liability for large damages. This alternative was offered as a proper matter for further discussion at future meetings. Indeed, the Committee may wish to provide an alternative discussion draft in its informational report to the Standing Committee.

This point of uncertainty was the occasion for one of the frequent observations anticipating the later discussion whether the burdens of class proceedings may be so important as to justify refusal to certify claims that are likely to succeed on the merits. It was suggested that although this question is conceptually distinct from the probability-of-success question, it affords an alternative approach to the concern that class proceedings may at times be much ado about too little.

These uncertainties also provoked one of several discussions of the frustration that inheres in a process of surveying many possible changes, large and small, before finally determining what path to take. The Committee has not finally determined whether to propose any changes at all -- the only commitment is to make thorough use of the information that has been gathered. If changes are to be proposed, there is no determination whether there will be only a few small changes, a major overhaul of the rule, or a substantial set that includes some important changes and a number of smaller improvements. The frustration, however, is a necessary price to be paid for carefully reviewing each of many possibilities, suspending judgment until all have been considered.

Returning to the probable-success issue, it was moved that the Committee present two alternatives to the Standing Committee for information and advice. One alternative would be the "not insubstantial on the merits" version set out at pages 19 to 20. The second alternative would not for the moment refer expressly to the effect of certification in creating pressure to settle, but would include an explicit balancing requirement and raise a higher threshold than the "not insubstantial on the merits" version. This

alternative would read:

(3) the court finds * * * that the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification * * *. The matters pertinent to ~~the~~ these findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

Retaining both versions for purposes of further discussion will provide the opportunity for further consideration. They are intended to be quite distinct.

The motion to present both alternatives passed 11 to 1.

Benefits and Costs of Class Victory

The next topic was a proposal, drawn from various state law models, that a court have discretion to refuse certification of a (b)(3) class if the benefits gained by success on the merits would not be sufficient to justify the costs of administering the class action and distributing individual recoveries. This proposal is distinct from the probability-of-success question because it can be applied by assuming that the class will prevail on the merits. In pure form, it would be administered by assuming that the class will prevail and asking whether the victory will justify the costs entailed in reaching the merits and implementing the judgment.

The discussion draft shaped this issue by adding a new item to the list of factors to be considered in determining whether a class action is superior and necessary to the fair and efficient adjudication of the controversy:

(F) the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation;

The first observation was that it is logically difficult to fit this drafting form into the list of findings required in the initial paragraph of (b)(3). It clearly does not bear on predominance of common issues, or probable success. It fits, if at all, only with the determination whether a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. This factor is likely to be relevant only when individual claims are too small to justify the cost of nonclass adjudication, so that a class action is necessary if the controversy is to be adjudicated, and so that it is difficult to deny that a class action is superior to alternatives that will not lead to any adjudication of the controversy. There may be a better drafting solution if this factor is to be adopted.

In support of some such approach, it was urged that this issue is a major matter. Although the Federal Judicial Center study shows median individual recoveries in class actions across a range from $300 to $500, there are many illustrations of far smaller recoveries. The "two dollar" individual recovery is

trivial, and is responsible more than anything else for the "bad name" of class actions. The courts are asked to shoulder a considerable burden, to conscientiously administer cases that mean little or nothing to individual class members but enrich class counsel.

Of course the contrary argument will be made that what is important is not the perhaps trivial individual recovery but enforcement of the social policies embodied in the legal rules that support the recovery. The malefactors must not be allowed to retain their ill-gotten gains because they have managed to profit from small wrongs inflicted on many people, and because public enforcement resources are not adequate to the task assumed by the class-action bar. But courts must pay the price of administering this form of justice, and the price is paid at the expense of litigants who present individually important claims that also rest on important social policies. The question whether to devise means to punish all wrongdoers is a question of political and social policy that should be left to other agencies of government. They should find the means to reach a proper level of enforcement, not civil rules adopted through the Rules Enabling Act process.

The median individual recovery figures of the Federal Judicial Center study were again advanced to show that although the typical figures are far below the level needed to support individual litigation, the figures are not trivial. Across the four districts in the study, median individual recoveries ranged from $315 to $528.

It was proposed that all of these concerns might better be addressed by a more thorough revision of factors (D), (E), and (F) in the Rule 23(b) calculus:

(D) the likely difficulties, expenses, and burdens if the controversy is resolved by class adjudication rather than by separate individual actions;

(E) the likely benefits to individual class members if the controversy is resolved by class adjudication rather than by separate individual actions; and

(F) the public interest, if any, in having the controversy resolved by class adjudication rather than by separate individual actions

(F) {alternative} whether the predominant motivation for class certification is counsel's interest in fees rather than the benefits sought for class members

It was agreed that if there is to be a factor F, and if it is to have the force suggested, its structure and placement are important. Various committee members had attempted to combine factors (E) and (F) of the draft version, and encountered difficulty. These efforts commonly wound up in the direction of asking whether the probable relief to individual class members is sufficient to justify the costs and burdens of class litigation, or more simply whether the probable relief is worth the effort. One difficulty arises from the meaning of the relatively neutral but open-ended reference in the draft to the "significance" of the public and private values of class relief. Identification of public and private values, and particularly of "public values," involves a wide-open element of discretion that may be too broad.

Turning to the cost and effort dimension, the Committee asked for a review of the attorney fee awards found in the Federal Judicial Center study. The response was that median gross monetary recoveries ranged in the four different courts from $2,000,000 to $5,000,000; attorney fees ranged from 20% to 40% of class recoveries, and the higher percentages ordinarily were associated with smaller gross recoveries.

Attention then focused on the issue that many believed to lie at the core of the F-factor issue. There are significant problems in administering class actions that yield only trivial individual recoveries -- the "$2 recovery" became the symbol of this phenomenon. But there is a deterrence value in enforcing existing social policy as captured in current law. The F factor seeks to incorporate this value by focusing on the public value of the probable relief, but may not capture the importance of deterrence and forcing disgorgement of ill-gotten gains. The very elasticity of the public value concept, indeed, virtually ensures that very good judges will reach different results in cases that seem indistinguishable. A focus solely on the insignificance of private relief, however, leaves out the deterrence function.

The need to pursue deterrence through privately instituted class litigation was challenged. Congress can, if it wishes, create a bounty system to encourage private enforcement of public values. Qui tam actions embody precisely such a system. The question is whether Rule 23 should continue to play a comparable role. This function has been absorbed by Rule 23(b)(3) over many years in which it was adapted to functions that never were anticipated by its authors. There was no imperative command that the rule be adopted. There was none that it be adapted as it has been. It should be possible to reexamine the question whether it must continue to function as an incentive to lawyers who at best can pursue the public interest only by means of the inefficient, costly, and pressure-ridden device of artificially aggregating vast numbers of individually trivial claims. Why not cut back on this outgrowth, leaving it to Congress to devise better means of enforcement in the public interest where better means really are desirable? Even the class action represents litigation with parties. It began life simply as a procedural device to facilitate effective determination of individual claims. It becomes quite a different procedural device -- and perhaps more a substantive tool than a procedural device -- when it is abused by fee-inspired lawyers in the name of social policy. It is brought on behalf of the constituent members of the class, and it is they who are bound by the judgment. It cannot be brought without defining a class of real people or legal entities. Why not focus solely on the benefits to the class members, as parties? If there is meaningful individual relief, class litigation makes sense. Lawyers who bring such class actions will be rewarded, and the public interest is served. But there are actions in which individual benefits are trivial or nonexistent. Why should class actions be the means of enforcing public values in such settings?

Quite apart from the direct costs of achieving public enforcement by aggregating trivial individual claims, it was observed that this device has contributed to a public sense of cynicism about courts, lawyers, and the law.

A first rejoinder was that the image of the $2 recovery is misleading. There are few such cases. What of a case with 20,000 claimants with $25 individual recoveries: is $500,000 too trivial to ignore? How will a judge decide whether $25, or $200, is important enough -- whether the calculation also includes public values, or is limited to private values?

A second part of the response was that whatever may have been intended when the 1966 amendments

were adopted, the social-enforcement function has become part of Rule 23. It is, in a real sense, woven into the fabric of social justice. The idea is to deter the conduct, in a manner somewhat analogous to punitive damages. If the costs of administering individual remedies are untoward, the answer may lie in substituted relief in the models often characterized as "fluid" or "cy pres" recovery.

Sheila Birnbaum was then asked to address the committee. She began by noting that many practitioners are exposed to class actions across the full national scene. They are proliferating. One new field of growing activity involves state-law attacks on the drafting failures of insurance policies, loan forms, and the like, framed as fraud claims but in fact involving highly technical matters. There are no statistics, but actions like this are common. And they enforce no meaningful social policies at all. Anticipating the later discussion, she also addressed the use of settlement classes. They often are proper; disagreement with the result in one or another prominent case should not disguise the importance of settlement as a means of resolving problems that otherwise may be intractable. Choice-of-law problems provide one illustration of the reasons that may support use of a settlement class where a litigation class would not be possible. It is not clear that the Rule 23 draft does enough to support settlement classes.

Further doubts were expressed about allowing courts to turn a certification decision on assessment of the public values to be served by a class victory. Rule 23 is what it has become. It is troubling. But the fact is that public enforcement agencies simply do not have the resources to achieve comprehensive enforcement of all our public laws against all significant violations. Rule 23 enforcement has become a major feature of the enforcement system, and only political judgments can justify substantial alteration. In addressing securities class actions, for example, pending legislation seeks simply to address specific perceived abuses, not to retrench the central role of class actions in vindicating individually small claims for violations that, in the aggregate, have inflicted sufficient total injury to repay the private costs of class-action enforcement. These problems are too much political to be addressed through the Enabling Act process. Congress is the agency to correct them.

These doubts were repeated in a different voice. Discretion needs anchors, it needs guidelines. Members of the Committee have expressed quite different views as to the proper interpretation of the draft (F) factor. It will be very difficult for district judges to administer, and the difficulty will generate costly uncertainty. This approach almost invites the troubling response that class actions are being trimmed to the "just-the-right-size" formula: if the problems are too small, or too large, Rule 23 assistance will be denied. When suit is filed, the parties and lawyers do not agree that it is a "$2" case. If attorney fees are the problem, the Committee should address that problem directly.

Another problem was seen in the feature of the draft that limits consideration of the burdens of certification to (b)(3) classes. Various illustrations offered in the Committee discussion have included (b)(2) classes in which injunctive or declaratory relief seemed to offer trivial benefits to individual class members. And in any event, it does not seem practicable to separate consideration of the probability of success from the importance of success. As with the approach sketched on page 22, it would be better to restructure factors (D), (E), and (F) together. It also might be better to incorporate a direct reference to cases in which attorney fees seem to be the motivating factor behind the litigation.

The suggested direct focus on attorney-fee motivation spurred the observation that the private attorney general aspect of class actions is not of itself untoward. It is accepted in actions that yield significant benefits to individual class members. The question is whether it should be accepted in actions that do not

yield significant individual benefits. Private enforcement can be wise; the question is whether it is desirable absent significant individual benefits. The antitrust laws, for example, encourage private enforcement by treble damages and attorney-fee awards, but provide these encouragements only to people who can prove antitrust injury.

So, it was suggested, the draft F factor may be too general. How might it be narrowed, reducing concerns about open-ended discretion and avoiding even the appearance of trespass on areas of social-political policy? Would it help to seek something simpler than a factor that bears on the also discretionary (b)(3) determination whether a class action is superior and necessary? The questions are first, what is the proper role of the committee in reconsidering the ways in which Rule 23(b)(3) has evolved over three decades of judicial interpretation? Second, what direction should be taken? And, third, what language will best effect the intended changes?

One approach would be to attempt to distinguish between the deterrence that arises from a meaningfully compensatory remedy and the deterrence that arises from the in terrorem function of aggregating trivial claims. Not all deterrence is desirable, particularly if it arises from the disproportionate burdens and risks of pursuing judgment on the merits. Focus on the public interest may legitimately recognize that there may be no public interest in a particular proposed means of enforcement -- the rule even could be drafted to focus on "the public interest, if any * * *." This leaves substantive concerns to substantive law, not the mode of relief. This approach, however, does not directly address the difficulty of understanding just what public values are involved in any particular proposed class action. It must be remembered that all of this discussion addresses a situation in which there is a strong claim on the merits but small individual damages. What is the public interest then?

The difficulty of the values concept was finally addressed by a proposal that the factor be redrafted in terms of public interest and private benefit. On motion, the Committee cast 11 votes, with no dissent, to adopt the following language as a working draft:

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

The Committee Note to this factor would explain that the burdens of litigation include not only the costs of class litigation and the complexity of the issues, but also the in terrorem effect of certification.

Settlement Classes

Discussion of settlement classes began with the reminder that this topic has come in for renewed attention in conjunction with dispersed mass tort actions. In re General Motors Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) has surveyed the terrain. Two asbestos cases are approaching appellate arguments in the Third and Fifth Circuit. The issues are open for debate and the law is in flux. The first question is whether the Committee should attempt to deal with these issues while the litigation cauldron is boiling. This question does not imply that the Committee should not consider the problem; to the contrary, the Committee already has begun the process, and should make a deliberate decision

whether anything useful can yet be done. But it may be the course of wisdom to decide that the time for action is not ripe. The risks of defendant-created plaintiff classes are not new. But the risks are much affected by the way in which the class is structured. An opt-out class is less threatening; consent is very important. An opportunity to opt-out knowing the actual terms of a proposed settlement can be particularly useful to ensure individual fairness. Other questions include the basic question whether it makes sense to certify a class for settlement purposes when the same class would not -- and often could not -- be certified for litigation, and whether it is proper to permit a class that is first proposed for certification at the same time as a proposed settlement is presented for approval. Settlements that seek to include "futures" claimants who do not yet have enforceable claims present quite different issues. Great savings in transaction costs can be achieved by means of settlement classes. And they may facilitate claims administration structures that achieve a measure of equality in the treatment of different claimants that could not be achieved by any other means.

The questions are large. The drafting chore may not be difficult once the questions are answered. But finding the answers remains difficult. The Committee has elected not to press forward with the draft that would have collapsed the categorical distinctions between (b)(1), (b)(2), and (b)(3) classes, recognizing the special origins and legitimacy of (b)(1) and (b)(2) classes and the risk of losing this history. Is the tie to litigation equally important to the legitimacy of class certification, or can the real-world importance of settlement be recognized in the text of the Rule? Notice and adequate representation will remain crucial. The opportunity to opt out, perhaps at the time of settlement as well as at the time of certification, may remain equally important.

The gravity of these questions led to the suggestion that perhaps settlement classes should not be treated simply as a factor subsumed in the (b)(3) certification process, but should become a new and separate Rule 23.3. The rejoinder was that any new rule would have to duplicate many provisions of Rule 23; there should be a way to make settlement classes a separate part of Rule 23.

It was urged that the decision whether to act now should not turn on anticipation of the guidance to be provided by pending cases. These cases will be controlled by the current language and structure of Rule 23, and by the specific settlement events in those cases. The first issue is whether the rule should address settlement classes as a separate phenomenon; the mechanics should be deferred until that decision is made. The question is whether it is proper to view the requirements for certification differently when certification is sought solely for purposes of settlement, not for litigation. The Rule or the Note can emphasize the distinctive importance of notice and adequacy of representation in settlement classes.

One ground for resisting settlement classes is the danger of sloppy thinking about the class definition. Another danger is presented by cases in which the settlement is worked out before the request for certification. Two parties negotiate a prepackaged complaint, certification, and settlement, and then present it for approval by a process that lacks any of the safeguards provided by a true adversary proceeding. It is not really clear whether there is an Article III case or controversy in this setting. There is some force to the view that the court is simply being asked to peddle res judicata through the group of plaintiffs' lawyers who made the lowest and most attractive bid to the defendants. How can a court ensure that there was genuine adversariness in negotiating the settlement? And how can it ensure that there was no disqualifying conflict of interests among different people who are lumped together in a single supposed class? There is a great practical value in settlement classes, but also a great strain on the system. How can adequate representation of class members be ensured, and by whom? Perhaps the impending Third and Fifth Circuit decisions will provide helpful guidance.

From a somewhat different perspective, it was urged that there should not be any need to amend Rule 23 to support settlement class certifications. All of the requirements for certification must be met. But the question whether the requirements have been met can be addressed from the perspective of settlement, not the problems of adjudication. The Third Circuit General Motors Pickup decision can be read to reject this view, and to insist that certification is permissible only if the Rule 23 requirements would be met for purposes of litigation. If the opinion is read that way and is followed, then Rule 23 should be amended to restore the meaning that should be found in its present text. The purpose of certifying a settlement class is to provide benefits for class members -- present claimants -- and to reduce the risks and transaction costs for all parties. The court has an important role to play by administering settlement through Rule 23; without this judicial supervision, defendants in the dispersed mass tort cases may attempt to establish nonjudicial claims-administration procedures that settle individual claims by means that do not inform claimants as well, and that do not protect individual interests as well. Most settlements in these cases occur after there have been individual judgments in individual actions; the terms of settlement are informed by the results of actual adjudications, and the exercise of judicial review is similarly informed.

This defense of settlement classes focused attention on Rule 23(e). It was observed that it is difficult enough to provide effective judicial review of settlements reached in actions certified for class adjudication, in substantial part because the parties cease to be adversaries when they join in seeking approval of a settlement, and suggested that these problems may be exacerbated with settlement classes. The fairness hearing, urged by some as adequate protection, does not do the job. The best lawyers and best judges can work together to fashion a fair settlement, present the alternatives effectively, and accomplish an effective review. But not all can get it right. Once a settlement is proposed, moreover, other class-action lawyers can undertake a campaign to encourage opt-outs, promising to get a better deal.

The case-or-controversy theme returned to the discussion, with the statement that it is essential that there be a bona fide dispute between real parties. There is no authority in the Enabling Act or Constitution to provide for settings that do not involve a valid dispute presented for actual decision. A settlement class divorced from a litigation class is illegitimate. Courts may be doing it, but it should be off-limits.

This view of the "real dispute" issue was met by the observation that many cases come to court this way. At the very least, there are nonclass individual actions pending, ordinarily many of them. Some of the individual actions may be consolidated by nonclass means. A settlement class is sought because everyone involved wants a global resolution, and for good reason. The proposed settlement reflects many antecedent real disputes. It should be enough that the settlement class meets Rule 23 requirements as applied to settlement, not litigation. And there are objectors -- there is always someone who comes forward to challenge the settlement. Some settlement classes involve large claims, some involve small claims. Settlement classes will continue to occur unless the Committee acts to prohibit the use of Rule 23 in dispersed mass torts. The settlement terminates claims that were real cases or controversies; it simply moves them into a class context.

The case-or-controversy discussion led to the question whether a settlement class can be used to expand jurisdiction, reaching people who could not be forced into an adjudicated class. It was suggested that "force" is not proper, nor even an opt-out approach, but that an opt-in class should be proper.

The praises of settlement classes were then sung by reference to the silicone gel breast implant cases. They could not be tried as a class. Choice-of-law problems would be insurmountable. In addition, differences in the facts relevant to different defendants would defeat a single action against all defendants. The critical thing is to get understandable notice to plaintiffs who demonstrate understanding by making informed choices. There are now thousands of individual actions outside the class, and thousands more are being filed every month. Asbestos litigation may provide even more persuasive justifications. There are large numbers of plaintiffs with clearly "real" claims. Manageability is very different for settlement than for litigation. If individuals consent, the settlement class should be appropriate.

Robert Heim observed that it is easy to be distracted by the common concern for the settlement class action that first comes to court as a prepackaged complaint, certification-by-consent, and settlement. The fear of collusion is genuine, and it is fair to worry whether courts can provide effective protection in the process of reviewing the settlement. But defendants who face massive litigation want to resolve the many problems that arise from dispersed actions. It should not be controlling whether the negotiations occur before or after the comprehensive class action is filed. The court can gain help in reviewing the settlement by making sure that effective notice is provided to class members. In addition, there is a whole new group of class-action lawyers who represent objectors, providing the adversary elements that otherwise would be missing. Beyond that, it would be desirable to appoint a guardian ad litem to provide independent representation for the class; if it is congenial to achieve this function by relying on the "master" label, that should be helpful.

The view was repeated that even prepackaged settlements come to court as the fruit of much earlier litigation.

It also was suggested that more thought should be given to adding to Rule 23(e) more detailed guidance on the process for reviewing and approving proposed settlements. The Manual for Complex Litigation provides guidance now. But perhaps Rule 23(e) should be elaborated along the lines recently developed by Judge Schwarzer.

The focus of the settlement discussion on dispersed mass torts led to the question whether Rule 23 should be used to make it easier to resolve these problems. The easier it is to resolve claims, the more claims there will be, and the more mass-tort class actions.

The prospect that ready access to settlement-class litigation may increase the volume of litigation was discounted by the observation that at least in asbestos litigation, the focus on the detailed manageability of class litigation blinks the reality that the alternative is no more individual than a class action. There are lawyers with hundreds or even thousands of clients, whose relationship with their clients is no more real than the relationship between class lawyers and nonrepresentative class members. And they too are said to be settling cases in batches, by group settlements that focus on a total sum that, as a practical matter, is allocated among clients by the lawyer who represents them.

The settlement-class topic was left unresolved. The Committee is anxious to hear specific proposals that go beyond the tentative beginnings in the discussion draft. The topic will remain on the agenda for the April, 1996 meeting.

Federal Judicial Center Study

The Federal Judicial Center study of class actions was referred to throughout the class-action discussion. Committee members had the nearly-final version of the report that was prepared for this meeting. A brief summary of the report was provided by Thomas Willging, and as to the appeal portion by Robert Niemic. The study, conducted in four districts, examined all actions that involved a class allegation and that were terminated between July 1, 1992 and June 30, 1994. The districts, chosen for believed high levels of class action activity and geographic dispersion, were the Northern District of California, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Southern District of Florida. The total number of cases with class allegations was 418. The data are representative only for those courts over the study period.

The first summary observation was that the study shows that class actions are commonly necessary means of enforcing the claims that they involve. Among the four districts in the study, the highest individual recovery figure was $5,331, an amount too small to support individual litigation. (By way of contrast, a study of litigation in the 75 largest counties by the National Center for State Courts showed average recoveries of $52,000 in personal injury actions, and $57,000 in fraud actions.)

The next observation was that despite the modest amount of individual recoveries, the aggregate recoveries showed that class litigation is an effective deterrent instrument. After deducting attorney fees, the median net settlements in certified Rule 23(b)(3) class actions ranged from $800,000 to $2,800,000 in the four courts; the median class sizes ranged from 3,000 to 15,000.

The entire study included 13 certified (b)(2) classes with no net monetary distribution. Some had nonmonetary distributions such as rebate coupons that could not be valued by the study. It seems likely that if the court had been able to foresee the results in the cases that did not involve significant injunctive relief, the classes would not have been certified.

It is not possible to use the study to predict what effects would follow from a requirement that the certification decision consider the probable outcome on the merits. The present system strongly discourages any consideration of the merits. But the study does show that through motions to dismiss or for summary judgment, judges commonly do look at the merits before certification. A majority of the cases in all districts had a ruling on dismissal before or at the same time as the certification ruling, and many had summary judgment rulings.

The study found 28 cases, 18% of the total certified classes, that involved simultaneous certification and settlement. A substantial share of the classes were certified for settlement only.

The class actions endured far longer than average litigation in the same courts.

Turning to appeals, 15% to 34% of the study cases had at least one appeal. There was a higher rate of appeal in the cases that were not certified as class actions than in the certified cases. There was a dramatically increased rate of appeal in the cases that went to trial -- appeals on trial-related issues were taken in 12 of these 18 cases, a very high rate for civil actions. The appeals led to affirmance in about 50% of the cases, to reversal and remand in about 15%, and to dismissal of the appeals in the remainder.

Few appeals dealt with class certification issues. The study cases involved one § 1292(a)(1) appeal. The only attempt to win mandamus review involved an attempt to remove the trial judge.

DISCOVERY

Robert Campbell, representing the Federal Rules Committee of the American College of Trial Lawyers, reported on the Committee's informal review of the scope of discovery under Civil Rule 26(b)(1). The Committee studied alternative possibilities in detail. The rule now permits discovery of "any matter * * * relevant to the subject matter involved in the pending action." It also permits discovery of information "reasonably calculated to lead to the discovery of admissible evidence." The committee includes a wide variety of plaintiff- and defendant-lawyers, and they achieved a strong consensus that the expense, time, and difficulties parties encounter in litigation are caught up in Rule 26(b)(1). A distinguished federal judge has estimated that 95% of all discovery is irrelevant and never used. That figure may be a bit high, but it is in the right neighborhood. This is the core of the discovery problem. They urge the Committee to consider both of these sweeping elements of discovery. Their committee was unanimous in making this recommendation, an unusual event.

The Committee agreed to include this topic on the agenda for the April meeting. Deep concerns with discovery were voiced at the Southwestern Legal Foundation conference on procedure attended by many Committee members in March, 1995, and it is appropriate for the Committee to review these problems as part of the continuing duty to study the rules. The Committee should not simply put the topic aside because the same concerns have been expressed for many years without leading to any direct response. Many efforts have been made to cabin the occasional excesses of discovery. If they have not done the job, it must be considered whether the time has come to reconsider the central issues. The purpose of the suggestion is large. The inquiry must not be undertaken lightly.

Standing Committee Self-Study Draft

Professor Coquillette, as Reporter of the Standing Committee, addressed the Committee on the draft self-study report prepared for the Standing Committee. The draft is tentative; it has not yet been approved and does not reflect considered Standing Committee views. The Standing Committee is anxious to have the draft reviewed by members of all of the Advisory Committees. Some of the recommendations are very important to the future of the rulemaking process.

Discussion began with the composition of the Advisory Committees and the Standing Committee. The Standing Committee is important not only to coordinate the several advisory committees, but also to

provide deliberate review of their recommendations. The history of the relationships has been one that expands the role of the advisory committee chairs. Some earlier chairs of the Standing Committee did not ask the advisory committee chairs to attend the full Standing Committee meeting. Now it is routine to have the advisory committee chairs attend the full meeting. They have become valuable participants. Their role would be enhanced by making them voting members of the Standing Committee. As a practical matter, the advisory committee chairs now do most of the work that would be entailed by full membership on the Standing Committee, participating actively in discussion of recommendations made by all of the advisory committees. This change can be effected without significant dislocation; the Standing Committee can simply be enlarged to include the advisory committee chairs. There is no need for legislation.

The Committee unanimously adopted a resolution supporting Standing Committee membership for advisory committee chairs.

Other Rules

Admiralty Rule B had been on the agenda for this meeting. The need to integrate Rule B with the 1993 amendments of Rule 4, however, presents challenging questions. Discussion of the necessary changes was put off to the next meeting to allow more thorough preparation.

A proposal that the rules require use of recycled paper and double-sided copying for all papers filed in district courts was held for continuing study.

Two proposals that had been made to the Committee were put aside as outside the Committee's role. One was creation of a privilege against discovery of police internal investigation reports. This proposal was found better suited to the Evidence Rules Advisory Committee. The other proposal was adoption of a requirement that successful defendants recover attorney fees in actions under 42 U.S.C. § 1983 or the Americans with Disabilities Act; if the unsuccessful plaintiff is unable to pay the award, payment by the plaintiff's lawyer should be ordered. This proposal was found to involve matters of substantive law suitable to Congress, not the Rules Enabling Act process.

Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the capacity of the full Enabling Act process. It is not only this Committee, but also the Standing Committee, members of the bench and bar, the Judicial Conference of the United States, the Supreme Court, and Congress that must lavish searching scrutiny on proposed rules. The Committee has proposed a continuing series of important rules changes, and must husband the resources of the process to ensure full evaluation of the most important proposals.

The Copyright Rules present a special problem because it seems that few lawyers have the experience needed to help the Committee determine what (if anything) should be done beyond amending Copyright Rule 1 to reflect that the 1909 Copyright Act has been superseded by the 1976 Copyright Act. Advice is

being sought.

Next Meeting

It was tentatively decided that the next Committee meeting would be held on April 18 and 19, 1996.

With thanks to the several observers who participated helpfully in the meeting, and to the Administrative Office staff for its unfailing strong support, the meeting adjourned at 4:40 p.m. on November 10.

Respectfully submitted,

Edward H. Cooper, Reporter